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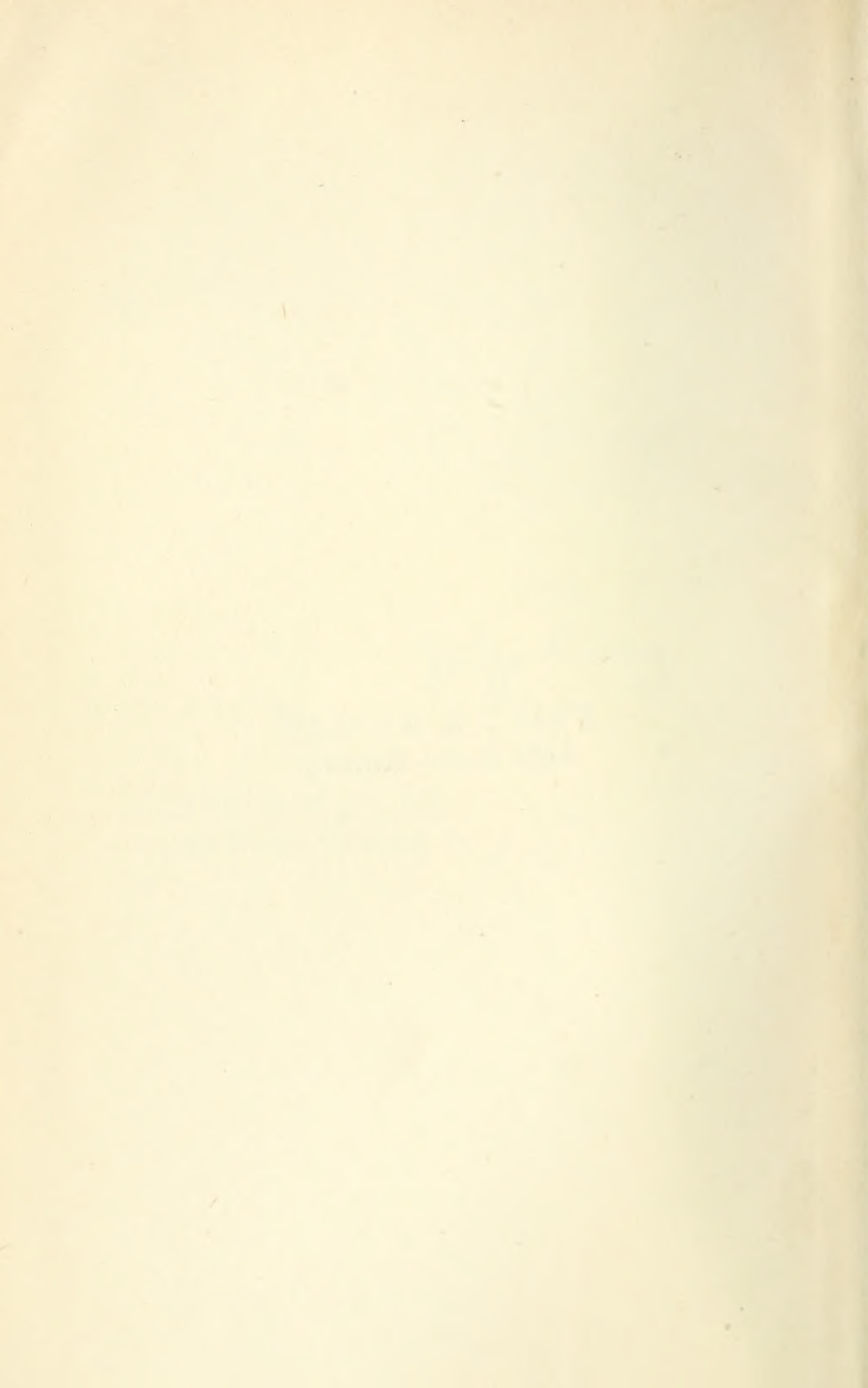
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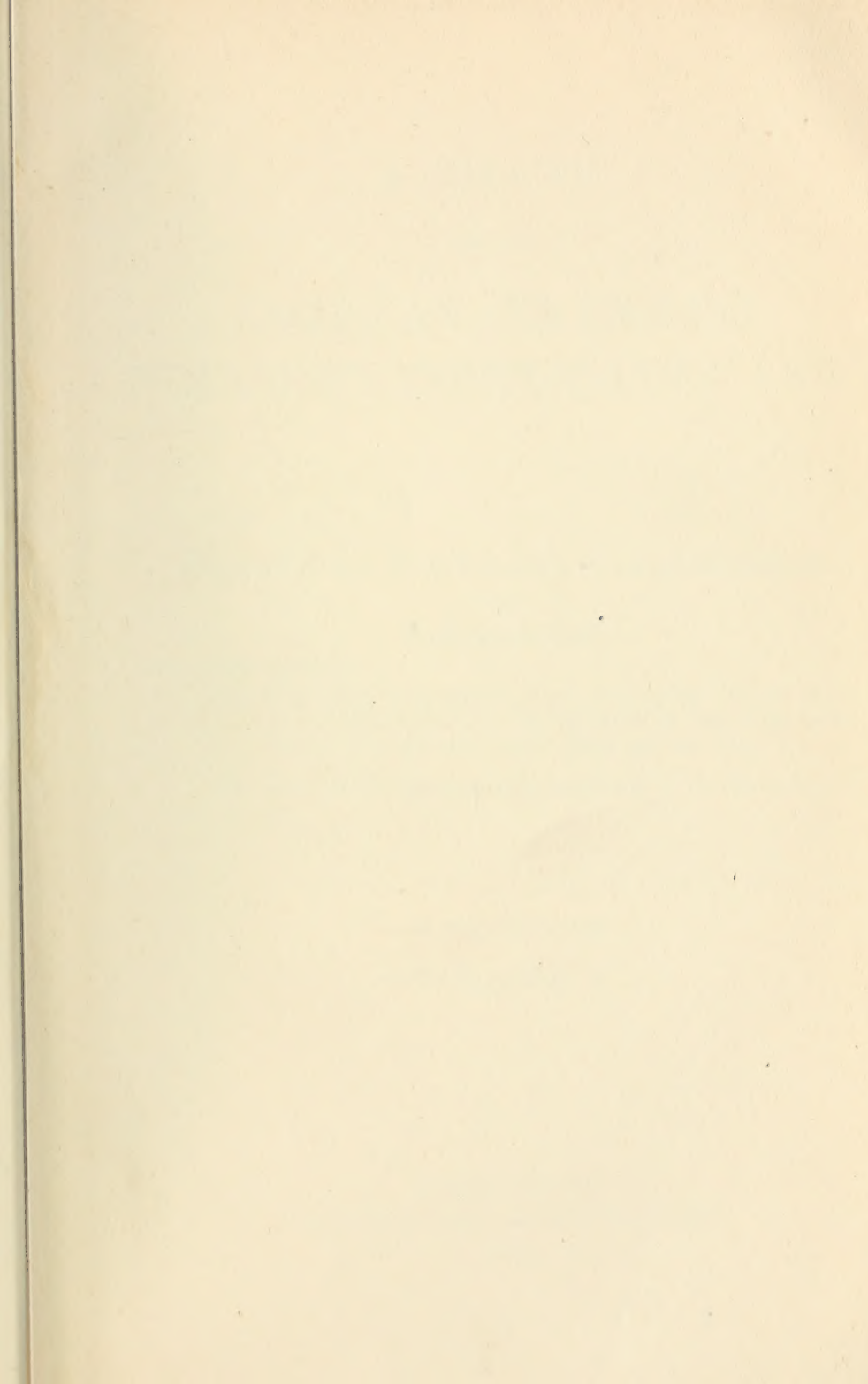
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Honnold on Workmen's Compensation with **Supplement**

This Edition contains:

- (A) **The original treatise** on the American and English Workmen's Compensation Laws; the full text of the Acts of the various States; a complete Index, and a Table of Cases Cited.
- (B) **The 1918 Supplement**, bringing all of the above down to date.

A TREATISE
ON THE
AMERICAN AND ENGLISH
WORKMEN'S COMPENSATION LAWS.

AS INTERPRETED BY THE COURTS AND TRIBUNALS
VESTED WITH THE POWER OF ADMINIS-
TERING AND ENFORCING SAME

WITH SUPPLEMENT

By ARTHUR B. HONNOLD
OF THE MINNESOTA BAR
AUTHOR OF A TREATISE ON OKLAHOMA JUSTICE PRACTICE

IN TWO VOLUMES

VOLUME I

KANSAS CITY, MO.
VERNON LAW BOOK COMPANY

1918

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PREFACE

WHILE compensation legislation is comparatively new, it has developed rapidly, as appears from the fact that Workmen's Compensation Acts have been adopted by the Federal Government, thirty-two states, three territories, and many foreign countries. This legislation has received a sufficiently thorough test to demonstrate its merit as a means of alleviating certain conditions which have arisen as a result of industrial progress, and to assure its permanency. The underlying principles have become sufficiently fixed to make of value a text book based on the opinions of the courts and various commissions and officers vested with the power and duty of enforcing these Acts, particularly if supplemented by an index furnishing a ready means of reference and a means of comparing the text of the legislation on which the opinions are based with the text of that Act in which the investigator is primarily interested. In this view this book has been prepared. It contains references to all material English and American cases and opinions, together with the text of each Act for purpose of comparison as above mentioned, and is submitted in the hope that it may duly facilitate investigations into this interesting and valuable class of legislation.

Occasion is hereby taken to acknowledge the uniform courtesy of the various commissions, boards, secretaries, and attorneys from whom much valuable material and information has been secured.

A. B. H.

ST. PAUL, MINN.

(iii)*

TABLE OF CONTENTS

OF VOLUMES I AND II

VOLUME I

TABLE OF ABBREVIATIONS

(Page xix)

CHAPTER I

WORKMEN'S COMPENSATION ACTS IN GENERAL

Section

- 1-5. Article I.—History, purpose and scope.
- 6-11. Article II.—Construction and operation.
- 12-19. Article III.—Validity.

ARTICLE I

Section

HISTORY, PURPOSE AND SCOPE

- 1. History.
- 2. Theory, purpose, and scope.
- 3. Report of Wainwright Commission.
- 4. Scope of legislation and change effected.
- 5. Insurance features.

ARTICLE II

CONSTRUCTION AND OPERATION

Section

- 6. Construction.
- 7. Retroactive operation.
- 8. Territorial operation.
- 9. Admiralty jurisdiction.
- 10. Interstate commerce.
- 11. Administration.

1 HON. COMP.

ARTICLE III

Section

VALIDITY

- 12. Police power.
- 13. Validity as against particular objections.
- 14. Objections raised under constitutional provisions.
- 15. New York—Ives Case.
- 16. Kentucky.
- 17. Classification.
- 18. Abolition of defenses.
- 19. Right to question validity.

CHAPTER II

ELECTIVE AND COMPULSORY COMPENSATION

Section

- 20. What Acts are elective and what compulsory.
- 21. Validity of Acts as affected by their elective or compulsory nature.
- 22. Contractual nature of elective compensation.
- 23. Presumption, notice and effect of election.
- 24. Pleading, and proof of election.
- 25. Abolition of defenses in common-law actions.

CHAPTER III

PERSONS AND FUNDS LIABLE FOR COMPENSATION

Section

- 26-31. Article I.—Employers, principals, and contractors.
- 32-40. Article II.—Insurers and funds.
- 41-48. Article III.—Third persons (indemnity and subrogation).

ARTICLE I

EMPLOYERS, PRINCIPALS, AND CONTRACTORS

Section

- 26. Primary liability—Who liable as employers.
- 27. Which of two employers liable.
- 28. Municipal corporations.
- 29. Contemporaneous employment by different employers.
- 30. Principals and contractors.
- 31. Principal and agent.

ARTICLE II

INSURERS AND FUNDS

Section

- 32. Distinctive insurance features of Compensation Acts.
- 33. Option of state insurance, private insurance, or self-insurance.
- 34. Rights and liabilities of insurance companies.
- 35. Substitution of parties, subrogation and reimbursement.
- 36. Premiums.
- 37. State insurance.
- 38. Excessive contributions and credits.
- 39. Public work.
- 40. Pension roll and reserve fund.

ARTICLE III

THIRD PERSONS (INDEMNITY AND SUBROGATION)

Section

- 41. In general.
- 42. California—Exercise of option.
- 43. Massachusetts.
- 44. Minnesota.
- 45. New Jersey.
- 46. New York.
- 47. Washington.
- 48. Wisconsin.

CHAPTER IV

PERSONS ENTITLED TO COMPENSATION

Section

- 49-69. Article I.—Employés.
- 70-84. Article II.—Dependents.

ARTICLE I

EMPLOYÉS

Section

- 49. Persons entitled to compensation as employés.
- 50. New York.
- 51. Contract of service.
- 52. State employés.

Section	
53.	Municipal employés.
54.	California.
55.	Federal employés.
56.	Previous health of employé.
57.	Minor employés.
58.	Employés excepted.
59.	Farm laborers.
60.	Domestic and household servants.
61.	Clerks.
62.	Casual employés.
63.	Connecticut.
64.	California.
65.	Iowa and Minnesota.
66.	Independent contractor.
67.	Federal Act.
68.	Employé of independent contractor.
69.	Officers.

ARTICLE II

DEPENDENTS

Section	
70.	Who are dependents and what constitutes dependency.
71.	Partial dependency.
72.	Total dependency.
73.	Alien dependents.
74.	What children may be dependents.
75.	Illegal and divorced wives—Marriage.
76.	Nonsupport and desertion.
77.	Dependents under federal Act.
78.	Claim of dependent.
79.	Payment to representatives—Survival of claim.
80.	Determination of question of dependency.
81.	Presumption of dependency—Husband and wife.
82.	Parent and child.
83.	California.
84.	Proof of dependency.

CHAPTER V

CIRCUMSTANCES UNDER WHICH COMPENSATION
BECOMES DUE

Section	
85-100.	Article I.—Injury and accident.
85-91.	Division I.—Accident.
92-96.	Division II.—Personal injury.
97-98.	Division III.—Diseases.
99-100.	Division IV.—Proof.
101-126.	Article II.—Arising out of and in course of employment.
101-104.	Division I.—In general.
105-114.	Division II.—Arising in the course of employment.
115-125.	Division III.—Arising out of employment.
126.	Division IV.—Proof.
127-137.	Article III.—Cause and result.
138-139.	Article IV.—Occupational diseases.

ARTICLE I

INJURY AND ACCIDENT

DIVISION I.—ACCIDENT

Section	
85.	Necessity, definition, and characteristics.
86.	Unexpected untoward event—Extraneous or not.
87.	Intentional act of another.
88.	Industrial accidents.
89.	Voluntary act in emergency.
90.	Fortuitous event.
91.	Question of law and fact.

DIVISION II.—PERSONAL INJURY

92.	Definition.
93.	Federal Act.
94.	Physical violence or not.
95.	Nervous shock.
96.	Hernia.

DIVISION III.—DISEASES

97.	Diseases compensable as injuries.
98.	Previously existing diseases.

DIVISION IV.—PROOF

- Section
 99. Proof of accident.
 100. Proof of injury.

ARTICLE II

ARISING OUT OF AND IN COURSE OF EMPLOYMENT

DIVISION I.—IN GENERAL

- Section
 101. "In course of" and "out of"—Necessity and distinction.
 102. Employments.
 103. Hazardous employments.
 104. Federal Act.

DIVISION II.—ARISING IN THE COURSE OF EMPLOYMENT

105. In general.
 106. Term of employment.
 107. Going to work.
 108. Returning from work.
 109. Premises of employer.
 110. Means of conveyance.
 111. Leisure periods—Attendance on personal comforts and necessities.
 112. Negligence and recklessness.
 113. Disobedience.
 114. Deviation from original employment.

DIVISION III.—ARISING OUT OF EMPLOYMENT

115. Risks due to employment.
 116. Risks peculiar to employment.
 117. Risks of commonalty.
 118. Risks external to the employment, but special exposure to risk due to employment.
 119. Injury from forces of nature.
 120. Injury caused by coemployé or others.
 121. Injury from horseplay or practical joking.
 122. Area of duty—Absence—Entry and exit.
 123. Incurring of additional risks.
 124. Intoxication.
 125. Susceptibility to risk.

DIVISION IV.—PROOF

126. Burden, requisites, and sufficiency of proof.

ARTICLE III

CAUSE AND RESULT

Section

- 127. When accident or injury proximate cause.
- 128. When proximate cause of disease.
- 129. When proximate cause of hernia—Proof.
- 130. Insanity.
- 131. Resulting incapacity or death.
- 132. Suicide.
- 133. Aggravation of existing disease.
- 134. Aggravation of injury after accident.
- 135. Additional injury.
- 136. Treatment in general.
- 137. Neglect and refusal of operation or medical services.

ARTICLE IV

OCCUPATIONAL DISEASES

Section

- 138. Occupational diseases.
- 139. Massachusetts.

CHAPTER VI

DEFENSES TO COMPENSATION CLAIMS

Section

- 140. Serious and willful misconduct—Purposely self-inflicted injury.
- 141. Disobedience—Violation of rules.
- 142. Drunkenness.
- 143. Burden of proof—Question of fact.
- 144. Estoppel and res judicata.
- 145. Negligence, contributory negligence, and assumption of risk.
- 146. Defenses under federal Act.

CHAPTER VII

COMPENSATION

Section

- 147-154. Article I.—Earnings as basis of compensation.
- 155-166. Article II.—Disability and incapacity for work.
- 167-174. Article III.—Death benefits.
- 175-192. Article IV.—Payment, release, and related matters.

Section	
193-201.	Article V.—Treatment and funeral expense.
193-200.	Division I.—Expenses of medical, surgical, and hospital treatment.
201.	Division II.—Funeral expenses.

ARTICLE I

EARNINGS AS BASIS OF COMPENSATION

Section	
147.	What constitutes earnings.
148.	Loss of earning capacity.
149.	Massachusetts.
150.	Computation of earnings in general.
151.	Determination of average earnings.
152.	Average weekly earnings.
153.	Daily wages.
154.	Federal Act.

ARTICLE II

DISABILITY AND INCAPACITY FOR WORK

Section	
155.	"Disability" and "incapacity for work."
156.	Permanent total disability.
157.	Permanent partial disability.
158.	Temporary total disability.
159.	Temporary partial disability.
160.	Computation in case of previously impaired physical condition.
161.	Hernia—California.
162.	Scheduled injuries.
163.	Eye.
164.	Arm.
165.	Hand, fingers, foot, and ankle.
166.	Disfigurement.

ARTICLE III

DEATH BENEFITS

Section	
167.	Computation and amount of benefit.
168.	California.
169.	Minnesota.
170.	New Jersey.
171.	New York.
172.	Washington.
173.	Wisconsin.
174.	Federal Act.

ARTICLE IV

PAYMENT, RELEASE, AND RELATED MATTERS

Section

- 175. Time, commencement, and continuation of payments.
- 176. Original federal Act.
- 177. Waiting period.
- 178. Original federal Act.
- 179. Lump sum payments.
- 180. Amount.
- 181. Deductions from award or settlement.
- 182. Deduction of payments made.
- 183. Deduction for interest.
- 184. Increased and reduced compensation.
- 185. Restriction of employé's rights in insurance contract.
- 186. Pensions.
- 187. Change, suspension, and termination of compensation.
- 188. California.
- 189. Release.
- 190. Contracting out.
- 191. Assignment of compensation rights.
- 192. Apportionment.

ARTICLE V

TREATMENT AND FUNERAL EXPENSE

DIVISION I.—EXPENSES OF MEDICAL, SURGICAL, AND HOSPITAL TREATMENT

Section

- 193. Rights, duties, and liabilities in general.
- 194. Massachusetts.
- 195. Failure or neglect of employer—Procurement of services and treatment by employé.
- 196. Where physician is furnished by employer.
- 197. Change of physician or service.
- 198. Expense for which employer is liable.
- 199. Recovery by physician.
- 200. Services of nurse or member of the family.

DIVISION II.—FUNERAL EXPENSES

- 201. Provisions allowing funeral expenses.

CHAPTER VIII

SETTLEMENT OF CONTROVERSIES

Section	
202.	Article I.—Settlement by agreement.
203-208.	Article II.—Remedies.
209.	Article III.—Legal proceedings in general.
210-215.	Article IV.—Notice and claim.
216-222.	Article V.—Evidence.
223-236.	Article VI.—Proceedings before special tribunal.
237-250.	Article VII.—Proceedings in court.
237-238.	Division I.—Original proceedings.
239-245.	Division II.—Review of decision of special tribunal.
246-250.	Division III.—Review by higher court.
251-252.	Article VIII.—Costs and attorney's fees.

ARTICLE I

SETTLEMENT BY AGREEMENT

Section	
202.	Amicable settlements.

ARTICLE II

REMEDIES

Section	
203.	Deprivation of other remedies.
204.	Willful and intentional injuries.
205.	Washington.
206.	New York.
207.	Arizona.
208.	Election of remedies after event.

ARTICLE III

LEGAL PROCEEDINGS IN GENERAL

Section	
209.	Practice.

ARTICLE IV

NOTICE AND CLAIM

Section	
210.	Notice.
211.	Notice to principal.
212.	Compensation claims—Sufficiency—Abatement.
213.	Necessity of claim—Waiver.
214.	Time for presentation—Limitations.
215.	Federal Act.

ARTICLE V

EVIDENCE

Section

- 216. Admissibility.
- 217. Hearsay.
- 218. Declarations of workman.
- 219. Burden of proof and evidence to sustain it—Presumption.
- 220. Report—Evidentiary effect.
- 221. Medical examination.
- 222. Federal Act.

ARTICLE VI

PROCEEDINGS BEFORE SPECIAL TRIBUNAL

Section

- 223. In general.
- 224. Jurisdiction.
- 225. Service of summons.
- 226. Parties.
- 227. Pleading and issues under California Act.
- 228. Taking and reception of testimony.
- 229. California.
- 230. Hearing, findings, and award.
- 231. California.
- 232. Review by special tribunal.
- 233. Dismissal.
- 234. Reopening of case, rehearing, and supplementary proceedings.
- 235. California.
- 236. Proceedings under original federal Act.

ARTICLE VII

PROCEEDINGS IN COURT

DIVISION I.—ORIGINAL PROCEEDINGS

Section

- 237. Jurisdiction and practice.
- 238. Verdict, judgment, and findings.

DIVISION II.—REVIEW OF DECISION OF SPECIAL TRIBUNAL

- 239. Jurisdiction.
- 240. Jury trial.
- 241. Appeal and review.
- 242. Review of findings and decision.
- 243. Connecticut.
- 244. Washington.
- 245. California.

Section	DIVISION III.—REVIEW BY HIGHER COURT
246.	Remedies.
247.	Right of appeal.
248.	Presentation below and for review.
249.	Questions reviewable.
250.	Decision.

ARTICLE VIII

Section	COSTS AND ATTORNEY'S FEES
251.	Taxation of costs.
252.	Contract for fee.

CHAPTER IX

Section	ILLUSTRATIVE SELECTED FORMS
253.	Forms for illustration and reference.
254.	Notices—Acceptance, rejection, and withdrawal.
255.	Notices to be posted, and certificate.
256.	Notice of injury or claim.
257.	First report of accident.
258.	Employer's reports.
259.	Agreements.
260.	Application for adjustment of claim—Settlement and petition.
261.	Answer to application.
262.	Notice of hearing.
263.	Arbitration.
264.	Attending physician's certificate.
265.	Proof of death, and certificate authorizing burial.
266.	Subpoena.
267.	Petition for review.
268.	Notice of hearing.
269.	Lump sum settlements.
270.	Petition to terminate or modify.
271.	Receipt and release.
272.	Insurance—Notices.

TABLE OF CASES CITED

(Page 881)

VOLUME II

CHAPTER X

TEXT OF LEGISLATION

	Page		Page
Arizona	977	New Hampshire	1402
California	988	New Jersey	1407
Colorado	1029	New York	1425
Connecticut	1082	Ohio	1468
Illinois	1100	Oklahoma	1503
Indiana	1121	Oregon	1521
Iowa	1138	Pennsylvania	1539
Kansas	1158	Rhode Island	1558
Kentucky	1170	Texas	1575
Louisiana	1200	Vermont	1585
Maine	1217	Washington	1600
Maryland	1233	West Virginia	1619
Massachusetts	1261	Wisconsin	1641
Michigan	1288	Wyoming	1658
Minnesota	1308	United States (Federal Acts)...	1672
Montana	1327	Great Britain (English Act)...	1685
Nebraska	1367	Germany (Synopsis of German	
Nevada	1383	Act)	1706

INDEX

(Page 1709)

SUPPLEMENT

(Following page 1905)

*

TABLE

OF

ABBREVIATIONS AND REFERENCES

THE STATE REPORTS ARE CITED BY THEIR FAMILIAR ABBREVIATIONS

A. C.	Law Reports, Appeal Cases (1891 et seq., Eng.).
Am. St. Rep.	American State Reports.
Ann. Cas.	American Annotated Cases.
Ann. Rep. Kan. B. of L.	Annual Report of the Kansas Bureau of Labor.
Ann. Rep. Neb. St. Dept. of L.	Annual Report of the Nebraska State Department of Labor.
App. C.	Law Reports, Appeal Cases (Eng.).
App. Div.	Appellate Division (N. Y.).
Ariz. Op. Atty. Gen.	Opinions of the Attorney General of Arizona.
Atl.	Atlantic Reporter.
Bulletin, Ill.	Bulletin of Decisions of the Industrial Board of Illinois.
Bul. Ohio Indus. Com. ...	Bulletins of Decisions of the Industrial Commission of Ohio.
Bul. Wis. Indus. Com. ...	Bulletins of Decisions of the Industrial Commission of Wisconsin.
B. W. C. C.	Butterworth's Workmen's Compensation Cases (British cases).
Cal. I. A. C. Dec.	Decisions of the Industrial Accident Commission of California (published first in bulletins and afterwards in bound volumes; page references to volumes 2 and 3 are to the bulletins).
Col. Indus. Com.	Industrial Commission of Colorado.
Conn. Comp. Dec.	Connecticut Compensation Decisions.
C. C. A.	U. S. Circuit Court of Appeals.
Cranch	Cranch, U. S. Supreme Court Reports.
Det. Leg. News	Detroit Legal News.
Eng. Com. B.	English Common Bench Reports.
F.	Court of Sessions, Scotland (Fourth Series).
Fed.	Federal Reporter.
Gray	Gray, Massachusetts Reports.
I. A. C. Dec.	See Cal. I. A. C. Dec.
Ill. App.	Illinois Appellate Court Reports.
Ind. Indus. Bd.	Industrial Board of Indiana.
Iowa Op. Sp. Counsel to Indus. Com.	Opinions of the Special Counsel to the Iowa Industrial Commissioner.
I. R.	Irish Reports.
Ir. L. T.	Irish Law Times.
Ir. L. T. R.	Irish Law Times Reports.
Ir. R.	Irish Reports.
Kan. Ann. Rep. B. of L.	Annual Report of the Kansas Bureau of Labor.
K. B.	King's Bench.

L. Ed.	Lawyers' Edition U. S. Supreme Court Reports.
L. J. K. B.	Law Journal King's Bench.
L. R. A.	Lawyers' Reports Annotated.
L. R. A. (N. S.)	Lawyers' Reports Annotated, New Series.
L. T.	Law Times (British cases).
L. T. Jo.	Law Times Journal (British cases).
L. T. R.	Law Times Reports (British cases).
Mass. Wk. Comp. Cases..	Reports of Cases under the Workmen's Compensation Act of Massachusetts.
Me. Indus. Acc. Com. ...	Industrial Accident Commission of Maine.
Mich. Wk. Comp. Cases.	Decisions of the Industrial Accident Board of Michigan.
Minn. Op. Atty. Gen.	Opinions of the Attorney General of Minnesota.
Minn. Op. Dept. of L. ...	Opinions of the Department of Labor of Minnesota.
Misc. Rep.	Miscellaneous Reports (N. Y.).
Mont. Indus. Acc. Bd.	Industrial Accident Board of Montana.
Md. St. Indus. Acc. Com.	State Industrial Accident Commission of Maryland.
N. C. C. A.	Negligence and Compensation Cases Annotated.
N. E.	Northeastern Reporter.
Neb. Ann. Rep. of St.	
Dept. of L.	Annual Report of the Nebraska State Department of Labor.
Nev. Rep. Indus. Com. ..	Report of the Industrial Commission of Nevada.
N. J. Law	New Jersey Law Reports.
N. W.	Northwestern Reporter.
N. Y. St. Dep. Rep.	New York State Department Reports.
Okl. St. Indus. Com.	State Industrial Commission of Oklahoma.
Op. Atty. Gen.	Opinions of the Attorney General of the United States.
Op. Atty. Gen. Minn....	Opinions of the Attorney General of Minnesota.
Op. Atty. Gen. Wash. ...	Opinions of the Attorney General of the State of Washington.
Op. Compt. of T.	Opinions of the Comptroller of the United States Treasury.
Op. Dept. of L., Minn....	Opinions of the Department of Labor of Minnesota.
Op. Mich. Indus. Acc. Bd.	Opinions of the Michigan Industrial Accident Board.
Op. Sol. Dept. of Labor...	Opinions of Solicitor United States Department of Labor from August, 1908, to April, 1915.
Op. Sp. Counsel to Iowa	
Indus. Com.	Opinions of the Special Counsel to the Iowa Industrial Commissioner.
Or. Rep. Indus. Acc.	
Com.	Reports of the Industrial Accident Commission of Oregon.
Pac.	Pacific Reporter.
Pa. St. Wk. Ins. Bd.	State Workmen's Insurance Board of Pennsylvania.
Pa. Wk. Comp. Bd.	Workmen's Compensation Board of Pennsylvania.
Q. B.	Queen's Bench.
Q. B. D.	Law Reports, Queen's Bench Division (1876-90).
Rep. Indus. Acc. Com. Or.	Reports of the Industrial Accident Commission of Oregon.
Rep. Indus. Com. Nev. ..	Report of the Industrial Commission of Nevada.
Rep. Wis. Indus. Com....	Reports of the Wisconsin Industrial Commission.
Rul. Wash. Indus. Acc.	
Ins. Com.	Rulings of the Industrial Accident Insurance Commission of the State of Washington.
S. E.	Southeastern Reporter.
S. C.	Session Cases.
S. L. R.	Scottish Law Reports.
So.	Southern Reporter.
Stone's W. C. A. Ins.	
Cas.	Stone's Workmen's Compensation and Accident Insurance Cases (British cases).
Sup. Ct.	United States Supreme Court Reporter.

S. W.	Southwestern Reporter.
Tex. Civ. App.	Reports of Opinions of the Courts of Civil Appeals of Texas.
Tex. Emp'rs' Ins. Assoc.	Employers' Insurance Association of Texas.
Tex. Indus. Acc. Bd.	Industrial Accident Board of Texas.
The Bulletin	A magazine issued monthly by the New York State Industrial Commission.
T. L. R.	Time Law Reports (British cases).
U. S.	United States Supreme Court Reports.
Vt. Indus. Acc. Bd.	Industrial Accident Board of Vermont.
Wall.	Wallace, United States Supreme Court Reports.
Wash. Op. Atty. Gen.	Opinions of the Attorney General of the State of Washington.
Wash. Rul. Indus. Acc. Ins. Com.	Rulings of the Industrial Accident Insurance Commission of the State of Washington.
W. C. C.	Workmen Compensation Cases (British cases).
W. C. & Ins. Rep.	Workmen's Compensation and Insurance Reports (British cases).
W. C. R.	Workmen's Compensation Reports (British cases).
Wk. Comp. Act	Workmen's Compensation Act.
W. Va. St. Comp. Com.	State Compensation Commissioner of West Virginia.

THE LAW OF
WORKMEN'S COMPENSATION
VOLUME I

HON. COMP.

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CHAPTER I

WORKMEN'S COMPENSATION ACTS IN GENERAL

Section

- 1-5. Article I.—History, purpose and scope.
- 6-11. Article II.—Construction and operation.
- 12-19. Article III.—Validity.

ARTICLE I

HISTORY, PURPOSE AND SCOPE

Section

- 1. History.
- 2. Theory, purpose, and scope.
- 3. Report of Wainwright Commission.
- 4. Scope of legislation and change effected.
- 5. Insurance features.

§ 1. History

The trend of state legislation indicates a rapid increase in sentiment favorable to those principles which underlie the Workmen's Compensation Acts. While the features of these acts are patterned largely after the English Act, the compensation idea seems to have originated in Germany. The economic loss from vocational disease, industrial accidents, old age, and nonemployment, created in the German States, prior to the days of the Empire, a sentiment favorable to some plan of compensation, but the credit for crystallizing this sentiment into workable laws rests with Bismarck. From the enactment of a sick insurance statute in Germany in 1883, the idea of compensation based on risks arising out of the business and impairment of earning capacity spread to other European countries, and finally to the United States. The federal government, 32 states, Alaska, Hawaii, and the Canal Zone now have measures for the relief of injured workmen which are

patterned after either the German insurance, or the English compensation plan, or both.¹ In consequence of the common origin of these Acts, they bear a close resemblance to each other in their essential features.² The basic German insurance plan and English compensation plan seek the same ultimate end, though by somewhat different means, and the term "workmen's compensation" is sufficiently comprehensive for all practical purposes to include both.³

¹ Compensation laws are in force in the following states: Arizona, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. The first Kentucky law was declared unconstitutional, and the present law became effective August 1, 1916. The law passed by the Idaho Legislature was vetoed by the Governor. The states above named have approximately 75 per cent. of the population and nearly 85 per cent. of the workmen engaged in manufacturing in the continental United States.

The original New York Act, enacted in 1910 (Labor Law [Laws 1910, c. 674] art. 14a), was modeled after the English Workmen's Compensation Act of 1897. *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156.

² Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245; *Mackin v. Detroit Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49; *State v. Industrial Commission*, 92 Ohio St. 434, 111 N. E. 299.

They are the expression of widely prevalent sentiments which have exerted a compelling influence on legislation in other countries as well as in the United States. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398.

"Confronted with a legislative history covering more than 30 years and extending to practically all of Europe, to many of the European dependencies, and to more than one-half of the United States, the members of the Legislative Assembly of 1915 must be credited with an understanding of compensation measures as they were generally understood at that time, and with an intention to employ terms appropriate to such measures as they were generally employed under like circumstances." *Lewis and Clark County v. Industrial Acc. Board (Mont.)* 155 Pac. 268.

³ *Id.*

The Act should be designated and referred to as the "Workmen's Compensation Act," not as the "Employers' Liability Act," though it has some of the

§ 2. Theory, purpose, and scope

The proper administration of Workmen's Compensation Acts necessitates an appreciation of the legislative purpose to abolish the common-law system relating to injuries to employés as inadequate to meet modern conditions ⁴ and conceptions of moral obligations,⁵ and substitute therefor a system based on a high conception of

characteristics of both. *Gregutis v. Waclark Wire Works*, 86 N. J. Law, 610, 92 Atl. 354.

⁴ It was the intention of the Legislature of New York to supersede "rules of law governing legal liability" which were stated by Governor Hughes to "offend the common sense of fairness," and to carry out the recommendation of the Wainwright Commission of 1909 that the state should "establish a new system of compensation for accidents to workmen." *In re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598.

All the Compensation Acts, whether elective or compulsory, rest on the notion that the common-law remedy by action involves intolerable delay and great economic waste, gives inadequate relief, operates unequally, and that, whether viewed from the standpoint of the employer or that of the employé, it is inequitable and unsuited to the conditions of modern industry. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398.

In an opinion by Judge Johnson, in the case of *State ex rel. v. Creamer*, 85 Ohio St. 349, 386, 97 N. E. 602, 603, 39 L. R. A. (N. S.) 694, construing the original Ohio Act, the court says of the Act: "It provides a plan of compensation for injuries * * * resulting from accidents to employés. * * * The system, which has been followed in this country, of dealing with accidents in industrial pursuits, is wholly unsound. * * * There has been enormous waste under the present system, and * * * the action for personal injuries by employé against employer no longer furnishes a real and practical remedy, annoys and harasses both, and does not meet the economic and social problem which has resulted from modern industrialism."

⁵ The purpose of the Act is to substitute a method of accident insurance in place of the common-law rights and liabilities for substantially all employés except domestic servants, farm laborers, and masters of and seamen on vessels engaged in interstate or foreign commerce, and those whose employment is casual or not in the usual course of trade, business, or employment of the employer, and probably those subject to the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]). It was a humane measure enacted in response to a strong public sentiment that the remedies afforded by actions of tort at common law and under the state Employers' Liability Act had failed to accomplish that measure of pro-

man's obligation to his fellow man,⁶ a system recognizing every personal loss to an employé, which is not self-inflicted, as an element

tection against injuries and in case of accident which should be afforded to the workman. *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1.

The originators of the Workmen's Compensation Acts believed that they would lessen crime. Some of the considerations behind them were economic: The difficulty and hardship involved in proving the workman's case, the great waste in procuring a recovery, the delay in obtaining the relief, the uncertainty oftentimes in determining the cause of the accident, the vastly increased dangers, and the impossibility of personal supervision by the employer, under modern conditions of employment, and the necessity of the workman accepting employment under conditions of increased danger or suffering loss of livelihood. Some were moral: The prevention of the tendency of some workmen to press unfounded claims, and the tendency of some employers to defend by means of questionable fairness. *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245.

⁶ The paramount object of the diverse workmen's compensation enactments which have been adopted by several of the states of the Union and in foreign countries has been the enactment of what has been claimed to be more just and humane laws to take the place of the common-law remedy for the compensation of workmen for accidental injuries received in the course of their employment, by the taking away and removal of certain defenses in that class of cases. *Adams v. Acme White Lead & Color Wks.*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 282.

Though the Ohio Act had in view the establishment of an insurance fund, it was passed primarily to protect the life and limb of the employé. *McWeeny v. Standard Boiler & Plate Co. (D. C.)* 210 Fed. 507, affirmed 218 Fed. 361, 134 C. C. A. 169.

As said by Judge Fullerton: "Theoretically, of course, the employer and employé, on entering into a contract by which the one engages the services of the other, stand on the same plane, but in practice, as it is well known, this ideal condition very seldom exists. Greed and sagacity on the one side, and necessity and incapacity on the other, sometimes lead to contracts that create conditions little short of peonage, and our own reports abound with instances where men have been induced to work in situations so dangerous to life and limb that the wonder is not that some of them were injured, but rather that any of them escaped injury. Indeed, it is a common thing for an employer, in defense of an action of damages brought by his employé for injury received in such a situation, to urge that the dangers of the place were so obvious and apparent that the employé was guilty of contributory negligence for working therein. These conditions, we think, authorize the interference of the Legislature. * * * The obligation of the employé to accept the

of the cost of production⁷ to be charged to the industry rather than to the individual employer,⁸ and liquidated in the steps end-

conditions of the statute can rest on the welfare of the state." *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

⁷ The object of the Workmen's Compensation Act is to minimize personal injury, distress, and loss, and throw the burden upon the public as well as on the person injured, recognizing that such loss legitimately enters into the cost of production as wages. *City of Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847.

The general purpose of the Act is to make compensation for the numerous accidents and injuries to workmen, which under present conditions occur in industrial enterprises, a part of the cost of production. It seeks to do this in accordance with a carefully regulated scheme, disregarding many of the principles of the common law which formerly affected actions to recover compensation for such injuries. *Jillson v. Ross* (R. I.) 94 Atl. 717.

"The remedy provided by our Compensation Act is substitutionary in character, furnishing what was purposed to be a more humanitarian and economical system as a substitute for one deemed wasteful to industrial enterprises and commerce, and unfair to employes. Its intent was to afford its protection to all Connecticut employers and employes who might voluntarily choose to make its provision for compensation for injury a part of their contracts of employment. It assumed that accident is incident to employment, and purposed to charge its cost in the case of every injury not caused by the willful and serious misconduct or intoxication of the injured employe to the industry in which it occurred. It intended that the employe should know what compensation he or his dependents would receive in the event of injury, and that payment should be made speedily by a procedure at once simple and inexpensive. It intended that the employer should know his liability in this regard, and so might include it among the cost of operation." *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436 (opinion by Wheeler, J.).

The workmen's compensation legislation is based on the economic principle of trade risk, in that personal injury losses incident to industrial pursuits are, like wages and breakage of machinery, a part of the cost of production. *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49. The Workmen's Compensation Act is a humane, remedial enactment which is intended to give vitality to the idea that personal injury losses incident to an employe's service are as much a part of the labor cost of such service as wages paid, and should, in some practicable way, be so treated. *Village of Kiel v. Industrial Commission of Wisconsin* (Wis.) 158 N. W. 68.

⁸ There is no doubt that it was the legislative intent to compensate workmen for injuries resulting from industrial accidents, and that such compen-

ing with consumption,⁹ so that the burden is finally borne by the community in general.¹⁰ The fundamental principle of government

sation is charged against the industry because it is responsible for the injury. *Klawinski v. Lake Shore & M. S. Ry. Co.*, 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A, 342.

The position in the line of causation which employers sustain in modern industrial pursuits is the basic fact on which employer's liability laws rest. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398; *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694. The theory is that each time an employé is killed or injured there is an economic loss, which must be made up or compensated in some way; that most accidents are attributable to the inherent risk of employment—that is, no one is directly at fault; that the burden of this economic loss should be borne by the industry, rather than by society as a whole; that a fund should be provided by the industry from which a fixed sum should be set apart as every accident occurs to compensate the person injured, or his dependents, for his or their loss. *State v. Industrial Commission*, 92 Ohio St. 434, 111 N. E. 299.

Workingmen's insurance and compensation laws are the products of the development of the social and economic idea that the industry which has always borne the burden of depreciation and destruction of the necessary machinery shall also bear the burden of repairing the efficiency of the human machine without which the industry itself could not exist. *Lewis and Clark County v. Industrial Acc. Board (Mont.)* 155 Pac. 268.

⁹ The theory of this legislation is that the risk of injury to workmen in the industries covered by the law should be borne by the industries rather than by the individual workman alone. As the ultimate result, the burden thus imposed in the first instance on the employer will be distributed, as part of the cost of production, among the consuming public. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398; *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

Proper administration of the Workmen's Compensation Act requires appreciation of the manifest legislative purpose to abolish the common-law system regarding injuries to employés as unsuitable to modern conditions and conceptions of moral obligations, and erect in place thereof one based on the highest present conception of man's humanity to man and obligations to members of the employé class—one recognizing every personal loss to an employé, not self-inflicted, as necessarily entering into the cost of production and required to be liquidated in the steps ending with consumption. *City of Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847.

In the enactment of the compensation law, the Legislature recognized that

¹⁰ See note 10 on following page.

parallel with this purpose, and on which all compensation legislation is based, the principle which was first advocated by Bismarck in Germany in about the year 1880, and later by Lord Salisbury in England, is that in a modern industrial state the risk of

the common-law remedies for injuries sustained in certain hazardous industries were inadequate, unscientific, and unjust, and therefore a substitute was provided, by which a more equitable adjustment of such could be made under a system which was intended largely to eliminate controversies and litigation and place the burden of accidental injuries, incident to such employments, upon the industries themselves, or rather upon the consumers of the products of such industries. *McRoberts v. National Zinc Co.*, 93 Kan. 364, 144 Pac. 247.

Injuries sustained by those who perform the manual and mechanical tasks of an industry must be deemed to have been intended by this statute to be made a social risk, a liability of the industry, a charge upon the production cost of the article manufactured or the service rendered. In *re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598. In contemplation of the Act and the constitutional provision under which it was passed, accidents in the employment finally fall upon the consumer, and not upon the employé or employer; the State Commission standing between the employé, the employer, and the ultimate consumer. *McQueeney v. Sutphen & Hyer*, 167 App. Div. 528, 153 N. Y. Supp. 554.

The theory of the law, and of the underlying constitutional authorization, is that the accidents growing out of the operation of industrial enterprises become a legitimate part of what is known in commercial life as the "overhead" cost, the same as the breakage, wear, and tear of machinery and equipment, and it is only in those industries which are carried on for pecuniary gain that "the cost of operating the business" can be taken care of in the fixing of the price of the product. *Allen v. State* (Sup.) 160 N. Y. Supp. 85.

¹⁰ The plain purpose of Laws 1913, c. 816, was to make the risk of accident one of the industry itself, to follow from the fact of the injury, and hence that compensation on account thereof should be treated as an element in the cost of production, added to the cost of the article and borne by the community in general. That the statute might be general in its scope provision was made to provide for compensation for every accidental personal injury to an employé arising out of and in the course of the employment, with the two exceptions specified in the statute. *Kenny v. Union Ry. Co.*, 166 App. Div. 497, 152 N. Y. Supp. 117. The scheme of the statute is to charge upon the business, through insurance, the losses caused by it, making the business and the ultimate consumer of its product, and not the injured employé, bear the burden of the accidents incident to the business. The statute contemplates the protection, not only of the employé, but of the employer, at the expense of the ultimate consumer. *Spratt v. Sweeney & Gray Co.*, 168 App. Div. 403, 153

injury to workmen while engaged in the employer's service is a social risk, chargeable against the business itself, the losses arising from which are to be added to the productive cost and to be borne ultimately by the community at large. This principle has been generally accepted in Europe for years, and is regarded by sociological writers as a forward step in the progress and development of a civilized state. It permits an injured workman, or, in the event of his death, his dependents, to demand as a right that which

N. Y. Supp. 505. The purpose of the Workmen's Compensation Act was to make the risk of an accidental injury one of the industry itself, even when happening through the fault of the workman, treating it as an element of the cost of production, to be added thereto and hence borne by the community in general. *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620.

The evil sought to be remedied "is one that calls loudly for action. Accidents to workmen in the industries enumerated in it are all but inevitable. It seems that no matter how carefully laws for the prevention of accidents in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters into the problem which cannot be eliminated and which invariably causes personal injuries and consequent financial losses to workmen engaged therein. Heretofore these losses have been borne by the injured workmen themselves, by their dependents, or by the state at large. It was the belief of the Legislature that they should be borne by the industries causing them, or, perhaps more accurately, by the consumers of the products of such industries. That the principle thus sought to be put into effect is economically, sociologically, and morally sound, we think must be conceded. It is so treated by the learned counsel who have filed briefs in support of the auditor's contentions; it is so conceded by all modern statesmen, jurists, and economic writers who have voiced their opinion on the subject, and the principle has been enacted into law by nearly all of the civilized countries of Europe, by Australia, by New Zealand, by the Transvaal, by the principal provinces of the Dominion of Canada, and in a partial form, at least, by one or more of South American Republics. Indeed, so universal is the sentiment that to assert to the contrary is to turn the face against the enlightened opinion of mankind. The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases—cases where the injury is the result of fault on the part of the employer and there is want of fault on the part of the workman. For the greater number of injuries traceable to the dangers incident to industry, no remedy at all is afforded." *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

they were often compelled to ask as a charity, with the ultimate costs in either event upon the community.¹¹ This purpose exists, though the primary liability for compensation or insuring the employé against loss rests on the employer.¹² In place of the common-law remedy, which involves tedious delays and great economic waste, it has been sought by this legislation to provide a certain and speedy method by which injured employés and their dependents may secure, at a minimum of cost¹³ and free from certain well-

¹¹ *Lindebauer v. Weiner*, 94 Misc. Rep. 612, 159 N. Y. Supp. 987.

¹² The purpose is to insure the workman at the expense of the employer against personal injuries not expected or designed by the workman himself, provided such injuries arise out of and in the course of employment. In *re Heitz*, 218 N. Y. 148, 112 N. E. 750, affirming (Sup.) 155 N. Y. Supp. 1112; *Trim Joint Dist. School Board v. Kelly*, App. Cas. 667.

Compensation legislation rests on the economic and humanitarian principles that compensation should be given at the expense of the business to the employé or his representative for earning capacity destroyed by an accident in the course of or connected with his work. *Waters v. William J. Taylor Co.*, 218 N. Y. 248, 112 N. E. 727, affirming 170 App. Div. 942, 154 N. Y. Supp. 1149.

¹³ Its purpose is to furnish a remedy that will reach every injury sustained by a workman engaged in any of such industries, and make a sure and certain award therefor. *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *Shade v. Ash Grove Lime & Portland Cement Co.*, 93 Kan. 257, 144 Pac. 249; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398.

It was intended by the Legislature that litigation under this Act shall proceed to a final determination without unreasonable delay. *Jillson v. Ross* (R. I.) 94 Atl. 717.

The Act, by eliminating the proof of negligence, by minimizing the delay in the award, and by making it reasonably certain, seeks to avoid the great waste of the tort action, and to promote better feeling between workman and employer, and accepts as an inevitable condition of industry, the happening of accident and charges its cost to the industry. It imposes upon the employer, presumably, his share of a common loss in a common industry. The period of compensation is limited as a "concession," it is said, "to expediency," although logically the spirit and purpose of the Act can only be met by having the period commensurate with the period of injury or dependence. The certainty of receipt of compensation for injury follows the Act. Its procedure contemplates a speedy investigation and hearing by a commissioner, without the formalities of a court, and without, as a general rule, the

established rules of law, compensation which will be more uniform than that awarded by juries,¹⁴ and which, so far as practicable, is

employment of an attorney. It attempts to improve the condition of workmen under modern methods of industry by giving him partial recompense for an injury, with a result more certain and speedy and less expensive than under the former method in tort litigation. *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245.

The purpose of the Act is to insure that compensation shall go intact to the injured employé or his dependents without any shrinkage by passing through or into the hands of assigns, agents, attorneys, friends, or relatives; it being common knowledge that, if a sum of money on its journey from the one from whom to the one to whom it is due passes through the hands of others, it is inevitable that it suffers diminution, sometimes almost to the vanishing point. *State v. Industrial Commission*, 92 Ohio St. 434, 111 N. E. 299. The original Ohio Workmen's Compensation Act was passed May 31, 1911 (102 Ohio Laws, p. 524). Its purpose, well expressed in its title, was: "To create a state insurance fund for the benefit of injured and the dependents of killed employés, and to provide for the administration of such fund by a state liability board of awards." *Id.*

"A striking feature of a good Compensation Act is the promptitude and ease with which claims for compensation are settled. Out of a total of 11,377 claims handled during the year, 10,534, or 93 per cent., were settled directly between the parties. Of the remaining 843 claims, 804 were disposed of after hearing by the Commission. There were only 39 court cases in all. Taking the total experience of the Commission to date, only 30 cases out of every 1,000 are brought before the Commission, and only 2 cases are carried to the courts." *Rep. Wis. Indus. Com.* 1914-15, p. 2.

¹⁴ While the legislation of this character is of recent growth in this country, the end sought to be accomplished is thoroughly well understood. The object and purpose of such legislation has been twofold: First, in cases of injury to employés to provide a speedy and inexpensive method by which compensation might be made to them or those dependent upon them without the delay of long and tedious litigation, and at a minimum of costs; and, secondly, to substitute a more uniform scale of compensation in cases of accident than could be obtained from the varying and often widely divergent estimates of juries, and also to avoid the application of certain well-established rules of law, which in some cases have seemed to be harsh in their operation. *Brenner v. Brenner*, 127 Md. 189, 96 Atl. 287.

"Injustice to the laborer and hardships to the industries of the state alike called for some plan that would relieve the servant of the necessity of pursuing his remedy for compensation in the courts, and the master of the harassments, vexations, and uncertainties attending the trial of all cases where men are called upon to defend against the charge of negligence. Clearly the

regulated as to amount by fixed rules and schedules.¹⁵ A full appreciation of the scope of this legislation cannot be obtained with-

purpose of the Act was to end all litigation growing out of, incident to, or resulting from the primary injury, and in lieu thereof give to the workman one recovery in the way of certain compensation, and to make the charge upon the contributing industries alone. The Act is grounded in a humanitarian impulse. It takes account only of the place of injury and the extent of the disability, and compensates for the conditions resulting from the primary injury, or, in other words, it will reject no element of disability if it has accrued in consequence of the first hurt, or as an aggravation arising from any collateral contributing cause. The Legislature knew that workmen had been compelled to meet the defense of nonliability on the part of the employer, who might plead the malpractice of the attending surgeon as a bar to recovery, and if they pursued their remedy against the malpractitioner, they might be subject to the hazard of expert opinion evidence, from which a jury may generally find a sufficient warrant to follow its own inclination. There was no assurance of recovery against either party, or against either offender. On the other hand, the employer and faithful and competent physicians and surgeons had been put to the hazard of ill-founded suits. The deserving had gone from the courts, their wrongs unredressed. The undeserving had taken that which, in good conscience, was not their own, and to cure all the Legislature passed the Industrial Insurance Law covering 'all phases of the premises.'" *Ross v. Erickson Const. Co.*, 89 Wash. 634, 155 Pac. 153.

"As the citizens of the state have become familiar with the purposes and actual operation of the compensation law during the past year, the co-operation and assistance received by the commission has increased correspondingly. Employers have been relieved of the worry and cost of litigation, and have had the satisfaction of knowing that the money spent for compensation was being received by the workmen who were injured, rather than going for attorney fees, court costs, and the expenses and profits of the liability insurance companies. On the other hand, injured workmen received compensation as promptly as possible and in a large number of cases where the employer would not have been liable under the former statutes." *First Annual Rep. Or. Indus. Acc. Com.* June 30, 1915, p. 24. "Although 4,546 accidents were reported to the Commission during the 12 months, only in a few instances did

¹⁵ The object in case of disability is to provide to workmen who have sustained injuries in their respective employments a compensation which is based on fixed schedules. *Nitram Co. v. Creagh*, 84 N. J. Law, 243, 86 Atl. 435.

The general purpose of the Illinois Act is to provide a method by which injuries received by employés in certain classes of occupations may be quickly adjusted, so that something shall be received according to fixed rules for determining compensation. *Victor Chemical Works v. Industrial Board of Illinois (Ill.)* 113 N. E. 173.

out also taking into consideration the fact that the state has an interest in compensation being awarded that the support of the workman or his dependents may not become a public charge.¹⁶

§ 3. — Report of Wainwright Commission

In its report to the New York Legislature, the reasons for the departure from long-established custom in the enactment of compensation laws are summarized by the Wainwright Commission as follows: "First, that the present system in New York rests on a basis that is economically unwise and unfair, and that in operation it is wasteful, uncertain, and productive of antagonism between workmen and employers. Second, that it is satisfactory to none, and tolerable only to those employers and workmen who practically disregard their legal rights and obligations, and fairly share the burden of accidents in industries. Third, that the evils of the system are most marked in hazardous employments, where the trade risk is high and serious accidents frequent. Fourth, that, as matter of fact, workmen in the dangerous trades do not, and practically cannot, provide for themselves adequate accident insurance, and therefore the burden of serious accidents falls on the workmen least able to bear it, and brings many of them and their

workmen ignore the Compensation Act and bring suit against their employers. In several cases workmen instituted suit, under the provisions of section 22, alleging they were injured 'from the deliberate intention of the employer to produce such injury.' In two instances, also, workmen brought action after the Commission had paid the full amount of benefits provided by the law. This litigation, however, has so far been unsuccessful. The fact that suit had been instituted by two workmen after receiving the benefits provided by the law on account of their injuries, and after executing final settlement vouchers in favor of the accident fund, created speculation as to the motives behind this litigation. This was, however, made plain later, when definite information came to the Commission that solicitors were visiting injured workmen at the hospital, offering varying amounts per week, if the workman would sign a contingent fee contract authorizing suit to be brought against the employer." *Id.* p. 19.

¹⁶ *Gerber v. Central Council of Stockton*, 2 Cal. I. A. C. Dec. 580.

families to want.”¹⁷ This indictment of the old system is followed by a statement of the anticipated benefits under the new statute as follows: “These results can, we think, be best avoided by compelling the employer to share the accident burden in intrinsically dangerous trades, since by fixing the price of his product the shock of the accident may be borne by the community. In those employments which have not so great an element of danger, in which, speaking generally, there is no such imperative demand for the exercise of the police power of the state for the safeguarding of its workers from destitution and its consequences, we recommend, as the first step in this change of system, such amendment of the present law as will do away with some of its unfairness in theory and practice, and increase the workmen’s chance of recovery under the law. With such changes in the law we couple an elective plan of compensation, which, if generally adopted, will do away with many of the evils of the present system. Its adoption will, we believe, be profitable to both employer and employé, and prove to be the simplest way for the state to change its system of liability without disturbance of industrial conditions. Not the least of the motives moving us is the hope that by these means a source of antagonism between employer and employed, pregnant with danger for the state, may be eliminated.”¹⁸

§ 4. — Scope of legislation and change effected

The change made by this legislation is radical, even revolutionary,¹⁹ and works fundamental changes in the familiar principles

¹⁷ *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156.

¹⁸ *Id.*; *In re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598.

¹⁹ *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156. This Act must in fairness be deemed to have been enacted in furtherance of a legislative determination, enforced by explicit mandate of the people through amendment of the state Constitution, that a new and different scheme and basis of indemnity for industrial acci-

governing the employer's heretofore existing liability for negligence.²⁰ In place of the liability in an action for damages, in which the employer was liable only in case he or his representative was negligent or at fault, a liability is imposed on the employer for any accidental injuries to his employes arising out of the employment—a liability which, as a general rule, is not conditioned on the employer's negligence or the employe's want of negligence. The Compensation Acts ordinarily require that the injuries shall not have been caused by the employe's intoxication or willful misconduct, and abrogate the common-law doctrines of assumption of risk, contributory negligence, and negligence of fellow servant.²¹

dents should be adopted in this state, in the light of the social experience of other commonwealths and countries. In *re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598.

²⁰ *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49.

Under the common law the burden of industrial accidents fell on the workman, where no fault was attributable to either employer or workman. Under the Compensation Acts it falls principally on the employer. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398.

²¹ *Id.*

Compensation for injury, regardless of fault, is the basis of the Compensation Acts. *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245.

The policy of the state of Illinois is to be found in the Compensation Act, and requires payment to employes in case of accident growing out of and in the course of the employment, without reference to the doctrine of negligence. *Blauvelt v. Chicago & A. R. Co.*, Bulletin No. 1, Ill., p. 181. The Compensation Act applies to no individual or corporation on the doctrine of tort, but it applies only by reason of its terms, which make it so. *Radigen v. Sanitary Dist. of Chicago*, Bulletin No. 1, Ill., p. 138.

Recovery of compensation under the Michigan Act does not depend upon, and is not affected by, the employer's negligence. *Grand Trunk Ry. Co. of Canada v. Knapp (C. C. A.)* 233 Fed. 950.

The Compensation Act was intended to relieve against the hardships resulting from many unfortunate accidents which do take place in this age of the extensive use of complicated machines and appliances and of great enterprises necessitating the indiscriminate employment of large forces of laborers and mechanics. All question of the employer's fault or negligence is eliminated from cases arising under this Act. The intention was to compensate all accidental injuries growing out of and received in the service,

The right to be compensated for an injury ordinarily has about it no element of pension, rebate, bounty, or charity.²² Nor does it

except those intentionally self-inflicted or due to intoxication. *State Du-luth Brewing & Malting Co. v. District Court*, 129 Minn. 176, 151 N. W. 912.

The fundamental difference between the conception of liability and compensation is found in the presence in the one, and the absence from the other, of the element of actionable wrong. The common law and liability statutes furnished an uncertain measure of relief to the limited number of workmen who could trace their injuries proximately to the master's negligence. Compensation laws proceed upon the theory that the injured workman is entitled to pecuniary relief from the distress caused by his injury, as a matter of right, unless his own willful act is the proximate cause, and that it is wholly immaterial whether the injury can be traced to the negligence of the master, the negligence of the injured employé or a fellow servant, or whether it results from an act of God, the public enemy, an unavoidable accident, or a mere hazard of the business which may or may not be subject to more exact classification; that his compensation shall be certain, limited by the impairment of his earning capacity, proportioned to his wages, and not dependent upon the skill or eloquence of counsel or the whim or caprice of a jury; that as between workmen of the same class who suffer like injuries, each shall receive the same compensation, and that, too, without the economic waste incident to protracted litigation and without reference to the fact that the injury to the one may have been occasioned by the negligence of the master, and to the other by reason of his own fault. *Lewis and Clark County v. Indus. Acc. Board (Mont.)* 155 Pac. 268.

The employer is responsible to the employé for every accident in the course of the employment, whether the employer is at fault or not, and whether the employé is at fault or not, except when the fault of the employé is so grave as to constitute serious and willful misconduct on his part. *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156. Neither the doctrine of respondeat superior nor the rule relative to the employer's liability for negligence controls in proceedings for compensation. In *re State Workmen's Compensation Com'n*, 112 N. E. 571, 218 N. Y. 59. Compensation is given without regard to the fault of the master at common law or under the Employers' Liability Acts. In *re Heitz*, 218 N. Y. 148, 112 N. E. 750, affirming (Sup.) 155 N. Y. Supp. 1112; *Lindebauer v. Weiner*, 94 Misc. Rep. 612, 159 N. Y. Supp. 987. The Act was passed

²² *State v. Industrial Commission*, 92 Ohio St. 434, 111 N. E. 299. The words "insurance fund," "compensation," "award," and "commutation" all negative the idea of pension or rebate of any kind. *Id.*

This legislation is not a substitute for disability or old age pensions. In *re Madden*, 222 Mass. 487, 111 N. E. 379.

make the employer an insurer of the life or health of the employé during the hours of labor.²³ Under the Washington Act, how-

to benefit workmen in hazardous employments who were without a legal remedy. In *re Heitz*, *supra*. The plain purpose of Laws 1913, c. 816, was to provide compensation to an employé for an accidental personal injury, and to the family of an employé who has suffered death as the result of such injury sustained by the employé arising out of and in the course of his employment "without regard to fault as a cause of such injury," with the two specified exceptions of "where the injury is occasioned by the willful intention of the injured employé to bring about the injury or death of himself or another, or where the injury results wholly from the intoxication of the injured employé while on duty." *Kenny v. Union Ry. Co.*, 166 App. Div. 497, 152 N. Y. Supp. 117. The radical character of this legislation is revealed by contrasting it with the rule of the common law, under which the employer is liable for injuries to his employé only when the employer is guilty of some act or acts of negligence which caused the occurrence out of which the injuries arise, and then only when the employé is shown to be free from any negligence which contributes to the occurrence. Under the common law an employer is liable to his injured employé only when the employer is at fault and the employé is free from fault; while under the new statute the employer is liable, although not at fault, even when the employé is at fault, unless this latter fault amounts to serious and willful misconduct. *Ives v. South Buffalo Ry. Co.*, *supra*. The new statute is totally at variance with the common-law theory of the employer's liability. Fault on his part is no longer an element of the employé's right of action. This change necessarily and logically carries with it the abrogation of the "fellow servant" doctrine, the "contributory negligence" rule, and the law relating to the employé's assumption of risks. There can be no doubt that the first two of these are subjects clearly and fully within the scope of legislative power, and that, as to the third, this power is limited to some extent by constitutional provisions. The "fellow servant" rule is one of judicial origin, ingrafted upon the common law for the protection of the master against the consequences of negligence in which he has no part. In its early application to simple industrial conditions, it had the support of both reason and justice. By degrees it was extended until it became evident that, under the enormous expansion and infinite complexity of our modern industrial conditions, the rule gave opportunity, in many instances, for harsh and technical defenses. In recent years it has been much restricted in its application to large corporate and industrial enterprises, and still more recently it has been modified, and to some extent abolished, by the Labor Law and the Employers' Liability Act. The law of contributory negligence has the support of reason in any system of jurisprudence in which the fault of one is the basis of liability for injury to another. Under such a system it is

²³ *Collins v. Brooklyn Union Gas Co.* (Sup.) 156 N. Y. Supp. 957.

ever, the workman takes a kind of pension in exchange for absolute insurance, while on his employer's premises.²⁴ The Oregon Act, following the lead of Washington, has also adopted in general a

at least logical to hold that one who is himself to blame for his injuries should not be permitted to entail the consequences upon another who has not been negligent at all, or whose negligence would not have caused the injury if the one injured had been free from fault. It may be admitted that the reason of the rule is often lost sight of in the effort to apply it to a great variety of practical conditions, and that its efficacy as a rule of justice is much impaired by the lack of uniformity in its administration. *Id.*

In the enactment of this new law, the Legislature declared it to be the policy of this state that every hazardous industry within the purview of this Act should bear the burden arising out of injuries to its employés. It was the further policy of the state to do away with the recognized evils attaching to the remedies under existing forms of law and to substitute a new remedy that should be ample, full, and complete, reaching every injury sustained by any workman while employed in any such industry, regardless of the cause of the injury or the negligence to which it might be attributed. *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154. The evident purpose and intent of the Act is to provide compensation for workmen injured in hazardous undertakings, reaching "every injury sustained by a workman engaged in any such industry, and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received," and that the Act should be liberally interpreted. *Zappala v. Industrial Ins. Com.*, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295; *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. The state, in the exercise of its sovereign power, recognized that the welfare of the whole people depends "upon its industries, and even more upon its wage-workers," and accordingly passed a law which was designed to compensate an injured workman, without reference to the manner of his injury, or the questions of negligence, contributory negligence, assumption of risk, or fellow servant. The state declared its power in the following comprehensive language: "The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the

²⁴ *Stertz v. Industrial Insurance Commission of Washington* (Wash.) 158 Pac. 256.

pension system of compensation which is essentially different from a system basing awards on a percentage of the wages, as is done in most of the other states. A pure pension system is intended to pay compensation from the standpoint of public policy, larger amounts being given to married men and men with families than to others, while a system based on a percentage of wage is intended to remunerate the injured employé or his dependents in proportion to the economic loss suffered.²⁵ Many of the Acts provide in

state over such causes are hereby abolished, except as in this act provided." (Sess. Laws Wash. 1911, p. 345) *Ross v. Erickson Const. Co.*, 89 Wash. 634, 155 Pac. 153. Compensation is payable under the Washington Act whenever four facts appear, namely: (1) The business of the employer was within the scope of the Act; (2) the employé was injured; (3) such injury occurred out of and incidental to his employment; (4) such injury was not caused by willful misconduct. It makes no difference whose fault it was or who was to blame. It is sufficient that the industry caused the injury. (Wk. Comp. Act Wash. § 5) *Rulings of Wash. Indus. Acc. Com.* 1915, p. 14.

Where the employer has not elected to pay into the compensation fund provided for by the West Virginia Act, it is not necessary, as it was at common law, to allege that the master's negligence was the proximate cause of the injury. (Wk. Comp. Act, § 26) *Watts v. Ohio Valley Electric Ry. Co.* (W. Va.) 88 S. E. 659. An employer corporation which has not elected to pay premiums is liable not only for its own negligence, but for the negligence of its officers, agents, and other employés. *Id.*

It is manifest from their context that the Legislature intended by St. 1911, §§ 2394—1 to 2394—71, that the employer should be liable for all injuries resulting from unsafety in employment, as regards places, safety devices, and safeguards, and to methods and processes of conducting their business. The clear implications are that the risks and hazard of an employment resulting from the failure of the master to comply with these requirements are risks and hazards incident to the employé's duties, though they may be of an obvious nature. The Legislature had a right to take into consideration that employés under the stress and condition of existing industrial life had but little choice but to refuse the employment offered them under such conditions of danger as the employers saw fit to adopt, and deemed it good policy to impose the burden of all the risks and hazards attending such business methods and processes on the employer, though they were open and obvious to an employé in the course of his employment. *Besnys v. Herman Zohrlaut Leather Co.*, 157 Wis. 203, 147 N. W. 37.

²⁵ First Annual Rep. Or. Indus. Acc. Com. June 30, 1915, p. 42.

different divisions two entirely different schemes—one regulative of the common-law liability for negligence, the other compensatory in nature and purely the creature of statute.²⁶ One very important, probably the most important, test of the success of an Act, is the extent to which preventable accidents decrease in the industries subject to it.²⁷

§ 5. — Insurance features

While the principles of workmen's compensation have been formally established in a large number of states, as already mentioned, a controversy still exists as to the best method of insuring compensation payments. Several Acts leave the employer

²⁶ *Sexton v. Newark District Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 451.

The Act is separated into two divisions designated as part 1 and part 2. The provisions of part 2 apply only in the event that both employer and employé elect to become subject thereto. If either or both elect not to become subject to part 2, the provisions of part 1 apply. *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71.

²⁷ First Annual Rep. Or. Indus. Acc. Com. June 30, 1915, pp. 23, 24. The Legislature substituted for former section 25 the requirement that the Commission shall investigate all cases where they have reason to believe that employers fail to observe the safety statutes, and, where violations are found, request the prosecuting attorney to prosecute the offending employer. This amendment has the effect of making compensation the only remedy to an injured workman, and also renders available in the work of accident prevention the information contained in the reports of accidents forwarded to the Commission. *Id.*

"Since the enactment of the Washington Act, safety committees have been organized and are now in operation in a majority of the mills, factories, and workshops throughout the state. The formation of corporate or voluntary associations, by members of the compulsory classes of employers, to study methods and appliances for accident prevention and to reduce the insurance cost under the Washington Act is urged, and the co-operation of the Commission tendered." (Wk. Comp. Act Wash. § 30) *Rulings Wash. Indus. Ins. Com. 1915*, p. 28. It is contemplated by the Washington Act that Class Bulletins to emphasize accident prevention in various industries may be issued from time to time; and Safety Regulations promulgated after consideration in trade conventions, violation of which may automatically increase the premium rate of the offending employer. (Wk. Comp. Act Wash. § 24) *Id.* p. 25.

free to insure with stock companies, mutual companies, state insurance funds, or, if he so desires, to carry no insurance. Under other Acts insurance is restricted to the state accident fund. Apparently it is yet to be demonstrated by experience which is the better method. The Oregon Industrial Accident Commission, after calling attention to the fact that a large proportion of the premiums is required by stock companies to cover expenses and profits, contends, in its first annual report, that a state compensation fund administered with efficiency and reasonable economy will best stand the test of experience.²⁸ The 1915 session of the Legislature of Oregon amended the Act of that state in several important particulars. Where formerly there had been but two insurance rates for the employer, the law as amended contains a differential classification of rates. In adopting the new schedule it was the purpose to provide rates that would closely correspond to the hazard of the various employments. The principle embodied in the original Act, recognizing the right of the individual employer to a reduction in the cost of his insurance for a favorable accident experience, is retained in the amended law, and, apparently, is potent in lessening the number of preventable accidents. In substance, the amendment makes possible a reduction in rate of 10 per cent. to the individual employer, during each of the second and third years he is subject to the Act, where the Commission pays out on account of accidents occurring to his workmen, not to exceed 50 per cent. of his contribution to the fund during the preceding year. As a result, a very large proportion of the employers subject to the law since July 1, 1914, enjoyed this reduction in payment for the second year.²⁹ Strong claims are made for the efficiency and economy of the plan of the Acts of Washington and Oregon and for the stability of the protection afforded by these Acts.³⁰

²⁸ First Annual Rep. Or. Indus. Acc. Com. June 30, 1915, p. 6.

²⁹ *Id.* p. 22.

³⁰ "Aside from the attitude maintained in the settlement of claims, an important phase of the compensation system is the cost of administration. A

tabulation of the experience of all companies writing compensation insurance in the state of Wisconsin during the year 1914 has been prepared by the commission of that state. It shows employers insuring with stock companies were required to pay an average of \$2.07 to provide the injured workmen with \$1 benefits. The experience of the insurance company which, through its agents, has been most effective in opposition to the Oregon Act, charged the employers of Wisconsin \$2.63 for every \$1 paid out in 1914 on account of benefits to injured workmen. The tables contained in another part of this report will show that in Oregon during the first 12 months the law has been in operation, only \$1.13 $\frac{1}{3}$ has been required to place \$1 in benefits in the hands of injured workmen. This difference in cost is emphasized when it is recalled that Wisconsin has an area of but 56,066 square miles, a population of 2,333,860, and an average of 42.2 people to the square mile, while Oregon, with its 96,699 square miles of territory, 672,765 of population, and an average of 7 people to the square mile, presents conditions under which the cost might properly be expected to be much greater." Id. p. 7. "Of vital importance to every citizen of the state is the method provided for insuring the deferred monthly payments in event of injury. Some Compensation Acts place directly upon the employer the obligation to pay compensation to his injured workmen. He is free to insure against this liability or to carry his own risk. If he be a man of limited means, injured workmen or their dependents are left without recourse in the event of his insolvency. This has resulted in a demand for a method which will with greater certainty insure these future payments, and in a number of states, including Oregon, this has been met by the creation of an insurance fund, administered by a Commission, and with the state treasurer as custodian. Under the Oregon law the future payments to workmen who are permanently disabled and to dependents in fatal cases are provided for by setting aside in each case a sum which, together with interest earnings estimated at 4 per cent. per annum, will be sufficient to meet these deferred payments." Id. p. 10.

ARTICLE II

CONSTRUCTION AND OPERATION

Section

6. Construction.
7. Retroactive operation.
8. Territorial operation.
9. Admiralty jurisdiction.
10. Interstate commerce.
11. Administration.

§ 6. Construction

Where any other construction is reasonably possible, a Compensation Act should not be given a construction which will make it unconstitutional, or cast doubt on its constitutionality.³¹ It should, if possible, be so construed as to give effect to every portion of it.³² Where two sections are so inconsistent that they cannot be reconciled, the one must stand which best conforms to the intent and policy of the statute, and where one section so conforms it is not to be rendered nugatory by an inconsistent provision, though found in a later section, which does not so conform.³³ Con-

³¹ *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037; *Victor Chemical Works v. Industrial Board of Illinois*, 274 Ill. 11, 113 N. E. 173; *Behringer v. Inspiration Consol. Copper Co.*, 17 Ariz. 232, 149 Pac. 1065; *Consolidated Arizona Smelting Co. v. Ujack*, 15 Ariz. 382, 139 Pac. 465.

Where the constitutionality of a law is involved, every presumption must be indulged and every reasonable doubt resolved in favor of its validity. It is a familiar doctrine that laws will not be declared unconstitutional unless it is clearly proved, beyond a reasonable doubt, that the requirements of the organic law have not been observed. *People v. Brady*, 268 Ill. 192, 108 N. E. 1009; *People v. Henning Co.*, 260 Ill. 554, 103 N. E. 530, 49 L. R. A. (N. S.) 1206; *Home Ins. Co. v. Swigert*, 104 Ill. 653; *Evanhoff v. State Industrial Accident Commission*, 78 Or. 503, 154 Pac. 106. This same rule applies to the constitutionality of a law when any defect is claimed in its passage. *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 999.

³² *State ex rel. Maryland Casualty Co. v. District Court* (Minn.) 158 N. W. 798.

³³ *Id.*

trary to the rule of strict construction prescribed by the Supreme Court of Michigan for the construction of the Act of that state,³⁴ Compensation Acts, being highly remedial in character, though in derogation of the common law, should generally be liberally and broadly construed to effectuate their beneficent purposes.³⁵ They

³⁴ This statute, being in derogation of the common law, should be strictly construed, though it is remedial and provides a remedy against a person who otherwise would not be liable. *Andrejwski v. Wolverine Co.*, 182 Mich. 298, 148 N. W. 684, 6 N. C. C. A. 807.

³⁵ *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436; *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245; *Coakley's Case*, 216 Mass. 71, 102 N. E. 930, Ann. Cas. 1915A, 867, 4 N. C. C. A. 508; *Bentley's Case*, 217 Mass. 79, 104 N. E. 432; *Panasuk's Case*, 217 Mass. 589, 105 N. E. 368; *State ex rel. Northfield v. Dist. Court*, 131 Minn. 352, 155 N. W. 103; *State ex rel. Splady v. Dist. Court*, 128 Minn. 338, 151 N. W. 123; *State ex rel. Virginia & R. L. Co. v. Dist. Court*, 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076; *Lindebauer v. Weiner*, 94 Misc. Rep. 612, 159 N. Y. Supp. 987; *In re Petrie*, 215 N. Y. 335, 109 N. E. 549; *McQueeney v. Sutphen*, 167 App. Div. 528, 153 N. Y. Supp. 554; *Zappala v. Indus. Ins. Com.*, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295; *Wendt v. Industrial Ins. Com.*, 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790; *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154, 4 N. C. C. A. 786; 36 Cyc. 1173; (Wk. Comp. Law, St. 1915, §§ 2394—1 to 2394—96) *Village of Kiel v. Industrial Commission of Wisconsin (Wis.)* 158 N. W. 68; *Lesh v. Illinois Steel Co. (Wis.)* 157 N. W. 539; *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, 156 N. W. 143; *Sadowski v. Thomas Furnace Co.*, 157 Wis. 443, 146 N. W. 770.

The Act is in a very large sense remedial, and the Legislature intended to fix upon the employer a liability which, though sounding in contract, need not depend at all upon the breach of any duty by the employer. *Bayon v. Beckley*, 89 Conn. 154, 161, 93 Atl. 139; *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368.

In *Vaughn v. American Coal Co.*, 1 Conn. Comp. Dec. 617, it was held that the Connecticut Act is remedial, and that the principles of equity govern.

The statute being highly remedial in character, the courts ought to guard against a narrow construction, and not exclude a servant from the benefits thereof, unless constrained by unambiguous language or the clear intent as gathered from the entire act. *State ex rel. Duluth B. & M. Co. v. District Court*, 129 Minn. 176, 151 N. W. 912.

The Act is to be construed liberally to protect the injured employé, whose rights to compensation otherwise it has taken away. *In re Meley*, 219 Mass. 136, 106 N. E. 559. It is to be construed broadly to carry out its manifest purpose. *In re Sullivan*, 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A, 378.

should not, however, be given a strained construction to include accidents not within their terms.³⁶ It has been held that the Wash-

It is to be interpreted in the light of its purpose and so far as reasonably may be to accomplish its beneficent design. *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1.

The Act should be construed liberally, and not strictly, as a statute in derogation of the common law, and should receive as broad an interpretation as can fairly be given it. *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620. It has been and should be construed fairly, indeed liberally, in favor of the employé. *In re Heitz*, 218 N. Y. 148, 112 N. E. 750, affirming 155 N. Y. Supp. 1112. The statute should be given a broad and liberal construction to carry out the beneficent purpose for which it was enacted. *Winfield v. New York Cent. R. R. Co.*, 168 App. Div. 351, 153 N. Y. Supp. 499; *Smith v. Price*, 168 App. Div. 421, 153 N. Y. S. 221. The statute must have a broad and liberal construction to protect the employé for all injuries received in the course of his employment, and to charge upon the fund or the insurer the loss which otherwise must fall upon the master. *Spratt v. Sweeney & Gray Co.*, 168 App. Div. 403, 153 N. Y. S. 505. "It is a fundamental canon of the proper construction of the Workmen's Compensation Act that it must be construed remedially and beneficially, with a view of carrying out fairly and fully the legislative purpose and bringing within the operation of the act all workers whose accidental injuries are inherent occupational risks, rather than with a view to excluding from the operation and protection of the act persons whose claim to its benefits falls fairly within the principle that disabilities to workers through trade mishaps should not be left to hang burdensomely on individuals who might thereby be forced into the class of dependents on public or private charity." *In re Rheinwald*, 168 App. Div. 425, 153 N. Y. S. 598.

"The consensus of writers on the subject of workmen's compensation legislation is that such statutes are beneficial and remedial; that such laws should be interpreted broadly and with elasticity, and that equity rather than the strict letter of the law should govern same. The purpose, spirit, and intent of the law should at all times be considered, and the language of the law taken in its obvious sense and as intended to be addressed to administrative officers." *Rep. Nev. Indus. Com. 1913-14*, p. 19; *Clements v. Columbus Sawmill Co.*, Vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 161.

In construing a statute which is referable to the police power and was originated to promote the common welfare, supposed to be seriously jeopardized by the infirmities of an existing system, the conditions giving rise to the law, the faults to be remedied, the aspirations evidently intended to be embodied

³⁶ *Hillestad v. Indus. Ins. Com.*, 80 Wash. 426, 141 Pac. 913, Ann. Cas. 1916B, 789, 6 N. C. C. A. 763; *De Voe v. New York State R. Co.*, 169 App. Div. 472, 155 N. Y. Supp. 12.

ington Act should be so construed as to suppress the mischief and advance the remedy to be promoted, even to the inclusion of cases within the reason, but outside the letter, of the statute, that every hazardous industry within its purview may bear the burden arising out of injuries to its employés, regardless of the cause of the accident.³⁷ The reasons formerly supposed to justify penalizing employers as wrongdoers at the ultimate expense of consumers should play no part in construing compensation laws. The directly responsible parties should be regarded as standing for the aggregate of consumers and joining with the injured person in submitting to an impartial tribunal the question how much, under all the circumstances and governed by legislative standards, the public should be burdened in order that reparation may be made for loss due to the employment.³⁸ A statutory rule, specifying the duty of the

in the enactment, and the effects and consequences as regards responding to the prevailing conception of the necessities of public welfare, should be considered, and the enactment given such broad and liberal meaning as can be fairly read therefrom so far as required to effectively eradicate the mischiefs it was intended to obviate. Marshall, J., in *City of Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1 Ann. Cas. 1915B, 847, 4 N. C. C. A. 149. In construing a statute which is referable to the police power and was originated to promote the common welfare, supposed to be seriously jeopardized by the infirmities of an existing system, "the conditions giving rise to the law, the faults to be remedied, the aspirations evidently intended to be effectually embodied in the enactment, and the prevailing conception of the necessities of public welfare" should be considered, and the enactment given such broad and liberal meaning as can fairly be read therefrom, so far as required to effectively eradicate the mischiefs it was intended to obviate. *Foth v. Macomber & Whyte Rope Co.*, 161 Wis. 549, 154 N. W. 369. The purpose of the Legislature to recognize the duty of the public to reasonably compensate workmen in the employ of others, based upon mutuality of interest between employers, employés, and the public, should be considered in construing the Act. *Lesh v. Illinois Steel Co.* (Wis.) 157 N. W. 539.

³⁷ *Zappala v. Industrial Ins. Commission*, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154, 4 N. C. C. A. 786.

³⁸ *City of Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847.

employer to furnish a place of employment as free from danger to the life, health, or safety of employes or frequenters as the nature of the employment will reasonably permit, should receive a liberal construction in favor of life, health, and limb.³⁹ Since the design is to decrease, not promote, unnecessary litigation, plain words should be given their ordinary signification,⁴⁰ and all provisions be given effect, if possible,⁴¹ according to the legislative intent.⁴² The

³⁹ *Tallman v. Chippewa Sugar Co.*, 155 Wis. 36, 143 N. W. 1054.

⁴⁰ *In re Nichols*, 217 Mass. 3, 104 N. E. 566, Ann. Cas. 1915C, 862. Workmen's Compensation Acts should be given their practical, popular meaning, and a technical construction should not be placed upon them. *Small v. Coles*, 2 King's Bench, 821; *Rogers v. Cardiff Corporations*, 8 W. C. C. 51; *Adams v. Shaddox*, 2 King's Bench, 859. As declared in *N. W. Iron Co. v. Industrial Commission*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877: "In giving construction to such statutes words are to be taken and construed in the sense in which they are understood in common language, taking into consideration the text and subject-matter relative to which they are employed." Reaffirmed in *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273.

⁴¹ While the provisions of the Michigan statute are so ambiguous as not to be free from doubt, all of its provisions should be given effect, if possible. *Weaver v. Maxwell Motor Co.*, 186 Mich. 588, 152 N. W. 993, L. R. A. 1916B, 1276.

Though the statute is remedial in the broadest sense of the term, and to be liberally construed, the court is without power or authority to change the plain language thereof by construing it to mean the reverse of what is clearly stated. *State ex rel. Garvin v. District Court*, 129 Minn. 156, 151 N. W. 910.

In construing an Act, every part thereof, as well as the title, must be taken into consideration. *Victor Chemical Works v. Industrial Board of Illinois* (Ill.) 113 N. E. 173.

⁴² The cardinal rule in the construction of a statute is to ascertain the intention of the Legislature as it is expressed in the words of the statute, and for this purpose the whole of the act must be considered together. *Mitchell v. State*, 115 Md. 360, 80 Atl. 1020; *Healy v. State*, 115 Md. 377, 80 Atl. 1074; *Purnell v. State Bd. of Ed.*, 125 Md. 266, 93 Atl. 518. "The real intent, when ascertained, will always prevail over the literal sense of the language." *Cutty v. Carson*, 125 Md. 25, 33, 93 Atl. 302, 305; *Brenner v. Brenner*, 127 Md. 189, 96 Atl. 287.

As stated by Donahue, J., in *Sipe, Auditor, v. State ex rel.*, 86 Ohio St. 80, 87, 99 N. E. 208, 210: "That intent [of the Legislature] must be ascertained

Washington Act, by avoiding the use of terms commonly employed in the various Compensation Acts, such as "accident" and "arising out of and in the course of employment," indicates an intent to get rid of judicial controversy.⁴³ The provision of this Act that the jurisdiction of the courts shall be abolished on the controversies covered by the Act must be liberally construed to effectuate the purposes of the Act.⁴⁴ Administrative interpretation, while not conclusive, is, if long continued, of persuasive effect, and not to be disregarded, unless this course be necessitated by judicial construction.⁴⁵ In view of the similarity of the Acts of England and of the various states, the decisions of the courts of England and of states other than the one whose Act is under consideration are very persuasive, though not conclusive, in the construction of a particular Act,⁴⁶ especially where the decision antedates the Act.⁴⁷

first, if possible, from the language used, and, where that language is clear and unambiguous, courts have no authority to change it." This rule is affirmed in *King v. Greenwood Cemetery Ass'n*, 67 Ohio St. 244, 65 N. E. 882; *Hough v. Dayton Mfg. Co.*, 66 Ohio St. 427, 64 N. E. 521; *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N. E. 574; *State v. Industrial Commission*, 92 Ohio St. 434, 111 N. E. 299.

⁴³ *Stertz v. Industrial Ins. Com.* (1916, Wash.) 158 Pac. 256.

⁴⁴ *Id.*

⁴⁵ *Industrial Commission of Ohio v. Brown*, 92 Ohio St. 309, 110 N. E. 744, L. R. A. 1916B, 1277.

⁴⁶ A uniformity of construction of provisions of acts of other states similar to the Workmen's Compensation Act of this state, while not conclusive, is a persuasive reason for similarly construing this Act. *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245.

The language, "arising out of and in the course of the employment," is also used in the English Act, and decisions of the courts of that country may properly be examined for their views as to the construction of this language. *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620; *Bryant v. Fissel*, 84 N. J. Law, 72, 86 Atl. 458; *Newman v. Newman*, 169 App. Div. 745, 155 N. Y. Supp. 665.

Comparison indicates that those who prepared the Michigan Act made a

⁴⁷ *In re Employer's Liability Assur. Corporation* (Mass.) 102 N. E. 697; *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 677.

These Acts are not, as a rule, dependent for their enforcement upon the validity of the contract of employment.⁴⁸

It will be presumed that the Legislature, in adopting an amendment, intended to make some change in the existing law.⁴⁹ In construing an ambiguous amendment, the history of the law, the condition of the law prior to the amendment, the occasion, necessity, and object of the change, are important to be considered. An amendment of an Act "to read as follows" repeals everything in the old statute not embodied in the new. From then on the old provisions derive their force from the amendatory Act. The old provisions are not, however, repealed and re-enacted. They are considered as having been the law all along, the new provisions as enacted at the time the amendment took effect; in other respects this form of amendment is no different in effect from one in the form of an independent statute.⁵⁰

thorough study of then existing laws and decisions upon the subject, and, conservatively adhering to tested precedent, when available, painstakingly developed a comparatively mild and well-balanced law, avoiding uncertainties and extremes which some of the more radical acts enacted elsewhere disclose. As a result similar provisions may be found in the Workmen's Compensation Acts of other states which have been passed upon in their courts of last resort, in carefully considered and well-reasoned opinions. *Mackin v. Detroit Timkins Axle Co.*, 187 Mich. 8, 153 N. W. 49. While English cases cannot be regarded as direct authority on constitutional questions, they are, when an English statute has been adopted here, authority to be recognized in the construction of the Act. *Grand Rapids Lumber Co. v. Blair* (Mich.) 157 N. W. 29; *Schmidt v. O. K. Baking Co.*, 90 Conn. 217, 96 Atl. 963.

Decisions under the English Act are authority in so far as there is no substantial difference between the provisions of such Act and the Massachusetts Act. *Gove v. Royal Indemnity Co.*, 223 Mass. 187, 111 N. E. 702.

⁴⁸ *Kenny v. Union Ry. Co.*, 166 App. Div. 497, 152 N. Y. Supp. 117.

⁴⁹ Construing Laws 1913, c. 467, § 14 (Gen. St. 1913, § 8208), as amended by Laws 1915, c. 209, § 5. *State ex rel. Maryland Casualty Co. v. District Court*, (Minn.) 158 N. W. 798.

⁵⁰ *State ex rel. Maryland Casualty Co. v. District Court*, *supra*.

§ 7. Retroactive operation

In accordance with the usual rule of statutory construction, which does not favor retroactive operation, it has been held that the Iowa and Ohio Acts do not affect contracts existing at the time of their enactment,⁵¹ and that the Arizona Act is inapplicable to injuries occurring prior to its enactment.⁵² The Minnesota Act, however, applies to the relation of employer and employé existing at the time of its passage and continuing thereafter.⁵³ The one-year limitation clause of the Act of New Jersey of 1913 does not operate retrospectively, in the absence of express words giving it that effect, and therefore does not limit claims for compensation under the Act of 1911 on the expiration of one year after the Act of 1913 went into operation.⁵⁴ Under the supplement to the original New Jersey Act, recovery was allowed, though the workman's death occurred at 5 o'clock on the afternoon of July 4, 1911, the date on which the supplement took effect.⁵⁵ Where an injury occurred before the 1913 amendment to the Act, which makes an employer liable to the employés of an independent or subcontractor just as he would have been had the employé been working directly for him, the injury was governed by the law existing at the time it happened, rather than by the law as amended.⁵⁶ Whether the right to compensation is controlled by the circumstances and law ex-

⁵¹ *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037; (102 Ohio Laws, p. 524) *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694.

⁵² (Laws Sp. Sess. 1912, p. 23) *Arizona & N. M. Ry. Co. v. Clark*, 207 Fed. 817, 125 C. C. A. 305, affirmed on appeal on other questions, 235 U. S. 669, 35 Sup. Ct. 210, 59 L. Ed. 415, L. R. A. 1915C, 834.

⁵³ *State ex rel. Nelson-Spelliscy Co. v. Dist. Ct. of Meeker County*, 128 Minn. 221, 150 N. W. 623.

⁵⁴ *Baur v. Court of Common Pleas*, 88 N. J. Law, 128, 95 Atl. 627; *Birmingham v. Lehigh & W. Coal Co.* (N. J.) 95 Atl. 242.

⁵⁵ (P. L. 1911, p. 763, supplement) *Sexton v. Newark District Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 451.

⁵⁶ *Zobel v. Godlevski*, Rep. Wis. Indus. Com. 1914-15, p. 12.

isting at the date of injury or the date of death is reserved for consideration in a subsequent section.⁵⁷

§ 8. Territorial operation

Except as to seamen, for whom express provision is made, the English Act applies only within the territorial limits of the United Kingdom,⁵⁸ but by the acts of several foreign countries definite and careful provision is made as to accidents occurring outside their territory.⁵⁹ In many of the state Acts no such provision is made, though several exempt persons engaged in interstate commerce where the federal laws shall be construed to furnish exclusive remedies, while some expressly limit the operation to employment within the state.⁶⁰ It is well settled, however, that a state has power to extend the privileges of a Compensation Act to employers and employes outside the state.⁶¹ In recognition of

⁵⁷ See § 80, post.

⁵⁸ (English Wk. Comp. Act, § 7) *Tomalin v. Pearson & Son* (1909) 2 B. W. C. C. 1, 2 K. B. 61, 7 L. J. K. B. N. S. 863, 100 L. T. N. S. 685, 25 Times L. R. 477; *Hicks v. Maxton* (1907, C. C.) 124 L. T. Jo. 135, 1 B. W. C. C. 150.

Where a workman, not a seaman, was lost at sea while on his way abroad for his employers, his employment was not within the Act. *Schwartz v. India Rubber, Gutta Percha & Telegraph Works Co., Ltd.* (1912) 5 B. W. C. C. 390, 2 K. B. 299 (1912) W. M. 98, 28 Times L. R. 331, 81 L. J. K. B. N. S. 780, (1912) W. C. R. E. P. 190, 106 L. T. N. S. 706. The employment of a British subject under a contract entered into in England, the execution of which took him abroad, where he was killed, was not within the Act. *Tomalin v. Pearson & Son, Ltd.* (1910) supra.

⁵⁹ France, Acts of 1898, 1902, 1905, 1906, title 3; Austria, Law of 1894, art. 2; Belgium, Act of 1903, art. 26; Germany, Law of 1900(a), art. 4; German Insurance Code of 1911, art. 157. See 24 Annual Report of U. S. Com. of Labor, vol. 2 (1909) pp. 2501, 2456, 2457, 2464, 2517, 2596.

⁶⁰ See Kansas, Laws 1911, c. 218, § 7; Michigan, Laws Extra Sess. 1912, No. 3, pt. 6, § 4; Washington, Laws 1911, c. 74, § 18; Nevada, Laws 1911, c. 183, § 3; Washington, Laws 1911, c. 74, § 2; Wisconsin, Laws 1911, c. 50, § 1; and acts of other states.

⁶¹ *Mulball v. Fallon*, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309; *In re Gould*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D,

this power, state courts have frequently given effect to the compensation laws of other states and countries, where they were not contrary to the laws or policy of the state of the forum.⁶² In view of the conflict of authority and differences between the various Acts, it is difficult to formulate a precise rule relative to the extraterritorial operation of these laws; but it may be stated on the weight of authority that Acts not construed to be contractual in character do not, in the absence of unequivocal language to the contrary, apply where the injury occurs outside the state,⁶³ while, on the other hand, Acts construed to be contractual protect one injured outside the state, where the contract of employment was made within the state and is governed by the laws of the state.⁶⁴ However, to this

372; *Gooding v. Ott* (W. Va.) 87 S. E. 863; *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158.

While the statute itself may have no extraterritorial effect, it can require a contract to be made by two parties to a hiring, which shall have an extraterritorial effect. *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 22.

⁶² *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158.

The New York courts have recognized the compensation laws of other states and countries, and given effect to them unless they were contrary to the laws or policy of New York. *Schweitzer v. Hamburg-Am. Line*, 149 App. Div. 900, 134 N. Y. Supp. 812; *Id.* 78 Misc. Rep. 448, 138 N. Y. Supp. 944; *Albanese v. Stewart*, 78 Misc. Rep. 581, 138 N. Y. Supp. 942; *Wasilewski v. Warner Sugar Refining Co.*, 87 Misc. Rep. 156, 149 N. Y. Supp. 1035; *Wooden v. Western N. Y. & P. R. R. Co.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803.

⁶³ In the absence of unequivocal language to the contrary, it is not to be presumed that statutes respecting this matter are designed to control conduct or fix the rights of parties beyond the territorial limits of the state. In *re American Mut. Liability Ins. Co.*, 215 Mass. 480, 102 N. E. 693. This rule is also supported by *Boston & Maine R. R. Co. v. Trafton*, 151 Mass. 229, 23 N. E. 829; *Howarth v. Lombard*, 175 Mass. 570, 572, 56 N. E. 888, 49 L. R. A. 301; *Young v. Boston & Maine R. R. Co.*, 168 Mass. 219, 46 N. E. 624; *Stone v. Old Colony St. Ry.*, 212 Mass. 459-464, 99 N. E. 218; *Merrill v. Boston & Lowell*, 63 N. H. 256, 260.

⁶⁴ Where the statute compels submission by the employer and employé, there is no contract, as a general rule, enforceable outside of the state. But where, as in New Jersey and West Virginia, the statute makes acceptance op-

or any rule formulated there appear to be exceptions. The Acts of Michigan, Nevada, and Minnesota have been held inapplicable

tional, and the parties freely contract with reference to the statute, the statute should be read into the employment contract as an integral part thereof, enforceable in any jurisdiction, the same as any other contract. *Gooding v. Ott* (W. Va.) 87 S. E. 863.

When a suit is brought in New Jersey for a liability under the Workmen's Compensation Act, and the contract of employment is a New Jersey contract, the fact that the accident happened in another state is irrelevant. The place where the accident occurs is of no more relevance than is the place of accident to the assured, in an action on a contract of accident insurance, or the place of death of the assured in an action on a contract of life insurance. *Rounsaville v. Central R. Co.*, 87 N. J. Law, 371, 94 Atl. 392.

The New York Act applied where an injury was received by a sheet metal worker while engaged in performing hazardous services for his employer outside the state. *Workmen's Compensation Law* (Consol. Laws, c. 67); *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158. An award of compensation to a captain of lighters was confirmed, where both employer and employé resided in New York, though the injury occurred in New Jersey while the employé was engaged in delivering bags of beans from a lighter to trucks. *Edwardson v. Jarvis Lighterage Co.*, 168 App. Div. 368, 153 N. Y. Supp. 391. The Act may apply to an accident happening in a foreign country. *Kennedy v. Kennedy Mfg. Co.*, *The Bulletin*, N. Y., Vol. 1, No. 5, p. 12. An employé of a domestic corporation, who was a resident of New York, and who was injured in Connecticut while on a short trip into that state in the course of his employment, was entitled to compensation under the New York Act. *Valentine v. Smith-Angevine Co.*, 2 N. Y. St. Dep. Rep. 460, affirmed in 168 App. Div. 403, 153 N. Y. Supp. 505; *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158.

The cause of action of a person injured outside of the state of Iowa is *ex contractu*. The *lex loci contractus* governs the construction of the contract and determines the legal obligations arising from it. *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 22; 9 Cyc. 664.

Where an employé of an Ohio employer is sent in the course of his employer's business to a foreign state and is there injured in the course of his employment, he is entitled to compensation for the consequential disability. In *re Schmidt*, Vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 21.

Where parties to an employment contract made in California are residents thereof, the employer is liable for an accident in such employment, although the work was to be performed wholly outside the state, and the term of employment commenced upon leaving the state and ended upon arrival within the state, and the employment was nonmaritime. *Polin v. Bristol Bay Packing Co.*, 3 Cal. I. A. C. Dec. 12.

In *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R.

where the injury was received in a foreign jurisdiction.⁶⁵ In this connection, in substantiation of the soundness of its ruling, the

A. 1916A, 436, it was held that the Connecticut Act applies to persons hired in the state, whose employment contracts are to be employed partly within and partly without the state; the court saying: "In a sense the injury may be said to have been sustained in the place of the contract, and if appeal is taken, in cases of injury occurring without the state, to the county of the contract, the terms of the act will be reasonably satisfied. The precise question

⁶⁵ A traveling salesman, injured in Buffalo, N. Y., while in the active discharge of his duties, was not entitled to compensation; the provisions of the Compensation Act not covering accidents occurring outside of the state of Michigan, even though both parties are residents of this state. *Keyes-Davis Co. v. Alderdyce*, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 19.

In the absence of evidence in the law itself that it is intended to have extra-territorial operation, the Nevada Industrial Insurance Act is operative and effective only within the boundaries of the state of Nevada. Rep. Nev. Indus. Com. 1913-14, p. 25. There is nothing in the Nevada Industrial Insurance Act which expressly states that the law is operative beyond the boundaries of the state, nor is there anything in the Act which indicates a purpose to make it operative or applicable beyond the boundaries of the state. *Id.* The rights and remedies provided by the Nevada Industrial Insurance Act are statutory rights and remedies, created by the statute, and existing only by force of the statute. If the statute is inoperative at the place the accident happened, the happening of the accident gives neither rights nor remedies. *Id.*

Where a workman employed by a St. Paul firm is insured while working in the state of Washington, and the employer is under the Minnesota Workmen's Compensation Act with respect to his employés, the employé must proceed under the Compensation Act of Washington (Workmen's Compensation Act, Gen. Laws Wash. 1911, c. 74); it being an old and established rule that the laws of the state have no extraterritorial force or effect outside the limits of the state. Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 15. In an employé's action, brought in Minnesota for injuries caused by the negligence of his employer, it appeared that plaintiff entered defendant's employ on railroad construction work on April 2, and worked at two different places within the state; that on June 26 of the same year he complied with defendant's request that he go to Wisconsin on similar work being done there by defendant; and that he was injured four days later. His original hiring was for no definite time and no particular place. On June 10 defendant elected to accept the Wisconsin Workmen's Compensation Act. The court held that plaintiff's right to damages or compensation depended on the law of Wisconsin, where the injury was received, and not on the law of Minnesota. *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620.

Minnesota Supreme Court laid down the proposition that, although an employé's action for injuries is predicated on his relation as serv-

we are considering has been the subject of discussion in two cases: One under the New Jersey Act, a contractual optional act very similar to our own, where the trial court, in *Deeny v. Wright & Cobb Lighterage Co.*, 36 N. J. Law J. 121, construed the contract under the New Jersey Act as we construe these contracts; the other under the Massachusetts Act, where the Supreme Court construed their act as confined to accidents within the state. *Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372. We must accept the construction accorded the Massachusetts Act by its Supreme Court. It may be well, however, to point out that the court does not state that its act is contractual in character. That, as we have indicated, is of final importance in the conclusion we reach concerning our own act. Then, too, under the Massachusetts Act, the employé is merely the beneficiary under a contract between the employer and the insured; with us the employer and employé enter into a contract relation. In its reference to and comment upon certain sections of their Act the court says that these must be found within the act from 'unequivocal language,' or 'plain and unmistakable words,' that the Act was intended to relate to injuries without the commonwealth. We have adopted a broader rule. We read our Act in the light of the purpose, subject-matter, and history of the Act, to determine whether it expressly or by reasonable inference intended to include in its contract injuries without our jurisdiction. This is our ordinary rule in the interpretation of statutes. The court states that: The subject of personal injuries received by a workman in the course of his employment is within the control of the sovereign power where the injury occurs. To subject them to the laws of the many jurisdictions in which they may be engaged will be especially burdensome to them, and involve them probably in greater expense and liability and far greater difficulties than under the old system. Equally hard will it prove to the employé, since he must pursue his remedy in the state of the accident, or the federal court applying that state's law, and thus he may be brought under any one of many different Compensation Acts, with whose provisions he cannot hope to be familiar, some acts contractual in character, some compulsory, some optional, and some *ex delicto*, and he may find he has forfeited the benefit of the foreign act through failure to comply with its provisions. A reading of the several acts now in force convinces us that these difficulties are not imaginative, but imminent actualities. Is it reasonable to infer that our Legislature, inaugurating a new system, based upon humanitarian and economical considerations, should intentionally frustrate the object of the new system, and cast a multitude of employers and employés into a maelstrom of trouble, uncertainty, and liability? On the other hand, is it not reasonable to infer that the Legislature, having bottomed the right to compensation upon contract, deemed unimportant the place of injury, since it must be presumed

ant of defendant and defendant's obligation as master, it is nevertheless one in tort, governed by the law of the place of injury, without regard to the law of the place where the contract of employment was made, although the employé was ignorant of the law of the place of injury.⁶⁶ In order that a contract of employ-

to have known that it, and not the place of injury, would govern the recovery? Such a construction of the act would lift insuperable burdens from industry and commerce and workmen, and give to each his course and the ascertained fruits of the contract of his will. Whether the contract shall include injuries in a jurisdiction other than where the contract was made is determined by the expressions or implications of each act."

In *Cohen v. Union News Co.*, 1 Conn. Comp. Dec. 62, it was held that the Connecticut Act applies to all employment conducted within the state, even though the contract of employment was made in New York. Jurisdiction lies where the injury occurs. In *Welton v. Waterbury Rolling Mill*, 1 Conn. Comp. Dec. 78, it was held that where a contract of employment was made in Connecticut between a resident of that state and a company incorporated and doing business in the state, both of whom had accepted the Compensation Act, an injury received by the employé in Canada while traveling in the course of his duties is compensable under the Connecticut Act.

The Rhode Island Act applies to an injury received outside the state, where the contract of employment was made within the state and the employment was begun therein; the employé being sent into another state later to complete the work. *Grinnell v. Wilkinson* (R. I.) 98 Atl. 103.

In *Schweitzer v. Hamburg-American Line*, 78 Misc. Rep. 448, 138 N. Y. Supp. 944, the German Act, when subscribed to by both parties, was held to preclude the recovery of damages in New York for injuries to an employé on a vessel leaving the New York City quarantine dock; the court saying: "A foreign law to which both employer and employés, engaged in interstate and foreign commerce and transportation, have subscribed, and upon the basis of which the contract of employment was made and entered into, where the cars or ships of the employer enter our state, and in or upon which, while within our borders, an accident occurs to the employé through his employer's negligence, particularly where the contract of employment provides for a fixed compensation in case of specified injury to take the place of a right of action at law, and which is lawful both in the place where made and that in which the cause of action arose, should obtain recognition and enforcement here. To hold otherwise works, not for benefit, but rather for injury, to our interstate and foreign commerce."

⁶⁶ *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620. An employé cannot plead ignorance of the Compensation Act of the state wherein his employment

ment, and consequentially the Compensation Act incorporated into it by construction, may be governed by the laws of the state where the contract was made, it is frequently of importance that the employer shall have been doing business in that state.⁶⁷ While the place of residence of the contracting parties may likewise become

was performed and under which alone his right to redress for injury must be asserted. *Id.*

⁶⁷ Where a coal company of West Virginia, with principal offices and tippie and main entrance and the principal part of its mine located in that state, has qualified under the provisions of section 9 of the Workmen's Compensation Act (Laws 1913, c. 10; Code 1913, c. 15p, § 9 [sec. 665]), as amended by Acts 1915, c. 9, by paying the premiums of liability and by giving notice to miners employed in its mine, etc., the widow of a miner residing in the state and so employed therein, unless employed wholly without the state, and whose injuries resulting in his death were sustained in the course of and resulting from his employment, while temporarily at work in that part of the mine located in an adjoining state, is entitled to participate in the workmen's compensation fund created by such Act, notwithstanding the language of section 25 thereof, authorizing disbursements of such fund to employes who "shall have received injuries in this state." *Gooding v. Ott* (W. Va.) 87 S. E. 863.

Where an employe of an employer doing business in the state was injured outside the state, he was within the protection of the Act. (*Wk. Comp. Act*, § 3, subd. 4) *Spratt v. Sweeney & Gray Co.*, 168 App. Div. 403, 153 N. Y. Supp. 505. In this case the court said: "The employer is carrying on his business in the state, and the premiums required to be paid by him are based on the assumption that each of the employes who are engaged in and about his business are insured all the time they are acting within the course of their employment. The fact that an employe may from time to time be outside of the state in the course of his employment does not diminish the amount of premium to be paid. The employer has paid for the insurance of his employe for all the time he is engaged in his work, and is entitled to the benefit of that insurance. The fact, therefore, that the employer's contribution to the fund is based on the pay roll and the number of men employed, without regard to the fact that from time to time some of them work outside of the state, emphasizes the fact that it is immaterial whether the injury took place within or without the state, so long as it occurred in the course of his employment."

Where the injured workman resides in California, and the employer corporation is chartered in California and doing business in the state, and the workman is injured on a ship belonging to the employer while the ship is lying at its dock at a port in Oregon, the workman is entitled to compensation. *Lentz v. Estabrook Co.*, 2 Cal. I. A. C. Dec. 205.

material under some Act,⁶⁸ the New Jersey Act has been held applicable to contracts made by resident employers with nonresident employes,⁶⁹ and under the Washington Act it has been held immaterial that the employer resided outside the state.⁷⁰ The California Act has been held inapplicable to nonresident employes injured outside the state, though the contract of hire was entered into in the state.⁷¹ Where the place of contracting and place of

⁶⁸ Where the contract is made within the state, and both contracting parties reside within the state, the commission has jurisdiction, though the injury occurred outside the state; the Act being intended to protect citizens of the state, and the rights of the parties being governed by the law of the place where the contract was made. *Anderson v. North Alaska Salmon Co.*, 2 Cal. I. A. C. Dec. 241. The Commission has jurisdiction over accidents occurring outside the state, where both the employer and employé reside in the state and the employment contract is made in the state. *Sandberg v. Kruse*, 1 Cal. I. A. C. Dec. 441; *Gallagher v. Western Steam Navigation Co.*, 1 Cal. I. A. C. Dec. 525. The Iowa Act is broad enough to include accidents happening beyond the borders of the state, and an employé, injured outside the state while working for an employer living in the state under a contract of employment made in Iowa, can recover compensation under the Iowa Act. (Code Supp. 1913, title 12, c. 8A) Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 22.

Resident employer.—The corporation owning the ship on which the workman was injured was chartered under the laws of Maine and had a technical place of business in Maine, in which state the ship was registered, but the ship had been built in California, and prior to the accident had never been on the Atlantic coast. Seventy-five per cent. of the business of the ship was done through San Francisco, and the remainder from other Pacific coast points. The ship was regularly engaged in coast line trade, with headquarters at San Francisco and 51 per cent. of the stockholders resided in California. The majority of the board of directors and all but one of the corporate officers also resided in California. The Commission held that the employer was a resident of the state of California for the purpose of determining liability under the Compensation Act. *Gallagher v. Western Steam Navigation Co.*, supra.

⁶⁹ *Davidheiser v. Hay Foundry & Iron Works*, 87 N. J. Law, 688, 94 Atl. 309, affirming 94 Atl. 1103, and following *American Radiator Co. v. Rogge*, 87 N. J. Law, 314, 93 Atl. 1083, affirming 86 N. J. Law, 436, 92 Atl. 85.

⁷⁰ (Wk. Comp. Act Wash. § 3) *Rulings Wash. Indus. Ins. Com.* 1915, p. 5.

⁷¹ Where a traveling salesman residing in the state made a contract of employment in the state with an employer residing in the state, and thereafter moved to Utah and was there injured in the course of his employment, the

injury are in the same state, the law of that state governs,⁷² though the employé lives and ordinarily works outside that state.⁷³ The Wisconsin Act covers all accidents happening within the boundaries of the state, whether on land or on boat.⁷⁴

The fact that the employer is also liable for compensation under the law of the foreign state where the accident occurred does not prevent the California Act from also applying where both the employer and employé reside in California and the employment contract was made in that state, it not being unusual for the law of two different states to govern the same transaction.⁷⁵ In answer to the contention that to give an Act an extraterritorial operation might permit a double recovery, the New Jersey court said:

California Act did not apply. In a case so holding (Commissioner French dissenting) it was said: "While the Commission has held informally that it has jurisdiction over injuries taking place outside the exterior boundaries of the state in those cases where the contract of hire was entered into within the state, it does not deem it wise or prudent or fairly within the intent of the Act to seek to extend the jurisdiction of the Commission to take cognizance of injuries happening outside of the state to persons not residing within the state, even though the contract of hire was entered into within the state with an employer residing within the state. This Commission seeks jurisdiction only over citizens of the state." *Croad v. Paraffine Paint Co.*, 1 Cal. I. A. C. Dec. 179.

⁷² Where an employé, suing in New York, was hired and was working in New Jersey at the time of his injury, his right to recover was governed by the New Jersey Act. *Waselewski v. Warner Sugar Refining Co.*, 87 Misc. Rep. 156, 149 N. Y. Supp. 1035. The New Jersey Act controls where the contract of employment was made in New Jersey and the injury occurred in New Jersey. *Pensabene v. F. & J. Auditore Co.*, 78 Misc. Rep. 538, 138 N. Y. Supp. 947.

⁷³ Traveling salesmen, ordinarily working in other states and living outside of Minnesota, though in the employ of a Minnesota company, come under the Minnesota Workmen's Compensation Act whenever they come within the territory of Minnesota, and, if injured in an accident arising in the course of their occupation, they are covered by the Minnesota Act. Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 17.

⁷⁴ *Lewandowski v. Crosby Transportation Co.*, Rep. Wis. Indus. Com. 1914-15, p. 9.

⁷⁵ *Sandberg v. Kruse*, 1 Cal. I. A. C. Dec. 441.

"Recovery of compensation in two states is no more illegal, and is not necessarily more unjust, than recovery upon two policies of accident or life insurance." ⁷⁶ If both the employer, the industry being conducted outside the state, and the injured employé, are non-residents, but the accident occurs in California, the Commission has stated that on grounds of comity it will refer the case to the domestic forum of the parties and decline to try the proceedings, unless the convenience of both litigants otherwise requires.⁷⁷

On the theory that the right to compensation, though contractual, rests on the statute rather than on the contract of employment, the New Jersey Act has been held by the New Jersey courts to apply where the employment contract was made in another state and required services to be performed in New Jersey where the injury was received,⁷⁸ the court saying: "The Workmen's Compensation Act indicates a public policy of the state, which will be enforced even as against a contract made in another state."⁷⁹

In a New York case it was held that, where an employer having an office in New York was insured under the Workmen's Compensation Act as to employés working in that state, the payroll on work done outside the state being used as a basis for such insurance,

⁷⁶ *Rounsaville v. Central R. Co.*, 87 N. J. Law, 371, 94 Atl. 392.

⁷⁷ *Sandberg v. Kruse*, 1 Cal. I. A. C. Dec. 441.

⁷⁸ Where a servant employed in New York died in New Jersey of injuries received there, compensation was properly awarded under the New Jersey Act; the right to compensation resting on the statute rather than on the contract of employment. The liability is indeed contractual in nature by force of the very terms of the statute, but it is not the result of an express agreement between the parties; it is an agreement, implied by the law, of a class commonly known as "quasi contracts." *American Radiator Co. v. Rogge*, 86 N. J. Law, 436, 92 Atl. 85.

⁷⁹ *American Radiator Co. v. Rogge*, 86 N. J. Law, 436, 92 Atl. 85, 94 Atl. 85, affirmed in 87 N. J. Law, 314, 93 Atl. 1083; *Davidheiser v. Hay Foundry & Iron Works*, 87 N. J. Law, 688, 94 Atl. 309.

The New Jersey Act permits recovery, though the contract of employment was made in another state. *West Jersey Trust Co. v. Philadelphia & R. Ry. Co.*, 88 N. J. Law, 102, 95 Atl. 753.

and employed decedent outside the state to work in Pennsylvania, in which state he was killed in the course of his employment, the employment of decedent was outside the state of New York, and therefore compensation could not be awarded under the New York Act, the court saying: "In this case the decedent had not been employed by the appellant in the state since 1912. His employment had not been continuous, but had been from time to time for certain jobs which were being performed entirely without the state. The contract of employment did not contemplate any work by him within the state; no such work was done. The statute in question is intended to regulate the relations between the employer and employé in hazardous employments within the state, and to protect the employé within the state from the ordinary risks of the employment, and to charge those risks upon the ultimate consumer. The mere fact that an employé is engaged by a resident of the state to go out of the state for service, and no service in the state is contemplated or done, cannot bring the employment within the Act. Ordinarily a statute has no extraterritorial effect. But where the regular service of the employé is being performed in the state, and as an incident to it he goes over the state line temporarily, we have held that such temporary absence from the state does not relieve the employer from liability under this statute. The relations between the decedent and the company with reference to the work at Ford City depended upon the laws of the state of Pennsylvania, and the protection there given to the employer and the employé. The mere fact that the contract was made in the state, if it was made in the state, is not material here, when we understand that the contract related solely to work to be performed outside of the state. It follows, therefore, that the employment of the decedent was outside of the state of New York."⁸⁰ This principle has been applied by the Commission.⁸¹ A resident of New Jersey, injured by ac-

⁸⁰ *Gardener v. Horseheads Const. Co.*, 171 App. Div. 66, 156 N. Y. Supp. 899.

⁸¹ Where, though the contract of employment was made in New York, the workman was a resident of, and the accident happened in, West Virginia, the

cident in the course of his employment in New York, is entitled to compensation under the New York Act, although the contract of hiring was made in Pennsylvania.⁸²

Since the New Jersey Act provides that in case of dispute or failure to agree on a claim all questions shall be submitted to the court of common pleas of that state on petition, which petition shall be answered and the issues raised determined by that court, thereby providing a forum wherein disputes between employer and employé relative to compensation may be settled, a Supreme Court of New York will not assume jurisdiction to enforce a claim under the New Jersey Act,⁸³ though defendant is a corporation which has moved its place of business to the state of New York and cannot be personally served in New Jersey.⁸⁴

An employé injured on a river over which two states have concurrent jurisdiction may recover under the Compensation Act of either state.⁸⁵ Where the federal government has acquired land by purchase for the construction of docks, forts, arsenals, or other buildings, the Washington Act is inapplicable to works and occupations carried on within the confines of such land.⁸⁶

Commission of New York had no jurisdiction to grant compensation. *Lloyd v. Power Specialty Co.*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 9. Although an accident happening in New York may come under the Act, even where the contract of employment was made in another state, for the reason that the New York Act takes away the action for damages for negligence for all injuries received in the state, where the contract is made and the accident happens outside the state, this reason does not apply, and the claim is not under the New York Act. *Dissoway v. Jallade*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 13.

⁸² *Griffiths v. American Bitumastic Enamels Co.*, *The Bulletin*, N. Y., vol. 1, No. 7, p. 8.

⁸³ *McCarthy v. McAllister Steamboat Co.*, 94 Misc. Rep. 692, 158 N. Y. Supp. 563.

⁸⁴ *Lehmann v. Ramo Films*, 92 Misc. Rep. 418, 155 N. Y. Supp. 1032.

⁸⁵ *Op. Atty. Gen. on Minn. Wk. Comp. Act*, Bul. 9, p. 16.

⁸⁶ *Wk. Comp. Act Wash.* § 17; *Opinion Atty. Gen. Sept. 20, 1911.*

§ 9. Admiralty jurisdiction

According to the courts of Connecticut and New York, a proceeding to recover under a Workmen's Compensation Act is a personal action, and not one in rem, and therefore not one of which admiralty courts have exclusive jurisdiction where the injuries occur on the high seas or navigable waters.⁸⁷ It has been held by a federal court that, while the Washington Act does not⁸⁸ and cannot take from an injured workman his right to proceed in admiralty by abolishing his right to pursue a common-law remedy for injury,⁸⁹ yet, where the workman takes the benefit of this Act, which is provided in lieu of his common-law remedy, he cannot thereafter pursue his remedy in admiralty.⁹⁰ The Washington Supreme Court has held that a Compensation Act cannot be permitted to encroach on the admiralty jurisdiction of the federal court, or make the owners of a vessel liable, where it is not claimed that they have been at fault, beyond the limits prescribed by the federal statutes.⁹¹ Ac-

⁸⁷ *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436. Citing *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 643, 648, 20 Sup. Ct. 824, 44 L. Ed. 921; *Schoonmaker v. Gilmore*, 102 U. S. 118, 26 L. Ed. 95; *Leon v. Galceran*, 11 Wall. 185, 20 L. Ed. 74; *The Belfast*, 7 Wall. 624, 19 L. Ed. 266; *The Hine v. Trevor*, 4 Wall. 555, 567, 568, 18 L. Ed. 451; *Manchester v. Mass.*, 129 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159. An accident occurring on a navigable river was within the jurisdiction of the New York Act. *In re Walker*, 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87.

The provision of the New York Act that compensation shall be the exclusive liability, and in place of all other liability, extends only to suits at common law; and where the circumstances of the case bring it under the Act, and also under admiralty jurisdiction, the employé may choose which remedy he will pursue. *Walker v. Clyde S. S. Co.*, 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87.

⁸⁸ The Washington Act does not withdraw from a workman who is injured on a vessel his remedy to proceed against the vessel in admiralty for the wrong sustained. *The Fred E. Sanders* (D. C.) 208 Fed. 724.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *State v. Daggett*, 87 Wash. 253, 151 Pac. 648, L. R. A. 1916A, 446.

cording to a federal decision, an action brought for compensation under the New Jersey Act, not being an action for tort or one based on negligence, was one of which the state courts had at least concurrent jurisdiction with the federal courts sitting in admiralty, and the state court having first acquired jurisdiction, the cause was not removable as one of admiralty and maritime jurisdiction.⁹²

When the action is brought in a state court and is maintainable therein, it must be determined according to state laws and not according to the laws of admiralty.⁹³

§ 10. Interstate commerce

In the absence of any decision on the question by the United States Supreme Court, and in view of the conflict between the decisions of other courts, the question of the extent to which, if any, the state Compensation Acts may apply to employés of interstate carriers by railroad, without conflicting with the federal Employers' Liability Act, cannot be answered with any show of authority, otherwise than by calling attention to and contrasting these conflicting decisions. Attempts to formulate any general rule by which these decisions may be tested and satisfactorily reconciled, meet with failure. However, it may be stated on positive authority that, where Congress has not entered the particular field and thereby excluded state action, a state law is within the state's jurisdiction, though it indirectly affects interstate and foreign commerce, and that it remains so until Congress enters the field.⁹⁴

⁹² *Berton v. Tietken, etc.*, L. Dry Dock Co. (D. C.) 219 Fed. 763.

⁹³ *Lindstrom v. Mutual S. S. Co.* (Minn.) 156 N. W. 669.

⁹⁴ *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Morgan's Steamship Co. v. Board of Health*, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237; *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Erie R. R. Co. v. Williams*, 233 U. S. 685, 34 Sup. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097.

The jurisdiction of Congress over interstate commerce, and thus over remedies against employers therein for injuries sustained by employes while engaged in such commerce, is paramount, and, since Congress in the Employers' Liability Act has fixed the employer's liability in cases where the act is caused by his own negligence, that Act is the exclusive remedy in such cases at least, and the state Act does not apply.⁹⁵ The Act of Congress does not apply, of course, where the parties are not in any wise engaged in interstate commerce.⁹⁶

⁹⁵ *Grand Trunk Ry. Co. of Canada v. Knapp* (C. C. A.) 233 Fed. 950.

⁹⁶ *Blauvelt v. Chicago & A. R. Co.*, Bulletin No. 1, Ill., p. 181.

Employés not engaged in interstate commerce.—An employé repairing a car used indiscriminately for intrastate and interstate commerce, in a car shop in New York, is not engaged in interstate commerce; his status being determined by the character of the work done at the time of the injury. *Parsons v. Delaware & Hudson Co.*, 167 App. Div. 536, 153 N. Y. Supp. 179. A railroad watchman employed to guard property and tools and materials used in building a new station and laying new tracks, which when finished were to be used in interstate commerce, was not engaged in interstate commerce, and was entitled to compensation. *White v. New York Central R. R.*, 2 N. Y. St. Dep. Rep. 477. Where an employé at the time of his injury was engaged in uncoupling cars on a railroad which operated exclusively and entirely within the state, the fact that the railroad sometimes carried interstate baggage and passengers, though always within the state, did not make the employé a workman engaged in interstate commerce. *Fairchild v. Pennsylvania R. R. Co.*, 170 App. Div. 135, 155 N. Y. Supp. 751. An employé, working in a railroad car shop maintained and operated entirely within the state, was not engaged in interstate commerce, although the cars repaired, and the car on which he was working at the time of the accident, were used in both intrastate and interstate commerce. *Okrzsezs v. Lehigh Valley R. Co.*, 170 App. Div. 15, 155 N. Y. Supp. 919. *Illinois.*—A private watchman employed by a railroad company, whose duty was to make the rounds of the yards, inspecting the freight house and various portions of yards, keep improper persons off the premises, and prevent stealing from cars, and who had power to arrest in cases of necessity, who was injured in the performance of his duty, was entitled to compensation under the Workmen's Compensation Act of Illinois. *Bassett v. Chicago, R. I. & P. Ry. Co.*, Bulletin No. 1, Ill., p. 120. The fact that along the line of a particular train of a railroad there was merchandise of an interstate character to be handled, and that just prior to the occurrence of the accident the crew and train had been handling inter-

The New York Act has been held to apply, so far as it may without interfering with any act of Congress, to injuries received by an employé in interstate commerce. The highest court of the state said: "The statute does not purport directly to regulate or impose a burden upon commerce, but merely undertakes to regulate the relations between employers and employés in this state. Such regulation may, and no doubt does, indirectly affect commerce, but to the extent that it may affect interstate or foreign commerce it is plainly within the jurisdiction of the state, until Congress by entering the field excludes state action."⁹⁷ It was further held that

state packages or cars, and that it was their custom to handle whatever merchandise was delivered to them, whether interstate or otherwise, does not stamp such train and its employés as engaged in interstate commerce. *Blauvelt v. Chicago & A. R. Co.*, Bulletin No. 1, Ill., p. 181.

⁹⁷ *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276. "Literally construed, section 114 makes the statute apply only to intrastate work, either done by itself or in connection with, but clearly separable and distinguishable from, interstate or foreign commerce. But, though the section is awkwardly phrased, it is manifest that a broader application was intended, else the clause 'for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States' is meaningless. The Legislature evidently intended to regulate, as far as it had the power, all employments within the state of the kinds enumerated. The earlier sections are in terms of general application, and section 114, which is headed 'Intrastate Commerce,' is one of limitation, not of definition. Its obvious purpose was to guard against a construction violative of the Constitution of the United States, and so it provided that the act should apply to interstate or foreign commerce, 'for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States,' only to the extent that intrastate work affected may or shall be clearly separable or distinguishable therefrom. In other words, the Legislature said that it did not intend to enter any field from where it had been or should be excluded by the action of the Congress of the United States. But it is said that Congress may at any time regulate employments in interstate or foreign commerce, and that the case is one to which a rule 'may be established,' etc. Again, the spirit, not the letter, must control. If it had been intended to confine the application of the act to intrastate work, the Legislature would doubtless have said so in a sentence. The words 'may be' should be construed in the sense of 'shall be.'" *Id.* The remedy given by the federal Employers' Liability Act is not exclusive for all

since the present federal statute applies only to carriers by railroad, not carriers by water, the New York Act applied where an employé was killed while unloading a steamship belonging to a railroad company, but not shown to have been operated in any way in connection with the company's railroad line.⁹⁸ This power of the state to legislate in regard to injuries occurring in interstate commerce by water, in view of the failure of Congress to legislate thereon, has also been recognized in decisions construing the Connecticut, Minnesota, and Washington Acts.⁹⁹ The New Jersey courts lay down the same rule as do the New York courts, which hold that the federal Employers' Liability Act is not exclusive,¹ and that the states, in the exercise of their police power, may make such laws and regulations for the protection of the laborers within the state as may seem best, unhampered by the federal statute, except so far as they attempt to prescribe a liability for negligence or the remedies therefor in interstate commerce. Workmen's Compensation Acts, such as those of New York and New Jersey, come

injuries to the employés of a railroad corporation engaged in interstate commerce, but only in case there is either an admission or proof that the accident was occasioned by the negligence of the interstate carrier. *Buell v. N. Y. C. & H. R. R. Co.*, *The Bulletin*, N. Y., vol. 1, No. 5, p. 12.

⁹⁸ *Id.*

⁹⁹ *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436. In *Miller v. N. Y., N. H. & H. R. R. Co.*, 1 Conn. Comp. Dec. 349, it was held that where the employer and employé were both under the Connecticut Act, though engaged in interstate commerce, recovery might be had under that Act, since the federal Employers' Liability Act did not provide compensation such as was given under that Act. *Sess. Laws Wash.* 1911, c. 74, § 18, extends to workmen employed in interstate commerce by water, in the absence of congressional legislation on the subject. *Stoll v. Pacific Coast S. S. Co.* (D. C.) 205 Fed. 169. That the Minnesota Act applies to interstate commerce by water does not invalidate it as an interference with interstate commerce. Congress has not legislated upon that subject as to interstate commerce by water, and until it does so such legislation is within the province of the several states. *Lindstrom v. Mutual S. S. Co.* (Minn.) 156 N. W. 669.

¹ *Rounsaville v. Cent. R. Co.*, 87 N. J. Law, 371, 94 Atl. 392; *West Jersey Trust Co. v. Philadelphia & R. Ry. Co.*, 88 N. J. Law, 102, 95 Atl. 753.

within this rule. They have no reference to the question of negligence of the employer and create no liability or remedy for negligence.² For the federal Employers' Liability Act to oust the court of common pleas of jurisdiction in a proceeding under the New Jersey Act, it must affirmatively appear either in the pleadings or the proof that a right of action is given by the federal statute. It must appear that the workman's death or injury resulted in whole or in part from negligence chargeable to an employer in an employment within the federal Act.³

The Supreme Court of Errors of Connecticut held that a provision of the Compensation Act of that state, excepting injuries arising in interstate or foreign commerce, did not apply where an employé was drowned in consequence of the foundering of a tug, without negligence, in the navigable waters of New Jersey. The court said: "Presumably section 40 and similar provisions in other Compensation Acts have reference to the federal Employers' Liability Act. Where the injury arises from a cause not covered by the federal Act, this section does not apply. To come within the federal Act there must be interstate traffic, interstate employment, and negligence. Though the first two conditions be present in this proceeding, the latter is not."⁴ The Minnesota Act, being general in its terms, applies to all cases within the territorial jurisdiction of the state save those expressly excepted. It excepts cases arising from interstate commerce by railroad, but not those arising from interstate commerce by water.⁵ The Ohio Act, though

² *Windfield v. New York Cent. & H. R. R. Co.*, 168 App. Div. 351, 153 N. Y. Supp. 499; *Rounsaville v. Central R. Co.*, 87 N. J. Law, 371, 94 Atl. 392; *Hammill v. Pennsylvania R. Co.*, 87 N. J. Law, 388, 94 Atl. 313; *Grybowski v. Erie R. Co.*, 88 N. J. Law, 1, 95 Atl. 764.

³ *Lynch v. Pennsylvania R. R. Co.*, 88 N. J. Law, 408, 96 Atl. 395.

⁴ *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436.

⁵ *Lindstrom v. Mutual S. S. Co. (Minn.)* 156 N. W. 669. Registered vessels (tugs and scows) engaged in commerce on the Great Lakes, hailing from Duluth, doing both intrastate and interstate work under the United States nav-

not applying to employers and their employés engaged exclusively in interstate commerce, applies to those engaged in both interstate and intrastate commerce to the extent that their mutual connection with intrastate work is clearly separable and distinguishable from interstate and foreign commerce, but only on the election of the employer and employé to be governed by its provisions.⁶

The position of those courts holding that the entire field of recovery for injuries received by employés engaged in interstate com-

igation laws, registered at the United States customs office, and operating partly in Canadian waters, whose employés live in Minnesota and other states, are within the provisions of the Minnesota Compensation Act so far as regards injuries received in the state of Minnesota, since there is no federal Compensation Act applying to workman on vessels. *Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 15.* Employés on a pleasure boat used exclusively for private purposes, and licensed on the Mississippi river between St. Paul and New Orleans, are within the provisions of the Minnesota Workmen's Compensation Act for all injuries which occur while the boat is on a portion of the river within the boundaries of the state of Minnesota. *Id.*

The employés of a carrier engaged in interstate commerce are excluded from the provisions of the Act, although the work of the particular workman injured may have been entirely within the state. (*Gen. Laws 1913, c. 467, § 8; Gen. St. 1913, § 8202*) *Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 19.* Any and all employés of a railroad engaged in interstate commerce are excluded from the provisions of the Act, and the employés in a local shop are not an exception to this rule. (*Gen. Laws 1913, c. 467, § 8; Gen. St. 1913, § 8202*). *Id.* The criterion to follow, in construing this law, especially section 8, is: Is the employer engaged in interstate or foreign commerce? This exception would apply to both the employer and employé, no matter what may be the character of the work done by the employé. *Id. p. 20.* The Minnesota Workmen's Compensation Act does not apply to a man who works for a contractor doing grading work on an interstate railroad already in use, the work consisting of surfacing the old line, since the man would be engaged in interstate commerce. *Id.*

⁶ *Connole v. Norfolk & W. Ry. Co. (D. C.) 216 Fed. 823.* 103 Ohio L. p. 90, § 51, with certain changes, is the same as section 6604—18 of the Washington statute (3 Rem. & Bal. Code, 1913). One change is the substitute of the words "and then only when" for the words "except that any such." The words in the Washington Act enlarge the class of persons to whom the act may apply, whereas the Ohio Act restricts such class. The one extends the application of the statute, and the other limits it. *Id.*

merce is covered by the federal Employers' Liability Act, and that therefore there is no room for the application of a state Compensation Act to such injuries, is well stated in a decision of the Illinois Supreme Court holding the Illinois Act inapplicable in such cases.⁷ The same position has been taken by the Supreme Court of California,⁸ and in numerous instances the Industrial Accident Com-

⁷ *Staley v. Illinois Central R. Co.*, 268 Ill. 356, 109 N. E. 342, L. R. A. 1916A, 450.

⁸ The Commission has no jurisdiction to award compensation where the workman at time of injury was engaged in work directly relating to interstate commerce, since, in such case, the federal Employers' Liability Act would control. *Smith v. Indus. Acc. Com. of Cal.*, 2 Cal. I. A. C. Dec. 439, 26 Cal. App. 560, 147 Pac. 601. Where a railroad watchman was accidentally injured from the discharge of his revolver while he was driving trespassers from the company's property after he had boarded and driven them from an interstate train, he was engaged in an act relating to interstate commerce, and not within the California Act. *Id.* Where a truck builder and truck repairer employed in a railroad roundhouse was killed while repairing a switch engine used in both interstate and intrastate commerce, the California Commission had no jurisdiction, though the engine had been temporarily withdrawn from service at the time of the injury, but was returned three days after the accident. *Southern Pacific Co. v. Pillsbury*, 2 Cal. I. A. C. Dec. 443, 170 Cal. 782, 151 Pac. 277. The California Commission has no jurisdiction of an application for compensation for injuries sustained by an employé of a railroad engaged in both interstate and intrastate commerce, where at the time of the injury he was engaged in interstate business; the federal Employers' Liability Act controlling such case. *Id.*

In *Smith v. Indus. Acc. Com.*, *supra*, the court quoted from opinions by Marshall, C. J., and Lurton, J., as follows: "If any one proposition could command the universal assent of mankind, we might expect it would be this: That the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason. The people have, in express terms, decided it, by saying, 'This Constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land,' and by requiring that the members of the state Legislature, and the officers of the executive and judicial departments of the states, shall

mission of that state, after determining that the injury occurred in interstate commerce affected by the federal Employers' Liability Act, has refused to award compensation.⁹ Injuries to an employé,

take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding'"—quoting Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. "By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employés, injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states. * * * it * * * follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employés while engaged in interstate commerce this act is paramount and exclusive"—quoting Lurton, J., in *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176. The court also quoted language to the same effect from *Mondou v. New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, and *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 501, 34 Sup. Ct. 638, 58 L. Ed. 1068, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

⁹ Where a brakeman employed in interstate and intrastate commerce was attacked by tramps and killed while he was working on a through freight train, the California Act did not apply. *Lutze v. Atchison, Topeka & Santa Fé Ry. Co.*, 2 Cal. I. A. C. Dec. 739. *Johnson v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 738.

California Act held inapplicable since the workman was injured while engaged in interstate commerce.—Where an employé, working in the repair shop of a railroad engaged in interstate and intrastate business, is injured while repairing a locomotive. *Beamer v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 737. Where a car inspector, in the employment of a railroad engaged in both interstate and intrastate commerce, was injured while coupling the air hose of a freight train carrying some cars destined for points outside the state. *Bridge v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 736. Where a mechanic, in the employment of a railroad engaged in interstate and intrastate commerce, is injured by a fall from a locomotive upon which he is working in a round-house of the railroad. *Donaldson v. Atchison, Topeka & Santa Fé Ry. Co.*, 2 Cal. I. A. C. Dec. 699. Where a section hand is injured while working upon the tracks of a railroad engaged in interstate and intrastate business. *Harris v. Western Pacific Ry. Co.*, 2 Cal. I. A. C. Dec. 697. Where it appeared that the injured man was a watchman in the employ of an interstate railway, and at the time of accident was weighing freight cars of an interstate character.

the scope of whose employment concerns both intrastate and interstate commerce, are compensable under this Act, however,

Keast v. Santa Fé Ry. Co., 2 Cal. I. A. C. Dec. 694. Where it appeared that the applicant was engaged at the time of the accident in the repair of a bridge, which was a portion of the main line of an interstate railway. *Sandberg v. San Pedro, Los Angeles & Salt Lake R. R. Co.*, 2 Cal. I. A. C. Dec. 694. Where an employé of the Santa Fé Railway was injured while engaged in the repair of a bridge used by the Santa Fé Railway in its interstate business. *Battenfield v. Atchison, Topeka & Santa Fé Ry. Co.*, 2 Cal. I. A. C. Dec. 688. Where an employé of the Southern Pacific Company. 2 Cal. I. A. C. Dec. 969. Where an employé of the Santa Fé Railway, while engaged in loading timbers intended for the repair of stockyards used by said railway to confine live stock shipped to and from points both interstate and intrastate, was injured by a falling timber. *Hummer v. Hennings*, 2 Cal. I. A. C. Dec. 859. Where an employé of the Southern Pacific Company was injured while engaged in repair work on a bridge, part of the main line of the railway used in the interstate business of the defendant. *McCarthy v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 780. Where an employé of the Southern Pacific Company was injured while engaged in switching cars of a train, some of the cars of which were used in interstate business of the defendant. *McCarthy v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 752. Where it appeared that at the time of the accident the employé was a section hand, and was being carried on a hand car from one point to another on the line used for interstate commerce of the railway. *Moreno v. San Pedro, Los Angeles & Salt Lake R. R. Co.*, 2 Cal. I. A. C. Dec. 754. Where it appeared that the injured employé was at the time of the accident doing work in the construction of a bridge on a branch of a railway used for interstate traffic. *Walde v. San Pedro, Los Angeles & Salt Lake Ry. Co.*, 2 Cal. I. A. C. Dec. 751. Where an employé of the Southern Pacific Company was injured while engaged in the repair of an engine used by the Southern Pacific in its interstate business. *Bishop v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 749. Where a workman was engaged in rearranging, transferring, and changing tracks used indiscriminately for interstate and intrastate commerce. *Cuebas v. Atchison, T. & S. F. Ry. Co.*, 3 Cal. I. A. C. Dec. 17. Where a brakeman on a wrecking train, sent to rerail an engine which was obstructing the tracks of an interstate railway, and at the time of derailment was hauling cars of interstate freight. *James v. San Pedro, L. A. & S. L. R. R. Co.*, 3 Cal. I. A. C. Dec. 13. Where an employé of the Santa Fé Railway was injured while engaged as a brakeman in switching a railway car, such car being a foreign car loaded with freight destined to points outside this state. *Grigsby v. Atchison, Topeka & Santa Fé Ry. Co.*, 2 Cal. I. A. C. Dec. 748. Where a section hand, employed by a railroad doing interstate business, is injured while working upon the repairing of railroad track. *Karras v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 748. Where an employé of the Southern Pacific

where at the time of injury he was not engaged in interstate commerce.¹⁰ Where one in the employ of a railroad lying wholly within the state is injured, the burden of proving that he was injured while engaged in furthering interstate commerce rests on the railroad company. Such burden is not sustained by proof, which is not clear, that certain small packages of freight, which alone are claimed to give an interstate character to the work, originated outside the state and were not broken or reshipped locally.¹¹

Railroad construction for an interstate carrier is under the state's jurisdiction, whether the work be performed by a railroad company's own employes or by contract. Such construction work

Company is injured while loading steel rails upon one of its flat cars at its terminal, the rails to be used in repairing the main line of its track. *Campos v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 747. Where an employe of the Southern Pacific Company is injured in repairing and maintaining a trestle and roadbed. *Lambert v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 743. Where an employe of a railroad engaged in interstate and intrastate business is injured while repairing a flat car. *Garcia v. Atchison, Topeka & Santa Fé Ry. Co.*, 2 Cal. I. A. C. Dec. 741.

¹⁰ Where an employe of a railway was injured while in the construction of a dining room of a railway engaged in intrastate and interstate commerce, such dining room being constructed within the state of California, the injury did not occur while he was engaged in interstate commerce, and the Compensation Act of California applied. *Harrington v. San Diego & Arizona Ry. Co.*, 2 Cal. I. A. C. Dec. 797. Where a baggageman, employed at a mailing station used in both interstate and intrastate commerce, was injured by accident while on his way out of the baggage room, which he had entered with the purpose either of preparing a local shipment or of ascertaining whether such a shipment was to be prepared, he was not engaged in interstate commerce at the time of the accident, and his injury was compensable. *Luke v. A., T. & S. F. R. R. Co.*, 2 Cal. I. A. C. Dec. 1011. Where a freight handler, employed at a station within the state to load cars with freight destined to points within the state, was injured while loading a car with freight which had originated within the state, but after his injury the car was loaded with more freight, including four pieces which had originated at points outside the state, and the accident and injury were not due to any negligence on the part of the employer, the injury was compensable. *Wilmunder v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 1030.

¹¹ *Connors v. Sugar Pine Ry. Co.*, 2 Cal. I. A. C. Dec. 879.

does not become interstate commerce until turned over to the actual use of interstate trade.¹² Steamboats on Lake Washington are engaged in traffic on interstate waters, and therefore outside the jurisdiction conferred by the Washington Act upon the Industrial Accident Commission of that state.¹³

§ 11. Administration

The Washington Act requires the state to pay the entire cost of administration of the state insurance fund, leaving the whole amount paid into such fund by the employers to be devoted to the payment of awards for injuries.¹⁴ In the opinion of the commission, the state can well afford to bear the cost of administering the insurance fund, "as its courts will be relieved of a large amount of work, and the burden now placed upon taxpayers by the trial

¹² Wk. Comp. Act Wash. § 18; Rulings Wash. Indus. Ins. Com. 1915, p. 23.

That the workman at the time of his injury was employed as a common laborer on the construction of a railroad tunnel, which, when completed, would be used to shorten the interstate line of the railroad, did not make him engaged in interstate commerce. *Raymond v. Chicago, M. & St. P. Ry. Co.* (C. C. A.) 233 Fed. 239. In *Bravis v. Chicago, M. & St. P. Ry. Co.*, 217 Fed. 234, 133 C. C. A. 228, the court said: "The mere fact that it was the purpose and intention so to use it at some future time did not make it an instrumentality of interstate commerce. That purpose and intention might be changed, and it might never be used in interstate commerce, or at all. The argument that the building of the cut-off was the mere correction or prevention of a defect or insufficiency of the defendant's instrumentality for conducting interstate commerce is too remote and inconsequential to convince."

In *Pedersen v. Delaware, L. & W. R. R.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, the court said: "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

¹³ (Wk. Comp. Act Wash. § 4, class 20) Rulings Wash. Indus. Ins. Com. 1915, p. 12.

¹⁴ (Wk. Comp. Act Wash. § 29) Rulings Wash. Indus. Ins. Com. 1915, p. 27.

of negligence cases will be minimized. The tendency of this act should be to produce good will between employer and employé, and to lessen the cases of hardship among dependents of injured employés. In taking into consideration the state's many vital interests in the welfare of the workman and his family, the general taxpayer may well afford to bear the expense of administration."¹⁵ The physician's report relative to the injury, as part of the workman's claim, is a duty to the state; no payment is allowed therefor, though charge for professional services rendered to a workman is his personal debt, unless the employer contracted to pay the same.¹⁶ Reports of the accident made to the insurance department must state the time, cause, and nature of the accident and injuries, and the probable duration of the injury resulting therefrom,¹⁷ and also whether the accident arose out of or in the course of the injured person's employment.¹⁸ All necessary blanks are furnished free of cost.¹⁹

The state insurance fund of Nevada, not being part of the "state treasury," though paid to the state treasurer, is not subject to the constitutional restrictions on the payment of funds from the state treasury.²⁰

The Minnesota Commissioner of Labor and any employé connected with that department are prohibited from disclosing wheth-

¹⁵ (Wk. Comp. Act Wash. § 29) Rulings Wash. Indus. Ins. Com. 1915, p. 27.

¹⁶ (Wk. Comp. Act Wash. § 12) Rulings Wash. Indus. Ins. Com. 1915, p. 20.

¹⁷ (Wk. Comp. Act Wash. § 14) Rulings Wash. Indus. Ins. Com. 1915, p. 21.

¹⁸ (Wk. Comp. Act Wash. § 14) Rulings Wash. Indus. Ins. Com. 1915, p. 21. They must answer all questions fully that appear on employer's report of accident, form 21, and workman's report of accident, form 22, so far as they apply to the particular accident being reported and any other information pertinent to the injury. Questions which are seemingly of no importance are asked for statistical purposes and should be answered whenever possible. (Wk. Comp. Act Wash. § 14) *Id.* p. 21.

¹⁹ (Wk. Comp. Act Wash. § 12) Rulings Wash. Indus. Ins. Com. 1915, p. 21.

²⁰ *State v. McMillan*, 36 Nev. 383, 136 Pac. 108.

er or not a certain accident has been reported to the labor department as required by the Act.²¹

Where the Wisconsin Industrial Commission, successor to the Industrial Accident Board, had many duties to perform other than those imposed on them by the Workmen's Compensation Act, a taxpayer could not enjoin payment of their salaries on the ground that the Act was unconstitutional, even if such ground were well taken.²²

²¹ (Gen. Laws, 1913, c. 416, § 4; Gen. St. 1913, § 3895) Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 11, p. 16.

²² *In re Filer & S. Co.*, 146 Wis. 629, 132 N. W. 584.

ARTICLE III

VALIDITY

Section

12. Police power.
13. Validity as against particular objections.
14. Objections raised under constitutional provisions.
15. New York—Ives Case.
16. Kentucky.
17. Classification.
18. Abolition of defenses.
19. Right to question validity.

§ 12. Police power

The authority for this legislation is that power of the state termed the police power;²³ a power by which the Legislature supervises matters relating to the common weal and enforces the observance by each member of society of duties owed by him to others and to the community at large. All rights are possessed and enjoyed subject to it. Under it the state may prescribe regulations for the promotion of health, peace, morals, education, and good order, and so

²³ This legislation is a legitimate exercise of the police power. *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037; *Memphis Cotton Oil Co. v. Tolbert* (Tex. Civ. App.) 171 S. W. 309; *Sayles v. Foley* (R. I.) 96 Atl. 340. The Workmen's Compensation Act, under which it was sought to collect premiums, is a police regulation, and a valid exercise of the police power of the state. *State v. City of Seattle*, 73 Wash. 396, 132 Pac. 45. The Industrial Insurance Act (Laws 1911, c. 74) is within the state's police power. *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645; *Stoll v. Pacific Coast S. S. Co.* (D. C.) 205 Fed. 169.

The Washington Act, substituting a new remedy for an existing remedy which was uncertain, slow, and inadequate, was a valid exercise of the police power of the state. *Raymond v. Chicago, M. & St. P. Ry. Co.* (C. C. A.) 233 Fed. 239; *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154.

The New York Act is a proper exercise of the police power of the state, growing out of the fact that injured workmen or their dependents are likely to become a public charge unless provision is made for their maintenance. *Lloyd v. Power Specialty Co.*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 9.

legislate as to increase the industries of the state, develop its resources, and add to its welfare and prosperity. Reduced to its last analysis, the police power is the power to govern.²⁴ It is inherent in every sovereignty.²⁵ All contracts are subject to it, and its exercise can neither be abridged nor delayed by reason of existing contracts.²⁶ The test of the validity of a police regulation is reasonableness, as distinguished from arbitrary or capricious action.²⁷ From the foregoing principles it clearly appears that it is within the state's power to enact and enforce police regulations, though certain contracts between individuals are thereby rendered less valuable and others are totally abrogated.²⁸ A Compensation Act is therefore valid where it has a reasonable relation to the protection of public health, morals, safety, or welfare, and will not be declared invalid because it incidentally deprives some person of his property without fault or takes the property of one to pay the obligations of another. Before an Act will be declared fatally defective in these respects, it must appear so utterly unreasonable and so extravagant in nature and purpose as capriciously to interfere with and destroy private rights.²⁹ An Act is none the less a valid

²⁴ *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398.

²⁵ *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

²⁶ *State v. City of Seattle*, 73 Wash. 396, 132 Pac. 45.

²⁷ *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

²⁸ *State v. City of Seattle*, 73 Wash. 396, 132 Pac. 45.

²⁹ *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

The police power of the state is an attribute of sovereignty, and by its exercise the state may provide for the safety and general welfare of its people. This power is not, however, unlimited and uncontrollable, but is subject to the supervision of the courts, which have power to restrain it within reasonable limits; in any case where the court can see that the particular act in question has a reasonable and substantial relation to the power, it should be cautious about declaring the act invalid. *American Coal Co. v. Allegany County Com'rs*, 128 Md. 564, 98 Atl. 143. The Maryland Act, creating a miners' and operators' co-operative relief fund for the relief and sustenance of employes or dependents of employes injured in clay and coal mining (Acts 1910, c. 153, as amended by Acts 1912, c. 445), reasonably tends to correct an exist-

exercise of the police power because the workman's dependents live outside the state or nation.³⁰

§ 13. Validity as against particular objections

The validity of this legislation should be viewed in the light of modern conditions, rather than those under which the common-law doctrines were developed. With the change in industrial conditions, sentiment has gradually developed, which almost universally favors a more just and economical system of providing compensation for accidental injuries to employes as a substitute for wasteful and protracted damage suits, frequently unjust in their results. The competency of the state, in the promotion of the general welfare, to require that both employer and employé yield something toward the establishment of a plan of compensation for their mutual protection and advantage cannot seriously be questioned. Any plan devised by man may, in exceptional cases, work unjustly, but this legislation is to be judged by its general plan and scope.³¹

It does not invalidate a Compensation Act that it does not in legal effect cover the entire field subject to such regulation,³² that it singles out a particularly hazardous employment and subjects it to burdens not imposed on other hazardous employments, or that it is limited to employes engaged in hazardous or extrahazardous work. Nor is it material to the validity of a Compensation Act that it hampers private action in a matter which before was free from interference,³³ that it provides for reimbursement of the employer or insurer by a third party tort-feasor,³⁴ that it contains

ing evil and promote the welfare of the state, and hence is a valid exercise of the state's police power. *Id.*

³⁰ *Western Metal Supply Co. v. Pillsbury (Cal.)* 156 Pac. 491.

³¹ *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276.

³² *Sayles v. Foley (R. I.)* 96 Atl. 340.

³³ *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398.

³⁴ *Grand Rapids Lumber Co. v. Blair (Mich.)* 157 N. W. 29.

provisions guarding against its nullification by contracts obtained by the employer when the employé is at a physical or financial disadvantage,³⁵ that it places the burden of proof as to negligence and proximate cause of injury on the employer,³⁶ or that it includes nonresident aliens within,³⁷ or excludes them from, its benefits.³⁸ It is no objection to an Act that the practice under it is unusual³⁹ and different from that theretofore existing,⁴⁰ constituting a change in the rules of evidence and procedure,⁴¹ and rendering findings of fact conclusive,⁴² or that it makes differences in the measure of

³⁵ Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147) §§ 3, 8, 13, 18, 19; *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037.

³⁶ *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037.

³⁷ The fact that the California Act authorizes payment to dependents who are nonresidents of the state and nation does not make it invalid as serving no public purpose. There is no constitutional or rational ground for limiting the benefits of this legislation to residents of the state. *Western Metal Supply Co. v. Pillsbury* (Cal.) 156 Pac. 491.

³⁸ The Legislature had power to exclude nonresident aliens from the benefits of this act. It was within the legislative power to give or withhold the right of action and to declare to whom and in what amount compensation shall be made. (Wk. Comp. Act, § 2, par. 12) *Gregutis v. Waclark Wire Works*, 86 N. J. Law, 610, 92 Atl. 354, citing *Cetefont v. Camden Coke Co.*, 78 N. J. Law, 662, 75 Atl. 913, 27 L. R. A. (N. S.) 1058.

³⁹ Since Const. art. 1, § 19, authorized the Legislature to create this new remedy and the practice to enforce it, the fact that the practice under this act is unusual is no objection to it. *McQueeney v. Sutphen & Hyer*, 167 App. Div. 528, 153 N. Y. Supp. 554.

⁴⁰ *McQueeney v. Sutphen & Hyer*, 167 App. Div. 528, 153 N. Y. Supp. 554.

⁴¹ *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037. The Legislature may from time to time, without violating a party's constitutional rights, change the rules of evidence and procedure. It may cast the burden of proof upon any party, and may make certain acts prima facie evidence of facts, if the acts by any reasonable intendment bear upon or tend to establish the facts. *McQueeney v. Sutphen & Hyer*, 167 App. Div. 528, 153 N. Y. Supp. 554.

⁴² That the Act provides that findings of fact by the superior court shall be conclusive does not render it unconstitutional. (Workmen's Compensation Act, Laws 1911-12, c. 831, art. 3, §§ 6, 7) *Jillson v. Ross* (R. I.) 94 Atl. 717.

damages.⁴³ It does not invalidate an Act that it operates to effect a change in the common-law obligations of the employer,⁴⁴ and prescribes a fixed sum for an injury, whether it result from dangers inherent in the employment or from some fault of the employer,⁴⁵

⁴³ It is not fatal that the act does not in legal effect cover the entire field subject to such regulation (*Dutton v. Priest*, 67 Fla. 370, 65 South. 282), or singles out a particularly hazardous employment and subjects it to burdens not placed on other extrahazardous employments (*Cunningham's Case*, 44 Mont. 180, 119 Pac. 554), or that it is limited to employes engaged in extrahazardous work (*State v. Clausen*, 65 Wash. 156, 117 Pac. 1102, 37 L. R. A. [N. S.] 466). In *Cunningham's Case*, *supra*, it is held not to be an arbitrary discrimination that the act makes no difference between employers who are careful and others who are or may be careless. It does not avoid the act that it makes differences in the measure of damages. *Railway v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037.

⁴⁴ The Legislature has unquestionable power to authorize contracts of employment which change the common-law obligation of the employer, providing instead the amounts fixed by the Compensation Act. *Troth v. Millville Bottle Works* (N. J.) 98 Atl. 435, affirming 86 N. J. Law, 558, 91 Atl. 1031.

In *Raymond v. Chicago, M. & St. P. Ry. Co.* (C. C. A.) 233 Fed. 239, the court said, relative to the Washington Act: "The state Legislature, in the exercise of its wisdom, has adopted for the case of an injury resulting in total disability to an employe a monthly compensation which is fixed and determined, and is secured to him for the remainder of his life. We are not prepared to say that it is not a better provision for him than the common-law remedy, whereby he was required to prove the negligence of the defendant, and his cause of action was subject to the defenses of contributory negligence and assumption of risk; and the amount recoverable was uncertain, and was largely to be reduced by the payment of attorney's fees."

⁴⁵ *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *Cunningham Case*, 44 Mont. 180, 119 Pac. 554. Constitutional objections will not lie to an Act because it imposes upon the employer a liability to compensate his employes for injuries actually received in the particular employment, while under other statutes—for example, that of Washington—all employers are required to contribute sums, proportioned to their pay roll and graduated according to the nature of the industry, into a fund out of which all claims for compensation are to be paid. The essential question is whether liability for injury suffered by employes through accident may be imposed upon employers who have been guilty of no breach of duty. Once this question is answered in the affirmative, the mode of imposing the liability, whether it be by way of a proportionate contribution having some of the characteristics

or that the administration of the Act devolves mainly on a special tribunal created by it.⁴⁶ That the Michigan Act applies to municipal corporations, and requires them to compensate injured employés of the municipality, does not make it invalid.⁴⁷ The fact that the California Act makes the employer liable for compensation for injuries received in the particular employment, while other Acts, such as that of Washington, require all employers to contribute sums proportionate to their pay roll and graduated according to the nature of the industry into a fund out of which all claims for compensation are to be paid, has no bearing on the constitutionality of the California Act.⁴⁸ The rule that all laws enacted by the Legislature are presumed to be valid, and that it is the duty of the courts to declare them valid, unless they clearly transgress some limitation upon the power of the Legislature imposed by the state or federal Constitution, applies with special force to Compensation Acts.⁴⁹

of a tax, or by fixing a direct liability upon each employer for each accident as it occurs, is a matter for legislative determination. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398. That the Iowa Act (Acts 35th Gen. Assem. Iowa, c. 147, §§ 1-22) fixes with certainty the damages to be allowed in case of loss or injury does not render it unconstitutional. *Hawkins v. Bleakley* (D. C.) 220 Fed. 378.

⁴⁶ *Evanhoff v. State Industrial Accident Commission*, 78 Or. 503, 154 Pac. 106. The provisions of the Iowa Act (Acts 35th Gen. Assem. c. 147, §§ 23-41), relating to arbitration under the direction of a commissioner, are constitutional. *Hawkins v. Bleakley* (D. C.) 220 Fed. 378.

⁴⁷ *Wood v. City of Detroit* (Mich.) 155 N. W. 592, L. R. A. 1916C, 388.

⁴⁸ *Western Indemnity Co. v. Pillsbury*, 2 Cal. I. A. C. Dec. 454, 170 Cal. 686, 151 Pac. 398.

⁴⁹ *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037; *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71. All laws are presumably valid. *Roos v. State*, 6 Minn. 428 (Gil. 291); *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 33 L. R. A. 437, 60 Am. St. Rep. 450; *Union Pacific Ry. Co. v. United States*, 99 U. S. 700, 25 L. Ed. 496; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253. The court should not declare compensation statutes unconstitutional unless satisfied of their unconstitution-

§ 14. Objections raised under constitutional provisions

Every conceivable constitutional objection has been made to the various Acts. They have been quite uniformly upheld as against general objections that they are unconstitutional,⁵⁰ and as against

ality beyond a reasonable doubt. *Victor Chemical Works v. Industrial Board of Illinois*, 274 Ill. 11, 113 N. E. 173. See § 6, ante.

While if, under the Maryland Act, creating a miners' and operator's co-operative relief fund, the employé should refuse compensation and bring suit after the employer had gone out of business, he might be required to pay the judgment in addition to his contributions to the fund (there being no provision for refund of premiums), such a possible contingency is not to be allowed to strike down an act supported by strong considerations of public justice, and which is manifestly promotive of the general interest of the state. *American Coal Co. v. Allegany County Com'rs*, 128 Md. 564, 98 Atl. 143.

⁵⁰ The Compensation Act of the particular state was held constitutional in each of the following cases: *Shade v. Ash Grove Lime & Portland Cement Co.*, 93 Kan. 257, 144 Pac. 249; *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 649; *State ex rel. Nelson-Spellissey Co. v. Dist. Ct.*, 128 Minn. 221, 150 N. W. 623; *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620; *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71; *State v. District Court of Meeker County*, 128 Minn. 221, 150 N. W. 623; *Sayles v. Foley (R. I.)* 96 Atl. 340; *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, 3 N. C. C. A. 599; *State v. City of Seattle*, 73 Wash. 396, 132 Pac. 45; *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645; *Delbeikis v. Linkbelt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241; *Devine v. Delano*, 272 Ill. 166, 111 N. E. 742; *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120; *Crooks v. Tazewell Coal Co.*, 263 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C, 304; *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 999; *Przyopenski v. Citizens' Coal Co.*, 270 Ill. 275, 110 N. E. 336; *Richardson v. Sears, Roebuck & Co.*, 271 Ill. 325, 111 N. E. 85; *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 105 N. E. 289 (Laws 1911, p. 314). The Workmen's Compensation Act is not violative of Const. art. 4, § 13, providing that every bill and all amendments thereto shall be printed before the vote is taken on its final passage. *Lauruska v. Empire Mfg. Co.*, 271 Ill. 304, 111 N. E. 82. The Workmen's Compensation Act (Laws 1913, c. 816 [Consol. Laws, c. 67], as re-enacted and amended by Laws 1914, c. 41, and by Laws 1914, c. 316, and Laws 1915, c. 167) is constitutional. *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620; *Wagner v. American Bridge Co. (Sup.)* 158 N. Y. Supp. 1043. Act approved June 15, 1911 (102 Ohio Laws, p. 524), is a valid exercise of the legislative power, not repugnant to the federal or state Constitutions. *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 1 N. C. C. A. 30, 39 L. R. A. (N. S.)

the objections that they are class legislation,⁵¹ and make unreasonable classifications,⁵² deny equal protection⁵³ and due process of

694; *Jeffrey Mfg. Co. v. Blagg*, 90 Ohio St. 376, 108 N. E. 465. The Washington Act is constitutional. *Stoll v. Pacific Coast S. S. Co.* (D. C.) 205 Fed. 169. The provisions of the Iowa Act (Acts 35th Gen. Assem. c. 147, §§ 42-51) relating to insurance to cover liabilities for damages are constitutional. That it may have objectionable features does not render it invalid. Objections to it from the standpoint of propriety and policy were for the legislature. *Hawkins v. Bleakley* (D. C.) 220 Fed. 378.

⁵¹ *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037. Laws 1911, c. 74, does not violate Const. art. 1, § 12, prohibiting class legislation. *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. Laws 1915, c. 96, is not open to the objection that it constitutes class legislation. *Lewis and Clark County v. Indus. Acct. Bd.* (Mont.) 155 Pac. 268.

⁵² Taking away the defense that the injury is due to the negligence of a fellow servant does not make the Act objectionable as illegal classification, or in any way violative of constitutional rights. *Railway v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Railway v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463; *Watson v. Railway* (C. C.) 169 Fed. 943; *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037. The classification of employments adopted is not unreasonable. *State v. Griffin*, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177, 76 Am. St. Rep. 130; *Wheeler v. Contoowok Mills Corporation*, 77 N. H. 551, 94 Atl. 265.

⁵³ (Const. U. S. Amend. 14, § 1) *Sayles v. Foley* (R. I.) 96 Atl. 340; *Memphis Cotton Oil Co. v. Tolbert* (Tex. Civ. App.) 171 S. W. 309; *Consumers' Lignite Co. v. Grant* (Tex. Civ. App.) 181 S. W. 202; *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398; *Shade v. Ash Grove Lime & Portland Cement Co.*, 93 Kan. 257, 144 Pac. 249. In *re Clausen*, 65 Wash. 156, 117 Pac. 1102, 37 L. R. A. (N. S.) 466; *Northern Pac. Ry. Co. v. Meese*, 36 Sup. Ct. 223, 239 U. S. 614, 60 L. Ed. 467; *Wheeler v. Contoowok Mills Corporation*, 77 N. H. 551, 94 Atl. 265. (Industrial Insurance Law, Laws 1911, c. 74) *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645; *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. The classification of certain specified occupations as dangerous was not fanciful or arbitrary, and hence does not violate the Constitution. (Laws 1910, c. 674, art. 14a) *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156. The classification of employers as municipal and otherwise and giving to private employers the right to elect whether to come under the act, while imposing it on municipal employers, does not invalidate the act. (Workmen's Compensation Act, Pub. Acts, Ex. Sess. 1912, No. 10, as amended by Pub. Acts 1913, No.

law,⁵⁴ impair the obligation of existing contracts, though applying to such contracts,⁵⁵ and interfere with the right to contract,⁵⁶ the

50) *Wood v. City of Detroit* (Mich.) 155 N. W. 592, L. R. A. 1916C, 388. The Act is not unconstitutional because it excludes from its operation casual employes and employes engaged in farm, dairy, agricultural, viticultural, or horticultural labor, in stock or poultry raising, or in household domestic service, on the theory that no exceptions are permissible under article 20, § 21, or that such exceptions make the law vulnerable as special legislation. *Western Indemnity Co. v. Pillsbury*, 2 Cal. I. A. C. Dec. 454, 170 Cal. 686, 151 Pac. 398.

The classification of the Maryland Act providing relief for injured employes and their dependents in the counties of Allegany and Garrett is based on a natural, reasonable, and essential difference in risk between the workmen included and those of other industries, and treats all alike within the classes established. It is therefore not in violation of the Fourteenth Amendment to the United States Constitution, commonly known as the equal protection clause. *American Coal Co. v. Allegany County Com'rs*, 128 Md. 564, 98 Atl. 143.

⁵⁴ *Sayles v. Foley* (R. I.) 96 Atl. 340; *Shade v. Ash Grove Lime & Portland Cement Co.*, 93 Kan. 257, 144 Pac. 249; *McQueeney v. Sutphen & Hyer*, 167 App. Div. 528, 153 N. Y. Supp. 554; *Evanhoff v. State Industrial Accident Commission*, 78 Or. 503, 154 Pac. 106. (Wk. Comp. Act, P. L. 1911, p. 136, § 2) *Sexton v. Newark District Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 451; *Memphis Cotton Oil Co. v. Tolbert* (Tex. Civ. App.) 171 S. W. 309; *Consumers'*

⁵⁵ *State v. City of Seattle*, 73 Wash. 396, 132 Pac. 45. (Wk. Comp. Act, P. L. 1911, p. 134) *Troth v. Millville Bottle Works*, 86 N. J. Law, 558, 91 Atl. 1031; *Sexton v. Newark District Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 451. That the statute applies to relations existing at the time of its passage does not render it unconstitutional as impairing the obligations of existing contracts. *State ex rel. Nelson-Spelliscy Co. v. District Court of Meeker County*, 128 Minn. 221, 150 N. W. 623. All contracts are subject to the police power. (Laws 1911, c. 74) *State v. City of Seattle*, 73 Wash. 396, 132 Pac. 45; *In re McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328; *Railway v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911; *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 603, 39 L. R. A. (N. S.) 694.

The provision of the supplement to the New Jersey Act which declares it shall be conclusively presumed, in absence of written notice by the employer or employe, that all contracts of employment made prior to its passage have been modified by mutual consent so that the measure of the employer's liability for accident shall be in accordance with the Compensation Act, is not unconstitutional as impairing the obligations of the employer under existing contracts. (P. L. N. J. 1911, p. 763; P. L. 1911, p. 136, § 2) *Troth v. Millville Bottle Works* (N. J.) 98 Atl. 435, affirming 86 N. J. Law, 558, 91 Atl. 1031.

⁵⁶ See note 56 on following page.

right to jury trial,⁵⁷ and vested rights by abolishing existing statutory and common-law remedies,⁵⁸ and that they abridge privileges

Lignite Co. v. Grant (Tex. Civ. App.) 181 S. W. 202; *Hunter v. Colfax Consol. Coal Co.* (Iowa) 157 N. W. 145; *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645. (Washington Act) *Stoll v. Pacific Coast S. S. Co.* (D. C.) 205 Fed. 109. A law which disturbs no vested right of property, which is not retroactive in its operations upon the conduct of persons, but which, looking to the future, merely changes the existing rules governing the liability of masters for injuries caused by accident occurring to their servants while in the service, does not come within the scope of the Fourteenth Amendment of the Constitution of the United States, but is simply an exercise by the state of its governmental power to pass laws regulating the ordinary private rights of person and property. (Boynton Act, St. 1913, p. 279) *Western Indemnity Co. v. Pillsbury*, 2 Cal. I. A. C. Dec. 454, 170 Cal. 686, 151 Pac. 398. That the Washington Act authorizes compensation for injuries due to the act of a third person does not make it violative of the due process of law provision of the Constitution. *Stertz v. Industrial Insurance Commission of Washington* (Wash.) 158 Pac. 256. The Washington Act is not invalid as denying to the injured workman the due process of law, in providing for the determination of the right to compensation without jury trial, since the due process of law in the states is regulated by the law of the state. (U. S. Const. Amend. 14) *Raymond v. Chicago, M. & St. P. Ry. Co.* (C. C. A.) 233 Fed. 239.

⁵⁶ *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037; *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. A provision that an employé of an accepting employer shall waive his common-law right of action unless he gives notice does not render the Act void as destroying the freedom of contract. (Pub. Laws 1911-12, c. 831, art. 1, § 6) *Sayles v. Foley* (R. I.) 96 Atl. 340. That the law makes payments not assignable, or subject to assignment or garnishment, does not render it unconstitutional as limiting the right to contract. *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49. "Liberty" means absence of arbitrary restraint, and not immunity from reasonable regulations imposed in the interests of the community. (Wk. Comp. Act, Laws 1911, c. 74) *State v. Clausen*, supra.

⁵⁷ *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645; *Sayles v. Foley* (R. I.) 96 Atl. 340; *Evanhoff v. State Industrial Accident Commission*, 78 Or. 503, 154 Pac. 106; *Shade v. Ash Grove Lime & Portland Cement Co.*, 93 Kan. 257, 144 Pac. 249; *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037; *Sexton v. Newark District Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 451. The Seventh Amendment to the United States Constitution does not forbid the state to abolish or deny the right of trial by jury, and the Washington Work-

⁵⁸ See note 58 on following page.

and immunities.⁵⁹ They have been likewise upheld over objections that they impose a property tax which is not equal, uniform,⁶⁰ and

men's Compensation Act is not invalid because it provides no jury trial in compensation proceedings. *Raymond v. Chicago, M. & St. P. Ry. Co.* (C. C. A.) 233 Fed. 239. "The common-law system of making awards for personal injuries has no such inherent merit as to make a change desirable. While courts have often said that the question of the amount of compensation to be awarded for a personal injury is one peculiarly within the province of the jury to determine, the remark has been induced rather because no better method for solving the problem is afforded by that system, than because of the belief that no better method could be devised." *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. In *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037, the court (opinion by Judge Salinger) says: "It is urged that trial by jury is denied of all issues except the amount of damages, and conceded that as to this latter the defendant waived trial by jury. It is urged that such trial is denied without a repeal of Code, § 3650, that issues of fact in an ordinary action must be tried by jury unless the same is waived. We hold on this appeal that the statute did not deprive the appellant of the right to a trial by jury in cases where, as here, he rejects the compensation statute, and that the denial is an error in interpretation on rather than obedience to legislative action. Without reference to the constitutional aspects of denying jury trial, the statute cannot be unconstitutional for denying trial by jury if it does not deny such trial. It is true, the statute accomplishes giving the jury less to do than formerly, and changes the character of its work. It can no

⁵⁸ There is no vested right in any remedy for a tort yet to happen which the Constitution protects. Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies. Common and statute laws only remain in force until altered or repealed. (Const. Schedule, § 1) *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49. The state may by statute modify its common-law rules of liability in their application, so long as the modification does not amount to a regulation of commerce or an interference with some paramount federal law. *Lindstrom v. Mutual S. S. Co.* (Minn.) 156 N. W. 669. By an amendment to the Constitution of California, it was intended to establish the authority of the Legislature to pass laws making the employer and employé subject to a system of rights and liabilities different from those prevailing at common law. (Const. art. 20, § 21) *Western Metal Supply Co. v. Pillsbury* (Cal.) 156 Pac. 491.

⁵⁹ *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037; *Clausen's Case*, 65 Wash. 156, 117 Pac. 1102, 37 L. R. A. (N. S.) 466.

⁶⁰ (Const. art. 7, §§ 1, 2) *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

for a public purpose,⁶¹ appropriate public money for private purposes,⁶² delegate legislative⁶³ or judicial power,⁶⁴ violate the guar-

longer pass upon whether the plaintiff should not be wholly defeated because guilty of some degree of negligence contributing to the injury complained of, and can defeat the plaintiff only if the contribution is by self-infliction, or by negligence due to intoxication. Other contributions will get to it only on a plea of mitigation. The jury will no longer consider whether the plaintiff should be defeated because the evidence shows he assumed the risk of being injured as he was—will not have the question whether there must be a failure to recover because the injury was due to the negligence of a fellow servant. It will not have the question whether the servant has proven that his injury is due to the negligence of the master, and will begin its inquiries by assuming the master was thus negligent, and next consider whether the employer had proven, notwithstanding this presumption, that he is wholly free from fault. It is self-evident none of this denies trial by jury, but merely changes the rules under which such trial shall proceed." "While the right of trial by jury is guaranteed under our Constitution, it is a right that any one may waive if he shall see fit, and, by electing to come within the provisions of the law, an employer or employé elects, in the first instance, to submit any dispute that may arise to a board of arbitrators without the intervention of any court or jury. It will be observed that the act does not make the finding and award of the board of arbitrators selected under its provisions final. Either party feeling aggrieved at the award has the right to appeal to a court of record, when the matter is heard *de novo*, and where either party has the right to demand a trial by jury. It will thus be seen that, even though the employé should elect to come within the provisions of the act, he is not wholly deprived of a trial by jury." *Deibeikis v. Ling-Belt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241. In view of the fact that an appeal is provided, on which a jury trial may be had, the Compensation Act is not invalid as taking away the right to a jury trial, in that it provides for the determination of claims by a board. *Middleton v. Texas Power & Light Co.* (Tex.) 185 S. W. 556.

⁶¹ *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037.

⁶² *Lewis and Clark County v. Indus. Acc. Bd.* (Mont.) 155 Pac. 268. Under the Michigan Act, there is no attempt to appropriate public money for private purposes. The expenditure of public funds to defray the expense of administering this law rests upon considerations of public policy, just as the state provides for protection of those engaged in hazardous employment, and supports a labor department for the general good, but primarily concerned with the condition of industrial workers. There can be no question that the Legislature may determine that an act of this nature concerning a portion of the

⁶³ *Sayles v. Foley* (R. I.) 96 Atl. 340.

⁶⁴ See note 64 on following page.

anty to every state of a republican form of government,⁶⁵ and of protection against unreasonable searches and seizures,⁶⁶ and take

body politic is necessary or conducive to promotion of the general welfare of the people of the state and make constitutional appropriation of public funds raised by taxation to carry the law into effect. *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49, distinguishing *Corn Ass'n v. Aud. Gen.*, 150 Mich. 69, 113 N. W. 582, holding that appropriating funds for the use of a voluntary, unincorporated society, the membership of which is limited to residents of the state actively interested in the improvement of corn, is an attempt to devote public funds to a private purpose in violation of the Constitution. On the same principle it was held a bounty on the manufacture of beet sugar could not be given by the state (*Mich. Sugar Co. v. Aud. Gen.*, 124 Mich. 677, 83 N. W. 625, 56 L. R. A. 329, 83 Am. St. Rep. 354), and townships could not raise money by taxation to aid a private corporation to build a railroad (*People ex rel. Detroit & H. R. Co. v. Township Board of Salem*, 20 Mich. 452, 4 Am. Rep. 490). The fatal objection to the laws under consideration in those cases was that they attempted to authorize a public tax for a mere private purpose, and whatever may have been said in those cases as to discrimination between different classes of occupations was directed to that proposition.

⁶⁴ *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694. (*Workmen's Compensation Act*, §§ 25-35) *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037; *Evanhoff v. State Industrial Accident Commission*, 78 Or. 503, 154 Pac. 106. "The contention that the Industrial Accident Board and arbitration committees provided for in said Act are unconstitutional bodies, because the powers conferred and duties imposed upon them combine executive, administrative, and judicial functions, while the Constitution vests the judicial power in the courts, forbidding any one of the three departments of government exercising the powers belonging to another, is not tenable. This board was created purely as an administrative agency to carry the provisions of the Act into effect. The Act being elective, it is operative only as to those who choose to come within its provisions, and in that particular it is a board of arbitration by agreement; but, aside from that consideration, it is but an administrative body, vested, it is true, with various and important duties and powers, some of them quasi judicial in their nature, but without that final authority to decide and render enforceable judgment, which constitutes the judicial power. Its determinations and awards are not enforceable by execution or other process until a binding judgment is entered thereon in a regularly constituted court. Section 13, pt. 3, of said Act. 'The judicial power, even when used in its widest and least accurate sense, involves the

⁶⁵ (*Indus. Ins. Law, Laws 1911, c. 74*) *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645.

⁶⁶ (*Indus. Ins. Law, Laws 1911, c. 74*) *Id.*

away the right to resort to courts to settle controversies.⁶⁷ Attacks made on the Compensation Acts of Michigan, New Jersey,

power to "hear and determine" the matters to be disposed of; and this can only be done by some order or judgment which needs no additional sanction to entitle it to be enforced. No action which is merely preparatory to an order or judgment to be rendered by some different body can be properly termed judicial.' Underwood v. McDuffee, 15 Mich. 361, 93 Am. Dec. 194. An examination of the many duties and responsibilities imposed upon the board by the act of a purely administrative nature makes plain that those which may be termed quasi judicial are but incidental, and only exercised when appeal is taken from an arbitration." Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 N. W. 49. In Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771, though constitutional questions were not there involved, this court, in considering the powers and duties of the Industrial Accident Board, held that, as a creature of statute, it is primarily an administrative body created by the act to carry its provisions into effect, having for the efficient administration of the law amongst its many duties and responsibilities quasi judicial powers in certain particulars. The constitutional objection that judicial power is lodged in an administrative board under Workmen's Compensation Acts has been carefully considered, and squarely decided against the contention in *State ex rel. v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694; *Cunningham v. N. W. Imp. Co.*, 44 Mont. 180, 119 Pac. 554; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; *Hawkins v. Bleakley* (D. C.) 220 Fed. 378. In *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037, the court (opinion by Judge Salinger) says: "Contracts by which the parties undertake to deprive themselves in toto of the right to resort to the courts to settle controversies between them, in which are stipulated away all the rights of each or either to resort to the tribunals created by law, have been universally condemned. See *Wood v. Humphrey*, 114 Mass. 185; *Pearl v. Harris*, 121 Mass. 390; *Barron's Case*, 121 U. S. 186, 7 Sup. Ct. 931, 935, 30 L. Ed. 915. Appellant contends that the act violates this rule. If we assume the statute would be void if it operated to oust the courts of all jurisdiction to try controversies between employer and employé, it is an immaterial concession in the cases wherein the Act is rejected; for, when rejected, the courts are not ousted of jurisdiction in toto, and, as we view it, not deprived of it at all. Where the Act is rejected, the full dispute between the parties is still submitted by ordinary proceedings, and tried in the usual way. True, some mere rules of procedure are changed, some defenses are eliminated, and there is some change in burden of proof. Even if it be assumed that these changes are unauthorized, the objection is not sustained that on

⁶⁷ (Wk. Comp. Act, §§ 10, 15, 25-35) *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037.

Oregon, Texas, Montana, Kansas, and Washington on the ground that their titles insufficiently expressed their subject-matter, or

rejection of the act the courts no longer have jurisdiction to try suits for the injury of an employé. A somewhat more difficult question arises when the provisions of the act are accepted. In that case, if the parties cannot come to an agreement, compensation, fixed by statute schedule, is awarded by arbitration provided for in the act. In a sense, then, the acceptance of the statute operates to take from the courts so much of the controversy as is determined by the applying of the statute schedules through the agency of the statute arbitrators. Before we reach the question whether, if this constitute a total ouster of the jurisdiction of the courts, it would invalidate the act, we, of course, have to determine whether such total ouster is so effected. We are forced to deal with this question as one of first impression, because no decision that sustains the Compensation Act of other states is applicable. The Washington Act and that of Massachusetts reserve recourse to the courts and full judicial review. In *Sabre's Case*, 86 Vt. 347, 85 Atl. 695, Ann. Cas. 1915C, 1269, a delegation is sustained because in the end the matter may get to the Supreme Court and have full review. *Borgnis Case*, 147 Wis. 327, 133 N. W. 209, 210, 37 L. R. A. (N. S.) 489, sustains the Wisconsin Act with a holding that there is a review if the act be without power or fraudulent, that if the board act without or in excess of its jurisdiction there may be action in court to set aside the award, and that this may also be done if its findings of fact are not supported by the evidence. Our act has no such reservations, in terms, and therefore these decisions afford us no light. It does not constitute an agreement for complete ouster of the jurisdiction of the courts to provide by contract for the arbitration of special matters, such as agreement concerning the amount of loss due under an insurance policy, an agreement how some facts shall be fixed and leaving ultimate liability or nonliability to be settled by the courts. Certain facts may be fixed by a person selected by contract for that purpose, so long as the ultimate question at issue may still be litigated in the courts. *Supreme Council v. Frosinger*, 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. Rep. 196; *Whitney v. Accident Ass'n*, 52 Minn. 378, 54 N. W. 184; *Insurance Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365; *Stephenson v. Insurance Co.*, 54 Me. 55; *Mentz v. Ins. Co.*, 79 Pa. 478, 21 Am. Rep. 80; *Reed v. Ins. Co.*, 138 Mass. 572; *Fox v. Accident Ass'n*, 96 Wis. 390, 394, 395, 71 N. W. 363. The following cases also throw some light on the question: *Guaranty Co. v. Railroad Co.*, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116; *Gitting's Case*, 2 Ohio St. 21; *Conner's Case*, 1 Ohio St. 166; *Kill v. Hollister*, 1 Wilson, 129." The Compensation Act is not invalid as delegating judicial authority to a board. *Middleton v. Texas Power & Light Co. (Tex.)* 185 S. W. 556. The judicial power conferred on the Commission by the California Act does not make it invalid as violative of Const. art. 6, § 1, in view of the authority conferred on the Legislature by article 20, § 21, authorizing the enactment of

that they contained more than one subject, have been unsuccessful.⁶⁸ An Act will not be declared void in its entirety because

compensation laws. *Western Metal Supply Co. v. Pillsbury* (Cal.) 156 Pac. 491.

⁶⁸ *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49; *Adams v. Acme White Lead & Color Wks., Op.* Mich. Indus. Acc. Bd. 31; *Consumers' Lignite Co. v. Grant* (Tex. Civ. App.) 181 S. W. 202; *Lewis and Clark County v. Indus. Acc. Bd. (Mont.)* 155 Pac. 268; *Postex Cotton Mill Co. v. McCamy* (Tex. Civ. App.) 184 S. W. 570; *Memphis Cotton Oil Co. v. Tolbert* (Tex. Civ. App.) 171 S. W. 309, 7 N. C. C. A. 547; *Huyett v. Pennsylvania R. Co.*, 86 N. J. Law, 683, 92 Atl. 58; *Allen v. Millville*, 87 N. J. Law, 356, 95 Atl. 130. The title of the Compensation Act expresses the single general subject of the Act. *Middleton v. Tex. Power & Light Co. (Tex.)* 185 S. W. 556. The title of the original Kansas Act, repeated in the title of the amendatory act, "An act to provide compensation for workmen injured in certain hazardous industries," is general and comprehensive, not limited or restrictive, and fairly includes every provision of the Act. (Laws 1911, c. 218; Laws 1913, c. 216) *Shade v. Ash Grove Lime & Portland Cement Co.*, 93 Kan. 257, 144 Pac. 249; *Lynch v. Chase*, 55 Kan. 367, 40 Pac. 666; *Rathbone v. Hopper*, 57 Kan. 240, 45 Pac. 610, 34 L. R. A. 674; *Harrod v. Latham*, 77 Kan. 466, 95 Pac. 11; *Payne v. Barlow*, 84 Kan. 132, 113 Pac. 432; *City of Winfield v. Bell*, 89 Kan. 96, 130 Pac. 680. The Act does not violate Const. art. 9, § 7, providing: "Laws making appropriations for the salaries of public officers and other current expenses of the state shall contain provisions upon no other subject"—the evident purpose of this provision being to prevent matters foreign to the general purpose of appropriation bills from being attached to them as riders, thereby taking advantage of the necessity of the state for money to defray its current expenses and to pay its officers to pass measures that perhaps would otherwise have been defeated, and the Compensation Act not being primarily an act to appropriate money to pay salaries or other current expenses, nor an appropriation bill in the sense that bills providing for general current expenses or salaries of the constitutional officers of the state are such. *Evanhoff v. State Industrial Accident Commission*, 78 Or. 503, 154 Pac. 106. "The first clause of the title indicates that it is an act relating to the compensation of injured workmen in any industry of the state, and the employment of the language further on in the title 'abolishing the doctrine of negligence as a recovery of damages against employers,' is indicative of the evil the Act seeks to overcome rather than the new remedy created. The title is plainly broad enough to indicate that the Act is intended to furnish the only compensation to be allowed workmen subsequent to its becoming law, and as such clearly includes any and all rights of action theretofore existing in which such compensation might have been obtained." (Wk. Comp. Act, Laws 1911, c. 74) *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, 4 N. C. C. A. 786, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154.

of void provisions thereof, where it contains separable valid provisions.⁶⁹

The Miners' Compensation Act enacted in Montana in 1909, was held unconstitutional, as depriving the employer who paid compensation under the Act of the equal protection of the laws, in that it did not protect him from being sued and compelled to pay damages in addition.⁷⁰ A new Act, general in its operation, has since been enacted in that state and upheld by its courts.⁷¹

The Texas Act is not invalid as creating a private corporation otherwise than by general law, the designation of the insurance association as a corporation being a mere matter of convenience, not making it a private corporation, and the association being an agency for the proper administration of the law.⁷²

The constitutional amendment of California, which authorizes the Legislature to create and enforce a liability on the part of employers to compensate their employes for any injury occurring in the course of their employment, authorized the Legislature to provide that medical and surgical treatment and support for those dependent on the employe should be furnished by the employer.⁷³

The effect of the elective or compulsory nature of an Act on its validity is reserved for consideration in Chapter II.

⁶⁹ *Consumers' Lignite Co. v. Grant* (Tex. Civ. App.) 181 S. W. 202. If section 22 of the Kentucky Act of 1916 (Laws 1916, c. 33) were invalid, in that it discriminates against aliens and their dependents, and also against American labor in favor of foreign labor, this would not make the Act unconstitutional as a whole, since this section is not so related to the other sections that it might not be eliminated and leave a complete act in such form as would accomplish the chief purpose of the legislation. *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648.

⁷⁰ *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554.

⁷¹ *Lewis and Clark County v. Indus. Acc. Com.* (Mont.) 155 Pac. 268.

⁷² *Middleton v. Texas Power & Light Co.* (Tex.) 185 S. W. 556.

⁷³ (Const. art. 20, § 21) *Western Metal Supply Co. v. Pillsbury* (Cal.) 156 Pac. 491.

§ 15. — New York—Ives Case

In the case of *Ives v. South Buffalo Ry. Co.*, which has been frequently cited and discussed, not only by the courts of New York, but by the courts of the various states which have adopted Compensation Acts, the earlier Workmen's Compensation Act of New York was held unconstitutional on the ground that it made the employer liable in a suit for damages, though without fault and without regard to the fault of the injured employé short of willful and serious misconduct.⁷⁴ This Act, though based on the proposition that the risk of accidental injuries in a hazardous employment should be borne by the business and that the loss should not fall on the injured employé and his dependents, who were unable to bear it or to protect themselves against it, made no attempt to distribute the burden, but subjected the employer to an action for damages. The present Act of that state, adopted pursuant to an amendment to the state Constitution,⁷⁵ distributes the burden equitably over the industries affected. It allows compensation only for the loss of earning power, but by the creation of a state insurance fund, or by the substitute methods provided, it insures that the injured employé or his dependents will promptly receive a certain sum undiminished by the expenses of litigation. It has been held to be quite dissimilar to the former Act and to be constitutional.⁷⁶

⁷⁴ *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156.

⁷⁵ Const. N. Y. art. 1, § 19, adopted November 4, 1913, was adopted in accordance with a suggestion of the court in the *Ives* Case, and, so far as the due process of law or any other provision of the state Constitution is concerned, amply sustains the Workmen's Compensation Law. *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276.

⁷⁶ *Id.*, distinguishing *Ives v. South Buffalo Ry. Co.*, *supra*.

§ 16. — Kentucky

The Kentucky Workmen's Compensation Act of March 21, 1914, which was compulsory on both employer and employé, was held to be in conflict with a provision of the Constitution of that state which prohibits the Legislature from limiting the amount recoverable for injuries or death.⁷⁷ In so holding, the court, in an opinion by Special Judge Dorsey, considered the decisions and laws of other states, and said: "It seems clear to us that such parts of this act as take from the personal representative or estate of a deceased employé, who left no dependents surviving him, any part of the compensation due such representative or his estate, and directs its payment into this fund for the benefit of other people, is a violation of the * * * Constitution. The Legislature has no right to limit the damages recovered, for the death of an employé negligently killed, to his dependents. * * * Nor do we think the Legislature has the right to take what is due the estate of one man, and give it to another. While the Legislature may say how the recovery may go and to whom it shall belong, it cannot say this recovery may be had from the employer, then in the next breath give it to this fund. It then necessarily follows that such parts of this Act under consideration as give to this board of compensation without the voluntary contract of the employé, the right to recover from the employer for the death of the employé leaving no dependents, and such other parts of the Act as coerce the employé to consent or to make a contract that such compensation shall be paid into this compensation fund, are unauthorized and void. There may never have been a word or a syllable between the employer and the employé in regard to a contract for employment to labor, yet the Act provides that such contract shall be conclusively presumed to have been made between

⁷⁷ Kentucky State Journal Co. v. Workmen's Compensation Board, 161 Ky. 562, 170 S. W. 1166, L. R. A. 1916A, 389, Ann. Cas. 1916B, 1273, affirmed 162 Ky. 387, 172 S. W. 674, L. R. A. 1916A, 402.

the employer and employé, if the employé continues to work for the employer after the employer has posted notices, in some conspicuous places about his place of business, to the effect that he has paid his premiums into the fund and accepted the provisions of the Act. We cannot subscribe to the proposition that this is a voluntary contract, even on the part of the employer. We have been referred to the Workmen's Compensation Act passed by the Legislature of the state of Washington. This Washington Act was held by the court in the above cause not to be compulsory, although it took away from the employer the defenses of assumed risk, negligence of a coemployé, and contributory negligence. There being no constitutional restrictions, the Legislature of the state of Washington had the power to enact the statute above referred to, and it was upheld by the state Supreme Court. The Legislature of the state of Ohio adopted a similar Workmen's Compensation Act. But here the injured employé had the right to have a jury fix his compensation within the limits and under the rules prescribed by the act. The Wisconsin Supreme Court, in *Borgnis v. Falk Co.*, held that a provision of the Workmen's Compensation Act of that state which took away from the employer who refused to accept the provision of the Act the defenses of assumed risk and negligence of a coemployé was not compulsory.⁷⁸ The state of New York now has a Compensation Act similar to the one before us, but it was especially authorized by an amendment to the New York Constitution. It will be observed here that there was no constitutional provision in the Constitution of Washington, Ohio, Wisconsin, or New York similar to section 54 of the Kentucky Constitution, which denied to the Legislature of the state of Kentucky the 'power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.' The Workmen's Compensation Acts in all of the states above named, as well as in New Jersey, Massa-

⁷⁸ *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489.

chusetts, and California, differ from the Kentucky Act in that there is an appeal granted to the state courts, or a jury is permitted to fix the amount of compensation. This court is bound by the limitations contained in the Kentucky Constitution."⁷⁹ However, any employé coming within the Act may voluntarily agree to accept its provisions fixing and limiting his recovery. He may likewise voluntarily accept the provisions fixing the amount that shall be recovered in case of his death, and said sum shall be paid to his dependents or legal representatives. But the statute cannot direct that this sum shall in any event be paid into the compensation fund.⁸⁰ This Act, moreover, did not violate any provisions of the Constitution so far as it affected the employer,⁸¹ and deprived injured employés of the right to a jury trial;⁸² but it was held essential, in order to render it valid, that provision be made for appeal to a court of competent jurisdiction in all cases where compensation is denied or a less sum allowed than is claimed.⁸³

The recently adopted Kentucky Act of 1916 is not violative of the due process of law provision of the federal Constitution.⁸⁴ Nor does it violate a provision of the state Constitution relative to title and subject-matter of statutes, or a provision prohibiting common carriers from contracting for relief from common-law liability, or a provision prohibiting the establishment of courts not provided for by the Constitution.⁸⁵ It is not special legislation,

⁷⁹ *Kentucky State Journal Co. v. Workmen's Compensation Board*, 161 Ky. 562, 170 S. W. 1166, L. R. A. 1916A, 389, Ann. Cas. 1916B, 1273, affirmed in 162 Ky. 387, 172 S. W. 674, L. R. A. 1916A, 402.

⁸⁰ *Kentucky State Journal Co. v. Workmen's Compensation Board*, 162 Ky. 387, 172 S. W. 674, L. R. A. 1916A, 402, affirming 161 Ky. 562, 170 S. W. 1166, L. R. A. 1916A, 389, Ann. Cas. 1916B, 1273, on rehearing.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648.

⁸⁵ *Id.*

which legislation applies to particular places or persons as distinguished from classes of places or persons. Nor is it invalid because no jury trial is allowed, since the parties may consent to a trial without a jury and this is what parties accepting the Act agree to do. It is not open to the objection that it is class legislation. All that it proposes to do is to create a class out of described employers and employes and deal with this class apart from other classes of employers and employes. In making classifications like this, it is obviously impossible to draw the line of separation with such accuracy as to include all who might well be brought within the class or to include all who might be left without it. The objection to the Act of 1914 that the right of appeal to the courts by the complaining employé was so limited as to practically deny any appeal and make the judgment of the Compensation Board final was met in the Act of 1916 by an elaborate scheme by which the courts may review the final decisions of the compensation boards. That section 11 of the Act of 1916 makes radical changes in the law of parent and child does not make the Act unconstitutional.⁸⁶

§ 17. Classification

While no discrimination which is palpably arbitrary and unreasonable, and not based on some reason of public policy, will be sustained by the courts,⁸⁷ it does not necessarily render an Act un-

⁸⁶ *Id.*

⁸⁷ *Hunter v. Colfax Consol. Coal Co. (Iowa)* 154 N. W. 1037. A wholly arbitrary classification will not be sustained—such for instance, as rests wholly on the nature of the employer's business, when it should rest upon difference in the nature of the employment (*Cleveland v. Foland*, 174 Ind. 411, 91 N. E. 594, 92 N. E. 165; *Kinney's Case*, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. [N. S.] 711), or where the exaction of a peddler's license is differentiated on whether the peddler be or be not a veteran of the Civil War (*Garbroski's Case*, 111 Iowa, 496, 82 N. W. 959, 56 L. R. A. 570, 82 Am. St. Rep. 524), or singling out from the general law of the state only such masters and servants as are railroad employers and employes, and though others are in like situa-

constitutional that some inequality exists in the classification. Indeed, the very idea of classification is that of inequality.⁸⁸ It is therefore only required that the classification be as reasonable and just as practicable as conditions will permit.⁸⁹ The question as to what differences or peculiarities of conditions or business authorize the application of a different rule to those affected by a particular condition or engaged in a particular business than is applied to the remainder of the community is for the Legislature,

tion (*Railway v. Westby*, 178 Fed. 619, 102 C. C. A. 65, 47 L. R. A. [N. S.] 97, to which, however, *Sonsmith's Case*, 173 Mich. 57, 138 N. W. 356, 360, runs counter).

⁸⁸ *Hunter v. Colfax Consol. Coal Co. (Iowa)* 154 N. W. 1037. It is not controlling that some inequality may be occasioned. *Melton's Case*, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84; *Bank v. Commonwealth*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236; *Railway v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1163, 32 L. Ed. 107; *Railway v. Matthews*, 174 U. S. 106, 19 Sup. Ct. 609, 43 L. Ed. 909. No rigid equality is required, and wide latitude by the courts is permitted in the discretion and wisdom of the Legislature. *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578; *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232, 237, 10 Sup. Ct. 533, 33 L. Ed. 892; *Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Sonsmith's Case*, 173 Mich. 57, 138 N. W. 356, 360; *Dutton's Case*, 67 Fla. 370, 65 South. 282. It suffices if the differentiation "is practicable" (*Insurance Co. v. Daggs*, *supra*), and if the classification and discrimination is "judicious" (*State v. Powers*, 38 Ohio St. 63). While not without limit, there is inhibited only "clear and hostile discrimination against particular persons and classes, especially such as are of unusual character and known to the practice of our government." *Bell's Gap's Case*, *supra*. The classification adopted by the Act, not being arbitrary or unreasonable, does not invalidate the Act. *Middleton v. Texas Power & Light Co. (Tex.)* 185 S. W. 556. The failure of the Boynton Act to limit compensation to specially enumerated industries declared to be extrahazardous does not make it unconstitutional. *Western Indemnity Co. v. Pillsbury*, 2 Cal. I. A. C. Dec. 454, 170 Cal. 686, 151 Pac. 398.

⁸⁹ *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648.

The power to classify is not taken away by the equal protection clause of the Constitution, and a wide scope of legislative discretion may be exerted in classifying, without conflicting with the constitutional prohibition. It is only classifications made without any reasonable basis, and therefore purely arbitrary, that are condemned. *American Coal Co. v. Allegany County Com'rs*, 128 Md. 564, 98 Atl. 143.

and its determination is binding unless arbitrary and without substantial basis.⁹⁰ A classification is not unreasonable because it

⁹⁰ *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49. This power of the Legislature is fully recognized in *Withey v. Bloem*, 163 Mich. 419, 128 N. W. 913, 35 L. R. A. (N. S.) 628; *Sonsmith v. Pere Marquette R. Co.*, 173 Mich. 73, 138 N. W. 347. Classifications of this nature, some of them identical with that under consideration, have been sustained in various states where Workmen's Compensation Acts and other laws affecting industrial workers were under consideration. *Mo. Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107. *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241; *Dirken v. Great Nor. Paper Co.*, 110 Me. 374, 86 Atl. 320, Ann. Cas. 1914D, 396; *Opinion of Justices*, 209 Mass. 607, 96 N. E. 308; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. Ed. 364. "It is said that the act violates the provisions relating to class legislation, because it diverts the contributions exacted from the numerous industries to the relief of a particular class of injured and disabled workmen, instead of applying it to the use of the state at large. But to divert the money collected in this manner to a special use is one of the prerogatives of legislation. The right of the state to regulate any form of industry arises from the fact that its pursuit affects injuriously the health, safety, morals, or welfare of the persons engaged in it, or is inimical in some form to some portion of the individuals of the community. It is not necessary that it always affect injuriously the public at large. On the contrary, it may be regulated if it affects injuriously those engaged in it, or those brought in direct contact with it, even though its pursuit may benefit generally the people of the state at large. Nor is there any particular form which the legislation must take. The conduct of the business may be prohibited entirely in a particular place or in a particular manner; its pursuit may be restricted to certain hours of the day; it may be permitted to be conducted only in case protective devices are used; or it may be permitted in certain forms, and a sum of money exacted from the individuals carrying it on for the purpose of recompensing those who suffer losses because thereof." *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. A legislative classification "must be based upon some reason of public policy growing out of the condition or business of the class to which the legislation is limited," but the Legislature may determine what differences or peculiarities, of conditions or of business, furnish a sufficient basis for applying a different rule to those engaged in such business, or those affected by such condition, than is applied to the remainder of the community, and may draw the line marking the boundary between one class and another, and between the several classes and the general public. When such questions have been determined by the Legislature, its judgment is binding on the courts, unless they can point out that the classification adopted is purely fanciful and arbitrary, and that no substantial or logical

excludes from the operation of the Act domestic servants, farm laborers, and the like, casual employés, railroads and railroad employés engaged in interstate commerce;⁹¹ nor is a classification

basis exists therefor. *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71, supported by *Cameron v. Chicago, M. & St. P. Ry. Co.*, 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 553; *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 33 L. R. A. 437, 60 Am. St. Rep. 450; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; *Joyce v. Great Northern Ry. Co.*, 100 Minn. 225, 110 N. W. 975, 8 L. R. A. (N. S.) 756; *State ex rel. v. Standard Oil Co.*, 111 Minn. 85, 126 N. W. 527; *State ex rel. Beek v. Wagner*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442, 77 Am. St. Rep. 681; *State ex rel. v. Westfall*, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. Rep. 571; *State ex rel. v. Brown*, 97 Minn. 402, 106 N. W. 477, 5 L. R. A. (N. S.) 327; *Hunter v. City of Tracy*, 104 Minn. 378, 116 N. W. 922; *Quong Wing v. Kirkendall*, 39 Mont. 64, 101 Pac. 250; *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 Pac. 554; *State v. Clausen*, 63 Wash. 535, 116 Pac. 7; *Id.*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. Legislation which applies to all persons within the designated class, but does not apply to persons outside such class, is well within the constitutional requirement, if there be reasonable grounds for making a distinction between those who fall within such class and those who do not. *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71; *Mobile, etc., Ry. Co. v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463; *Mondou v. N. Y., N. H. & H. Ry. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Merritt v. Knife Falls Boom Co.*, 34 Minn. 245, 25 N. W. 403; *Cameron v. Chicago, M. & St. P. Ry. Co.*, 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 553; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *State ex rel. v. Justus*, 85 Minn. 279, 88 N. W. 759, 56 L. R. A. 757, 89 Am. St. Rep. 550; *Pfaender v. C. & N. W. Ry. Co.*, 86 Minn. 218, 90 N. W. 393; *State ex rel. v. Standard Oil Co.*, 111 Minn. 85, 126 N. W. 527.

⁹¹ *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71; (*Boyn-ton Act*, §§ 13, 14) *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398; *Hunter v. Colfax Consol. Coal Co. (Iowa)* 154 N. W. 1037—the court saying: “As we view it, substantially such differentiations as are here challenged have been sustained. *Dirken's Case*, 110 Me. 374, 86 Atl. 320, Ann. Cas. 1914D, 396, sustains exclusion of those in domestic service and those engaged in agriculture pursuits; *Deibelkis' Case*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, the excepting those engaged in casual work and clerical and administrative employment in a branch of hazardous business, *Borgnis v. Falk*, 147 Wis. 327, 133 N. W. 210, 37 L. R. A. (N. S.) 489; *Coal Co. v. Ill.*, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872; *Soon Hing's Case*, 113 U.

unreasonable or objectionable as class legislation, or not affording equal protection, because it is based on the nature of the business or the number of employes,⁹² or places those who elect to come within the compensatory provisions of the Act in a different class than those who do not so elect,⁹³ or because the Act is mandatory

S. 703, 5 Sup. Ct. 731, 28 L. Ed. 1145; *Ives v. Railway*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156; *Jacobson's Case*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765." It may well be said in passing that such differences as do exist are sustained by the quite generally accepted doctrine that the freedom to contract is only in theory enjoyed by the employé as fully as by his employer, and that the police power may be invoked to sustain some differentiations in favor of the employé, on the theory that this is a method of protecting him for the public good against the actual inequality between him and his employer." *Hunter v. Colfax Consol. Coal Co. (Iowa)* 154 N. W. 1037.

⁹² *Shade v. Ash Grove Lime & Portland Cement Co.*, 93 Kan. 257, 144 Pac. 249. That the Ohio Act only applies where the employer hires five or more workmen or operatives regularly in the same business is not an unfair classification, since the risks of any regular employment are less and the opportunity for avoiding them better where there are only five workmen. (102 Ohio Laws, p. 524) *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694.

In *Mezansky v. Sissa*, 1 Conn. Comp. Dec. 430, it was held that the classification of employers into those employing more than five employes and those employing less than five is not an unreasonable classification.

⁹³ *Hunter v. Colfax Consol. Coal Co. (Iowa)* 154 N. W. 1037. The Legislature may place employers who become subject to part 2 of the Act in a different class than those who do not, and may also place employes who become subject thereto in a different class from those who do not. Abrogating the defenses of contributory negligence, assumption of risk, and the negligence of a coemployer, in actions against employers who do not accept such part 2, and permitting such defenses in actions against employers who do accept such part 2, does not render the act invalid as class legislation. Part 2 of the act substitutes the rights, remedies, and liabilities therein provided for those previously existing, and employers and employes subject thereto are limited to such rights and remedies; but such provisions impair no constitutional rights, as they apply only to those who have voluntarily chosen to become subject thereto, and such choice is no less optional because part 2 is presumed to have been accepted by all employers and employes who have not given notice to the contrary. "The Legislature is well within its prerogative when it places in one class employers who become subject to the pro-

as to cities and other municipalities and elective as to private corporations and persons.⁹⁴

§ 18. Abolition of defenses

The objection frequently made to elective Compensation Acts that, though they give the employer an option to either accept or reject the Act, they coerce him into acceptance by depriving him, in case he refuses to come under the Act, of the defenses of negligence of fellow servant, assumption of risk and contributory negligence, has been uniformly unsuccessful.⁹⁵ That an Act gives

visions of part 2 of the Act, and in another class employers who do not become subject to such provisions; also when it places in one class employés who become subject thereto. Employers who become subject to part 2 thereby tender to their employés, as a consideration for exemption from common-law liabilities, rights and privileges which did not previously exist, and offer to assume the burden of duties and obligations which were not previously imposed upon them. Employés who become subject to part 2 thereby tender to their employers immunity from common-law actions as a consideration for the rights and remedies provided for by part 2. There propositions become binding contracts in respect to all who accept them, and remain as continuing offers to those who have not accepted them. An employer or employé, who, at his option, may secure all the advantages possessed by any other, is hardly in a position to claim that he is discriminated against. The defenses of contributory negligence, assumption of risk, and negligence of a fellow servant were doubtless abrogated in the cases specified, and not abrogated in other cases, to induce an acceptance of the provisions of part 2 of the Act. But notwithstanding this purpose, the Act permits any employer to place himself in either class of employers at his election, and to change from one to the other if he so desires. Such legislation is not discriminatory nor inhibited by the Constitution. Furthermore, if its validity rested upon the distinction between the two classes of employers, and the distinction between the two classes of employés, we could not say that such distinction is so fanciful and arbitrary, or so wanting in substance, that the Legislature is prohibited from applying rules to one class which it does not apply to the other. This is in harmony with the holding of other courts." *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71.

⁹⁴ *Marshall v. City of Detroit*, Mich. Wk. Comp. Cases (1916) 57.

⁹⁵ *Consumers' Lignite Co. v. Grant* (Tex. Civ. App.) 181 S. W. 202; *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037; *Hovis v. Cudahy Refining*

the employé of a nonaccepting employer his action at common law not subject to defenses, and the common-law action of the nonaccepting employé is subject to defenses, does not make it unreasonable or arbitrary.⁹⁶ Statutory modifications of these defenses are clearly within the legislative power. They may be regulated or abolished.⁹⁷ This is in accordance with the view of the Supreme Court of the United States, which has sustained the validity of the

Co., 95 Kan. 505, 148 Pac. 626. The Iowa Act is valid as against this objection. *Hawkins v. Bleakley* (D. C.) 220 Fed. 378; *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245; *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. Law, 85, 86 Atl. 451, 3 N. C. C. A. 569; *De Francesco v. Piney Mining Co.* (W. Va.) 86 S. E. 777. Opinion of the Justices, 209 Mass. 607, 96 N. E. 308; *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694; *Ives v. Company*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517. *Wood v. City of Detroit* (Mich.) 155 N. W. 592, L. R. A. 1916C, 388. *Wheeler v. Contoocook Mills Corp.*, 77 N. H. 551, 94 Atl. 265. No fundamental rights are disturbed by the defenses eliminated or modified. *Hunter v. Colfax Consol. Co.* (Iowa) 154 N. W. 1037.

⁹⁶ *Sayles v. Foley* (R. I.) 96 Atl. 340; *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037; *De Francesco v. Piney Mining Co.* (W. Va.) 86 S. E. 777; *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241; *Hovis v. Cudahy Refining Co.*, 95 Kan. 505, 148 Pac. 626. These defenses may be entirely abolished, or abolished as to certain classes of employments only. *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71; *Vindicator, etc., Mining Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1108; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211; In re Opinion of Justices, 209 Mass. 607, 96 N. E. 308; *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156; *Sexton v. Newark District Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 451. That the Workmen's Compensation Act denies to employers who do not elect to pay premiums the common-law defenses of contributory negligence, assumption of risk, and negligence of fellow servant does not make it unconstitutional. *Watts v. Ohio Valley Electric Ry. Co.* (W. Va.) 88 S. E. 659.

⁹⁷ *Mathison v. Minn. St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71, 73; *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 603, 39 L. R. A. (N. S.) 694; *Cunningham v. N. W. Imp. Co.*, 44 Mont. 180, 119 Pac. 554; *Strom v. Postal Telegraph-Cable Co.*, 271 Ill. 544, 111 N. E. 555. That the common-law defenses became recognized as law by judicial decisions did not deprive the Legislature of the power to abrogate them. *Hawkins v. Bleakley* (D. C.) 220 Fed. 378.

federal Employers' Liability Act, which, in cases covered by it, abrogated the fellow servant rule and greatly restricted the operation of the defenses of contributory negligence and assumption of risk.⁹⁸ The power to abolish these defenses rests on the principle that no person has any property right or vested interest in a rule of the common law, and that the Legislature may change such rules at pleasure.⁹⁹ As said in an opinion of the Court of Appeals

⁹⁸ *Mondou v. N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. The *Jeffrey Case*, 235 U. S. 571, 35 Sup. Ct. 169, 59 L. Ed. 364, is authority for the proposition that abolishing such defenses as contributory negligence, assumed risk, and the negligence of fellow servants, only where the employer, being free to accept or reject, rejects, violates no constitutional rights. The statement of Mr. Justice Van Devanter relative to the right to abolish common-law defenses, though made in a case involving the Employers' Liability Act and with reference to that act, applies in principle to a Compensation Act. He says: "Of the objections to these changes, it is enough to observe: First. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will * * * of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of the statutes is to remedy defects in the common law as they are developed and to adapt it to the changes of time and circumstances. Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the basis of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employes and to advance the commerce in which they are engaged, we entertain no doubt but that in making these changes Congress acted within the limits of the discretion confided to it by the constitution." *Sexton v. Newark District Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 451, 3 N. C. C. A. 569.

⁹⁹ *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Mondou v. New York, N. H. & H. Ry. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; *Hunter v. Colfax Consol. Coal Co. (Iowa)* 154 N. W. 1037; *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694. The employer has no vested right in the common-law defenses, and hence the Legislature could take them away even without giving any election. *Greene v. Caldwell*, 170 Ky. 571, 183 S. W. 648. An employer has no vested right to the common-law defenses of

of New York, written by Miller, J.: "No one has a vested right under the Constitution to the maintenance of that common-law doctrine, which undoubtedly may be extended or curtailed by the Legislature. No one doubts that the doctrine of assumption of risk and the fellow servant doctrine, also developed by the courts under different conditions than those now prevailing, may be limited or entirely abrogated by the Legislature. Acts having that effect have been sustained by repeated decisions of this court. The power to limit or take away must also involve the power to extend. At the common law the servant was held to assume by implied contract the ordinary risks of the employment, including the risk of a fellow servant's negligence, and even of negligence imputable to the master if the danger was obvious, or with knowledge of it the servant voluntarily continued in the employment. It would not be a great extension of that doctrine for the Legislature to provide that the employé should assume the risk of all accidental injuries, and, if that can be done, it is certainly competent for the Legislature to provide by the creation of an insurance fund for a limited compensation to the employé for all accidental injuries, regardless of whether there was a cause of action for them at common law."¹

§ 19. Right to question validity

Since the Legislature has power to take away in their entirety the defenses of contributory negligence, assumption of risk, and the fellow servant rule, the employer cannot complain of supposed defects in the processes by which these defenses may be regained. Until he shows some desire to avail himself of these processes, he

assumed risk and contributory negligence, and hence the Compensation Act is not unconstitutional as taking away vested rights. *Middleton v. Texas Power & Light Co. (Tex.)* 185 S. W. 556.

¹ *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276.

cannot be heard to complain that they are unequal.² Nor can he be heard to urge a grievance of the employé,³ or attack the law on the ground that it is unconstitutional as to servants, unless it appear that such unconstitutionality will affect his liability or exemption from liability.⁴ Neither can an employé question the validity of an Act where he has elected to come under it.⁵ A statute will not be declared unconstitutional on a point not involved in the litigation.⁶ Therefore the question whether an Act is unconstitutional as depriving a workman's parents of their right of action for loss of his services while he is a minor will not be determined where the injured employé was not a minor at the time of his injury.⁷ Likewise, where an employer has not accepted the Act and has been given a jury trial, he cannot attack the Act on the ground that it is unconstitutional as denying a jury trial on the issue of damages to employers who have accepted it.⁸ The Michigan Act concerns only the workman's own right of action, and does not

² *Wheeler v. Contoocook Mills Corporation*, 77 N. H. 551, 94 Atl. 265.

³ *Hunter v. Colfax Consol. Coal Co. (Iowa)* 154 N. W. 1037; *Jeffrey v. Blagg*, 235 U. S. 571, 35 Sup. Ct. 169, 59 L. Ed. 364.

⁴ *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276. An allegation that the provision of paragraph 9 that "in the employment of minors section 2 shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor" is void will not be considered by the Supreme Court when it appears that decedent was 34 years old at the time of his death. *Sexton v. Newark District Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 451.

⁵ *Sayles v. Foley (R. I.)* 96 Atl. 340.

⁶ In *Sexton v. Newark District Telegraph Company*, 84 N. J. Law, 85, 86 Atl. 451, 3 N. C. C. A. 569, the court says: "The question cannot be broader than that raised by the facts. That the Act or the supplement may or may not deprive parties to supposititious cases of constitutional rights has no bearing upon the present case, if it appears that the parties before the court are not deprived of constitutional rights by the proceedings under review."

⁷ *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49.

⁸ (Laws 1911, c. 163) *Wheeler v. Contoocook Mills Corp.*, 77 N. H. 551, 94 Atl. 265.

affect the right of action of his parents for loss of his services and therefore cannot be said to be unconstitutional as depriving a parent of his right of action for injury to a minor child.⁹ It has been held that the constitutionality of the Industrial Insurance Act of Washington could be raised by a proceeding in mandamus to compel the state treasurer to issue a warrant to pay an obligation of the Industrial Insurance Department.¹⁰ Waiver of the right to question the constitutionality of an Act by electing to come within its terms is considered in a subsequent section.¹¹

⁹ *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49.

¹⁰ *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

¹¹ See § 21, post.

CHAPTER II

ELECTIVE AND COMPULSORY COMPENSATION

Section

20. What Acts are elective and what compulsory.
21. Validity of Acts as affected by their elective or compulsory nature.
22. Contractual nature of elective compensation.
23. Presumption, notice and effect of election.
24. Pleading, and proof of election.
25. Abolition of defenses in common-law actions.

§ 20. What Acts are elective and what compulsory

Of thirty-four Acts adopted in the American states and territories, fifteen are elective as to all classes of employers within their terms,¹ ten are elective as to private employers but compulsory as to public employers,² and nine may be classed as compulsory.³

¹ Elective Acts have been adopted in Alaska, Colorado, Connecticut, Illinois, Kansas, Kentucky, Massachusetts, Minnesota, Nebraska, New Hampshire, Oregon, Rhode Island, Texas, Vermont, and West Virginia.

The operation of the system of compensation provided rests upon the free consent of employer and employé, given in the manner provided by the Act. Without such consent on his part, the employé retains all his rights and remedies under common and statutory law. *Shade v. Ash Grove Lime & Portland Cement Co.*, 93 Kan. 257, 144 Pac. 249.

The Act of 1911 was elective. *Price v. Clover Leaf Coal Min. Co.* (1914) 188 Ill. App. 27.

² Acts of this class have been adopted in Indiana, Iowa, Louisiana, Maine, Michigan, Montana, Nevada, New Jersey, Pennsylvania, and Wisconsin.

The Iowa Act is optional. *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 3. As is also the New Jersey Act (P. L. N. J. 1911, p. 134). *Albanese v. Stewart*, 78 Misc. Rep. 581, 138 N. Y. Supp. 942.

The employé is not compelled to give up any common-law or constitutional right, but reasonable provisions are made for the exercise of his election. *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1.

³ Compulsory Acts have been adopted in Arizona, California, Hawaii, Maryland, New York, Ohio, Oklahoma, Washington, and Wyoming. The Arizona Act is compulsory on the part of the employer and optional on the part of

In this connection, it should be noted that the California Act, classed as compulsory,⁴ is elective as to farm laborers, domestic servants, and casual employés, but otherwise is compulsory.⁵ Some Acts, such as the present New York Act, are elective only with the employer,⁶ while others are elective as to both employer and

the employé. *Behringer v. Inspiration Consol. Copper Co.*, 17 Ariz. 232, 149 Pac. 1065; *Consolidated Arizona Smelting Co. v. Ujack*, 15 Ariz. 382, 139 Pac. 465, 5 N. C. C. A. 742. In a recent Arizona case the court said: "The cases decided under the New Jersey Compensation Law, cited by appellant do not aid us in the consideration of the question before us. The New Jersey Act is not compulsory either on employer or employé, but is elective or optional as to both. Our Constitution and Compensation Act make the compensation provided compulsory upon the part of the employer, and optional on the part of the employé. Just a line or two from two New York cases will sufficiently distinguish the New Jersey law from ours. In *Albanese v. Stewart*, the court said: 'However, the New Jersey Act is not a compulsory statute. It is a so-called optional or elective statute.' In *Pensabene v. F. & J. Auditore Co.* it was said: 'The option to accept one or the other forms of remedy is equally open to both parties at the time of their contracting, and before any rights have accrued by accident.' The New Jersey Supreme Court, in *Sexton v. Newark Dist. Tel. Co.* said: 'Under the Act neither the employer nor the employé is bound to accept the provisions of section 2, unless he chooses to do so.' It can be readily seen that the New Jersey Compensation Act is so widely different from ours as to make a judicial construction of it valueless when applied to our law. There is no option to election left to the employer under our Constitution and laws; for, as to him, they are compulsory." *Consolidated Arizona Smelting Co. v. Ujack*, 15 Ariz. 382, 139 Pac. 465, quoting from *Albanese v. Stewart*, 78 Misc. Rep. 581, 138 N. Y. Supp. 942; *Pensabene v. F. & J. Auditore Co.*, 78 Misc. Rep. 538, 138 N. Y. Supp. 947; *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. Law, 85, 86 Atl. 451, 455.

⁴ Many Acts, like the Roseberry Act of California (St. 1911, p. 796), which in 1913 was superseded by the Boynton Act, are made applicable only to employers and employés electing to be bound by them. Others provide a compulsory system of taxation, as does the Boynton Act. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398.

⁵ St. Cal. 1913, p. 279, known as the Boynton Act, superseded the Roseberry Act, St. 1911, p. 796. The most striking difference between the two laws is that the compensation provisions of the later statute are compulsory on all employers and employés coming within its terms, while the Roseberry Act gave to both employers and employés a right of election in this regard. *Id.*

⁶ *Herkey v. Agar Mfg. Co.*, 90 Misc. Rep. 457, 153 N. Y. Supp. 369.

employé.⁷ The present Act of Ohio is compulsory as to all employers employing five or more workmen, and optional as to those employing less.⁸ The New Jersey Act, being elective and becoming compulsory only when neither party disaffirms it,⁹ is not contrary to the public policy of New York,¹⁰ but is enforceable in that state.¹¹

§ 21. Validity of Acts as affected by their elective or compulsory nature

Some of the Acts were made elective to avoid constitutional objections,¹² and to meet the view of those holding that the question whether the employer and employé are left free to either accept or reject an Act is determinative of its constitutionality. Con-

⁷ It has been held that the Acts of Connecticut (Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245), Illinois (Eldorado Coal & Mining Co. v. Mariotti, 215 Fed. 51; Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241), Iowa (Hawkins v. Bleakley [D. C.] 220 Fed. 378; Op. Sp. Counsel to Iowa Indus. Com. [1915] p. 5), Michigan (Mackin v. Detroit Timkin Axle Co., 187 Mich. 8, 153 N. W. 49), and New Jersey (Rounsaville v. Central R. Co., 87 N. J. Law, 371, 94 Atl. 392; Sexton v. Newark District Telegraph Co., 84 N. J. Law, 85, 86 Atl. 451; Scott v. Payne Bros., 85 N. J. Law, 446, 89 Atl. 927) are elective as to both employer and employé.

⁸ The original Ohio Act was optional or elective in principle. On September 3, 1912, a constitutional amendment was adopted by the people of Ohio (section 35, art. 2) authorizing the passage of laws providing for a state fund to be created by compulsory contribution thereto by employers and administered by the state. Pursuant to this authority the Legislature passed the present Act (103 Ohio Laws, p. 72). This act is in effect an amendment to the act of 1911 (102 Ohio Laws, p. 524); the principal changes being that it is compulsory as to all employers employing five or more workmen and optional as to those employing less. State v. Industrial Commission, 92 Ohio St. 434, 111 N. E. 299.

⁹ (P. L. N. J. 1911, p. 134) Albanese v. Stewart, 78 Misc. Rep. 581, 138 N. Y. Supp. 942.

¹⁰ Wasilewski v. Warner Sugar Refining Co., 87 Misc. Rep. 156, 149 N. Y. Supp. 1035; Albanese v. Stewart, 78 Misc. Rep. 581, 138 N. Y. Supp. 942.

¹¹ Pensabene v. F. & J. Auditore Co., 78 Misc. Rep. 538, 138 N. Y. Supp. 947.

¹² Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245.

sideration of this view, in respect to which the courts are by no means unanimous,¹³ gives rise to the further question whether an apparent election is free or coerced. If an Act is not susceptible of being accepted freely, elective provisions will not validate it. One may waive a constitutional right, but cannot be compelled to do so and be arbitrarily subjected to an option to stand upon one right under penalty of losing another.¹⁴ It would not save an Act that every provision was in itself valid, and though it plainly said that all were free to reject it, if an extreme penalty were to be inflicted upon rejection. The test is whether the Act in truth resorts to undue compulsion to induce acceptance.¹⁵

That the person seeking work is at a disadvantage, since, unless he accept the compensation provisions of the statute, he may have small chance of securing employment, makes his decision to accept such provisions none the less the exercise of an option.¹⁶ Nor does it amount to coercion that an employer's failure to elect to come under an Act will result in eliminating certain defenses and in changing certain rules of procedure.¹⁷ As said by Miller, J., in *Hunter v. Colfax Consol. Coal Co.*: "It comes to this: Can a law be void for coercion which attaches no penalty to rejection of its provisions other than taking away, in whole or in part, that which the citizen may lawfully be deprived of without reference to any statute which might be either accepted or rejected? If the Legislature may validly say: You shall not defend with contributory negligence, nor with fault of fellow servants; you must prove you are not in fault for the injury suffered by your servant

¹³ The fact that an Act is compulsory does not necessarily make it unconstitutional, particularly where the scheme of the Act is merely a compulsory scheme of insurance. *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037.

¹⁴ *Byer's Case*, 84 Ohio St. 408, 95 N. E. 917, 38 L. R. A. (N. S.) 913; *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037.

¹⁵ *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037.

¹⁶ *Nitram Co. v. Creagh*, 84 N. J. Law, 243, 86 Atl. 435.

¹⁷ *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037.

while doing your work; you must effect insurance so that your insolvency may not leave him a crippled public charge, or make a public burden of his dependents; you may contract with each other to arbitrate summarily, effectively, and cheaply, and the award shall be not more than a stated sum, and you shall not contract for less payment—can validly compel all this without enacting a Workmen's Compensation Act—then how can the saying that these things you shall lose and these things you shall do unless you accept the Act be undue compulsion? One who is at liberty to do or not to do a thing can always say: 'I will not do what I can refuse to do, with or without reason, unless you do what I demand.' There can be no coercion in the sight of the law effectuated by doing or not doing what one has the absolute right to do or not to do, no matter what terms are attached to doing or refraining. One who has absolute right to do or not to do a thing can attach to his doing or not doing any condition, no matter how unreasonable or arbitrary. The remedy is refusal to accede to the unreasonable demand."¹⁸ An employer's election to come under the Act is not coerced because of a provision that such election will be presumed if he fails to give certain notices.¹⁹ Since the right to trial by jury may be waived, an objection based on deprivation of such right cannot successfully be made by one who has voluntarily accepted the provisions of a Workmen's Compensation or Insurance Act.²⁰ The same is true of other constitu-

¹⁸ Id.

¹⁹ Id.

²⁰ In *Evanhoff v. State Industrial Accident Commission*, 78 Or. 503, 154 Pac. 106, the court (opinion by McBride, J.) says: "Plaintiff's argument proceeds upon the theory that the Act establishing the Industrial Accident Commission attempts to establish a court for the trial of causes without a jury, which it does not, and to compel workmen and employers to adjust their grievances without their consent, which is contrary to the whole spirit and intent of the act. As before noted, the Act leaves the employer free to accept the provisions of the Act or to reject them as he may see fit. If he gives notice that he rejects them, he is left to protect himself from actions for personal injury by litigation in the courts. It is true that the Act has swept away certain defenses heretofore available; but, as this could have

tional objections to an Act,²¹ such as that it takes away the right to contract,²² improperly delegates judicial power to arbitrators

been done in any case, he has no legal reason to complain. If he sees fit not to avail himself of the provisions of the Act, he may still protect himself by giving notice that he rejects its provisions. It is not compulsory, and the arguments that apply with greater or less force to compulsory Acts are here inapplicable. The state says to the employer and employé alike: 'We present to you a plan of accident insurance which you may accept or reject at your own pleasure. If you accept, you must be bound by its terms and limitations; if you reject it, the courts are open to you with every constitutional remedy intact. Take your choice between our plan and such remedies as the statute gives you.' Discussing certain features of the Iowa Compensation Act, limiting the amount to be allowed for certain injuries, Mr. Justice McPherson, in the case of *Hawkins v. Bleakley* (D. C.) 220 Fed. 378, 381, says: 'The first twenty-two sections of this lengthy statute fix the liability of the employer and the rights of the employé. A scale of compensation is fixed and made certain. Each party can come within the statute or remain outside of the statute. Each party has his election. Many of the states for many years have had statutes fixing the liability with precision in cases of death, and in no instance has any court held such statute invalid. And why a statute cannot fix with certainty the damages to be allowed in case of the loss of an arm, leg, eye, or other injury is not perceived.' In *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037, the court says: "Passing abstractions and general discussion, and coming to the question whether the Act is invalid because it denies the right to trial by jury in proceedings to administer the Act between those who have accepted it, we find it universally held that in such case it is not a valid objection that the jury trial is not provided for. *Sexton v. Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 452; *State v. Clausen* (Wash.), *supra*; *Jensen's Case*, 215 N. Y. 514, 109 N. E. 603, 604, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276; *Deibeikis' Case* (Ill.), *supra*; *Lumber Co. v. Commission*, 154 Wis. 114, 142 N. W. 187, L. R. A. 1916A, 374, Ann. Cas. 1915B, 997; *In re State Journal Co.*, 161 Ky. 562, 170 S. W. 437, 1166, L. R. A. 1916A, 389, Ann. Cas. 1916B, 1273. The right to jury trial can be waived. Our own statute (section 3650) provides in terms that the right exists only if it be not waived. It may be conceded the cases hold that the waiver of trial by jury and by due process of law must be by voluntary assent, but it does not follow that constitutional guaranties must be 'expressly' waived by the party thereby affected. Proceeding upon this premise, the authorities hold that, whenever two agree to have their difficulties adjusted by a method which excludes trial by jury, they thereby waive the right to such trial; that the right to such trial is waived by electing to come

²¹ See note 21 on following page.

²² *Hunter v. Colfax Consol. Coal Co.* (Iowa) 154 N. W. 1037.

or other boards,²³ and takes away the right to have liability determined in the courts,²⁴ creates a conclusive presumption,²⁵ limits

within the act; that such acts take away the cause of action on the one hand and the ground of defense on the other, and merge both in a statutory indemnity, fixed and certain; that for these benefits the parties are required to give up 'the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all, after long delay, must go to pay expenses and lawyer fees.' In the case of *The Timber Co.*, 75 Wash. 581, 135 Pac. 645, 1166, it is held that the right to regulate the management of industries is so within the police power as that Workmen's Compensation Acts are valid, though thereby the injured employé is deprived of a jury trial."

²¹ *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71.

In *Jeffrey v. Blagg*, 235 U. S. 571, 35 Sup. Ct. 169, 59 L. Ed. 364, dealing with the validity of the Ohio Compensation Act, which, among other things, was attacked for arbitrarily eliminating defenses like contributory negligence, assumed risk, and the negligence of fellow servants, from larger shops, while leaving them to smaller ones, the court said: "No employer is obliged to go into this plan. He may stay out of it altogether if he will."

The Supreme Court of Ohio has upheld the Ohio Act on the ground that it is purely optional and voluntary, both as to employés and employer, in so far as it deals with the requirement that if the parties concerned elect to accept the Act they shall make certain payments to effectuate insurance

²³ *Mellen v. Industrial Commissioners*, 154 Wis. 114, 142 N. W. 189, L. R. A. 1916A, 374, Ann. Cas. 1915B, 997; (*Workmen's Compensation Act*, §§ 25-35) *Hunter v. Colfax Consol. Coal Co. (Iowa)* 154 N. W. 1037.

It cannot be said that by this act judicial power is delegated to boards of arbitrators, contrary to the Constitution. Parties to a contract may make valid and binding agreements to submit questions in dispute or any disagreement that may arise to a board of arbitrators composed of persons or tribunals other than the regularly organized courts, and such agreements will be enforced. *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241.

²⁴ Employers who become subscribers under the Act voluntarily waive the right to have their liabilities determined in the courts. As to employers who remain without the Act, negligence for which they are responsible must be established to render them liable. This is not the creation of an absolute liability against them, since they may defend the suit by disproving any negligence. The substantial defense in such action is therefore not taken away. The Act accordingly deprives neither class of employers of any fundamental right. *Middleton v. Texas Power & Light Co. (Tex.)* 185 S. W. 556.

²⁵ See note 25 on following page.

the amount of recovery,²⁶ and violates the constitutional provisions guaranteeing due process of law²⁷ and equal protection and pro-

against the results of accidents in the employment. Substantially this is affirmed in *Re Opinion of Justices*, 209 Mass. 607, 96 N. E. 309, as to a statute substantially like the Iowa Act held constitutional in *Hunter v. Colfax Consol. Coal Co. (Iowa)* 154 N. W. 1037. It is said in the Massachusetts case that, so long as it is elective, an Act requiring an employer to become a subscriber, and the employé to waive right to sue at common law, and accept compensation provided in the Act, violates no constitutional requirement. "It is a general principle that a person may, at any time, waive his right to bring an action upon a money demand unless there is a constitutional or statutory provision prohibiting it, or it is clearly against public policy to permit him to do so. * * * This view of the Act disposes of many of the constitutional questions raised by counsel. The state proposes to employers and employés an accident and life insurance scheme, and offers it to them in lieu of litigation. It does not compel them to become participants in it or to contribute to it, but if they voluntarily choose to do so, they waive any other remedy, because the statute provides as a part of the scheme that they must do so; and, as before observed, by permission of the statute a party may waive or limit the quantum of his compensation for any possible prospective injury. The noncompulsory feature of the act may be said to eliminate most of the objections urged upon constitutional grounds." *Evanhoff v. State Industrial Accident Commission*, 78 Or. 503, 154 Pac. 106.

The Act of 1913 (Laws 1913, p. 335) is no more compulsory than the Act of 1911 (Laws 1911, p. 314), which has been declared constitutional, because elective. *Victor Chemical Works v. Industrial Board of Illinois*, 274 Ill. 11, 113 N. E. 173.

In the Kentucky Act of 1916 (Laws 1916, c. 33) the objectionable compulsory features of the Act of 1914 (Laws 1914, c. 73), in so far as the employé

²⁵ The conclusive presumption provided for in part 3, § 4, does not render it unconstitutional, since the employé is left free in the first instance to prevent the presumption by his own act if he so desires. Such legal presumptions are not unconstitutional or uncommon. A familiar illustration is the conclusive presumption that a party entitled to a jury trial in a civil action has waived his right, unless he has taken some affirmative action and made demand before arrival of a certain point in the progress of the case. *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49.

²⁶ The Act of 1916 is not violative of Constitution, § 54, forbidding limitation on the amount of recovery for injuries; this objection being obviated by the elective nature of the Act. *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648.

²⁷ See note 27 on following page.

hibiting class legislation.²⁸ That an Act requires the employé to elect at the time of his employment and in advance of all injuries,

is concerned, were eliminated, and under the Act of 1916 the employer cannot, without the employé's consent, bring him under the Act, nor does it operate, as to the employé, until he has voluntarily signified in writing his willingness to accept its provisions. *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 649.

²⁷ In re Madden, 222 Mass. 487, 111 N. E. 379; *Mellen Lumber Co. v. Industrial Com.*, 154 Wis. 114, 142 N. W. 187, L. R. A. 1916A, 374, Ann. Cas. 1915B, 997; *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71; *Western Indemnity Co. v. Phillsbury*, 170 Cal. 686, 151 Pac. 398; *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694; *Cunningham v. N. W. Imp. Co.*, 44 Mont. 180, 119 Pac. 554; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; *Hawkins v. Bleakley (D. C.)* 220 Fed. 378; *Mackin v. Detroit-Timkin A. Co.*, 187 Mich. 8, 153 N. W. 49. *Wood v. City of Detroit (Mich.)* 155 N. W. 592, L. R. A. 1916C, 388; *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276.

In the *Jensen Case*, the court cited as of controlling effect *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, holding valid a state law whereby solvent banks are required to pay money into a fund for the direct benefit of others, the banks benefiting only indirectly from the supposed benefit to commerce and the greater stability of banking, and distinguished *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 294, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156, which it held to be not controlling, because the state and not the federal Constitution was involved, and also because of the differences between the Act then before the court and the present Act. The court said: "The mutual benefits under law are direct. Granted that employers are compelled to insure, and that there is in that sense a taking. They insure themselves and their employés from loss, not others. The payment of the required premiums exempts them from further liability. The theoretical taking doubtless disappears in practical experience. In fact, every industrial concern, except the very large ones who insure themselves, have for some time been forced by conditions, not by the law, to carry accident indemnity insurance. A relatively small part of the sums thus paid actually reach injured workmen or their dependents. With the economic saving of the present scheme, insurance in the long run should certainly be as cheap as under the old wasteful system, and the families of all injured workmen, not a part only, will receive some compensation for the loss of earning power of the wage earner. Practical experience, as well as theory, should be con-

²⁸ *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1.

whether he will come under its terms, does not render it unconstitutional.²⁹ Nor does the possibility that the employé in a given instance may not know all his rights relative to electing, affect the constitutional aspects of the law.³⁰

§ 22. Contractual nature of elective compensation

Where an election is made under an Act authorizing same, the Act usually becomes a part of the employment contract,³¹ and binds employer and employé to settle, as provided by the Act, any dis-

sidered in deciding whether a given plan constitutes a taking of property without due process of law in violation of the federal Constitution. A compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity certainly promotes the general welfare as directly as does an insurance of bank depositors from loss under the Oklahoma statute, which has been held valid by the Supreme Court of the United States." But in *Herkey v. Agar Mfg. Co.*, 90 Misc. Rép. 457, 153 N. Y. Supp. 369, the court says that a Compensation Act which was compulsory as to the employer would be violative of the due process of law provision of the federal Constitution.

²⁹ The requirement that the election be made at the time of the contract for hire is reasonable. Difficulties of a serious nature might be presented if the right of election were allowed to be exercised after the happening of the accident. *Id.*

³⁰ *Id.*

³¹ Appeal of *Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245; *Rounsaville v. Central R. Co.*, 87 N. J. Law, 371, 94 Atl. 392; *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241; *McRoberts v. National Zinc Co.*, 93 Kan. 364, 144 Pac. 247; *Shade v. Cement Co.*, 92 Kan. 146, 139 Pac. 1193. Liability under the Workmen's Compensation Act does not arise out of negligence, but out of contract created by acceptance of the Act. (*Workmen's Compensation Act*, § 2) *Lynch v. Pennsylvania R. R. Co.*, 88 N. J. Law, 408, 96 Atl. 395; *Anderson v. North Alaska Salmon Co.*, 2 Cal. I. A. C. Dec. 241. The relation of employer and employé, under said act, being voluntary and not compulsory, is contractual; the statute becoming an integral part of the contract, and limiting the rights and liabilities of employer and employé, binding upon the parties. *Gooding v. Ott* (W. Va.) 87 S. E. 863.

Persons operating under the terms of the Compensation Act, by election or operation of law, make the terms and provisions of the Act a part of the contracts made with labor; hence the rule excluding public corporations exercis-

pute arising between them as to compensation for injury.³² Mutuality being essential to any contract, an employé cannot, by electing to come under the Act, bring the employer under it.³³ Likewise, where the employer alone has exercised a right of election given to both, the employé is not bound by such contractual relation, and accordingly is not limited in his recovery to the compensation provided by the Act. He cannot be said to be bound by a contract which has never been made. Where both have elected to come within the Act, then, in seeking redress under it, the action must be brought in accordance with its provisions; but, when the employer has elected not to be bound by the Act, then the parties are remitted to their action at law and are governed by the principles of law applicable to such actions, except alone as to the matter of defenses. The employer cannot insist that the employé be bound by all the provisions of a law which the employer has

ing sovereignty from liability on account of torts does not apply. *Radigen v. Sanitary Dist. of Chicago*, Bulletin No. 1, Ill., p. 138. The Compensation Act of Illinois is a contract between the employer and all his employés and the state, represented by the Industrial Board, in which they agree to accept all the terms and provisions of the Act, where the employer and the employés elect to be bound by the Act. *Fitt v. Central Illinois Public Service Co.*, Bulletin No. 1, Ill., p. 129.

Acceptance of the Act, whether made expressly or impliedly, as permitted by the Act, makes its provisions part of the employment of contract. The significance of the contract relation is foundational in the consideration of cases under any Compensation Act contractual in character. (Laws 1913, c. 138) *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436.

In *Kenny v. Union Ry. Co.*, 166 App. Div. 497, 152 N. Y. Supp. 117, it was said, however, that the Compensation Act is not to be read into the contract of employment as forming part of it and as dependent for its enforcement upon the validity of the contract of employment.

³² *Deibelkis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241.

³³ (Laws 1911, p. 315) *Dietz v. Big Muddy Coal & I. Co.* (1914) 263 Ill. 480, 105 N. E. 289, 5 N. C. C. A. 419; *Price v. Clover Leaf Coal Min. Co.* (1914) 188 Ill. App. 27. *Salus v. Great Northern R. Co.* (1914) 157 Wis. 546, 147 N. W. 1070.

elected not to be bound by.³⁴ A mutual agreement by employer and employé not to be bound by the compensatory provisions of an Act becomes effective immediately.³⁵

§ 23. Presumption, notice and effect of election

For an election to be effective it must be made as prescribed by the statute;³⁶ but a statement of an election need not be in any technical form, or be evidenced with the same formality as a deed or other instrument transferring property.³⁷ Under some statutes an election may be presumed from failure to give notice to the contrary,³⁸ or from silence.³⁹ Under Acts requiring that the notice

³⁴ *Crooks v. Tazewell Coal Co.*, 263 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C, 304.

³⁵ Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 11, p. 16.

³⁶ The approval of the employer's notice of acceptance of the Act by the Accident Board is essential to the validity of his election. (Pub. Acts, Extra Sess., 1912, No. 10) *Bernard v. Michigan United Traction Co.* (Mich.) 154 N. W. 566.

³⁷ (Workmen's Compensation Act Kan. 1911, § 44) *Piatt v. Swift & Co.* (Mo. App.) 176 S. W. 434.

To have the protection afforded under chapter 10, Acts of the Legislature of 1913 (Code 1913, c. 15P, §§ 1-55 [secs. 657-711]), known as the Workmen's Compensation Act, an employer must not only have paid the premiums provided thereby, but the injured employé must have had actual notice that his employer had elected to pay into the Workmen's Compensation Fund the premiums provided by said Act; but typewritten or printed notices thereof, when duly posted in conspicuous places about his place or places of business, as required by said Act, will, as provided thereby, constitute sufficient notice to all his employés that he has made such election. *Daniels v. Charles Boldt Co.* (W. Va.) 88 S. E. 613.

³⁸ *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620; *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 105 N. E. 289; Op. Sp. Counsel to Iowa Indus. Com. (1915) pp. 3, 5.

Both employer and employé are under the Act, where neither has elected to the contrary. *Shade v. Ash Grove Lime & Portland Cement Co.* (1914) 92 Kan. 146, 139 Pac. 1193.

It is an essential feature of the Act that every employer and employé com-

³⁹ *Rounsaville v. Central R. Co.*, 87 N. J. Law, 371, 94 Atl. 392.

be given at the time of the contract of hire,⁴⁰ the employé waives his right of action at common law where he fails to give the written notice at the time of his contract of hire, though he has no knowledge or notice that the employer is a subscriber.⁴¹ Under the Arizona Act, the employé need not elect in advance of his injury.⁴² The requirement that notice be given to prevent a presumption of an election is not ordinarily deemed objectionable,⁴³ though the

ing within its terms is bound by it, unless he makes an election not to accept it. No provision is anywhere in the Act for an acceptance. There is always an acceptance, unless there be an election not to accept. (Laws 1913, c. 467; Gen. St. 1913, §§ 8195-8230) *Harris v. Hobart Iron Co.*, 127 Minn. 399, 149 N. W. 662. A workman injured before giving notice was under the Act, though he gave notice within thirty days after the Act went into effect. *Id.* That the employer was designated at times by witnesses and attorneys as *Barnard & Cope*, *Barnard & Cope Company*, and *Barnard-Cope Company*, instead of its true name of *Barnard-Cope Manufacturing Company*, was too technical and unmeritorious a defense to remove the presumption that the employer had accepted and was bound by the Act. (G. S. 1913, § 8205) *Mahowald v. Thompson-Starrett Co.* (Minn.) 158 N. W. 913.

The Act of 1911 is effective as to all employers and employés within the prescribed employments until the required notice to the contrary is given. The elective feature is to be exercised to avoid being governed by the Act, and not to cause the Act to be applied in any given case. *Dietz v. Big Muddy Coal & I. Co.*, 263 Ill. 480, 105 N. E. 289, 5 N. C. C. A. 419. Where an express company comes under the Act by operation of law, it is conclusively presumed to have filed notice of its election under paragraph (b), § 1. *Zorcic v. Adams Express Co.*, Bulletin No. 1, Ill., p. 55.

⁴⁰ If an employé desires to avoid the Act and preserve his common-law rights, he must give notice to that effect, in the absence of fraud, when he enters the employment, rather than when he is notified of insurance by the employer, or he is held to have availed himself of the Act. *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49.

⁴¹ (St. 1911, c. 751, pt. 1, § 5) *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Mackin v. Detroit Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49.

⁴² *Behringer v. Inspiration Consol. Copper Co.*, 17 Ariz. 232, 149 Pac. 1065, *Consolidated Arizona Smelting Co. v. Ujack*, 15 Ariz. 382, 139 Pac. 765, 5 N. C. C. A. 742.

⁴³ The requirement that the employé give notice affects no existing property right, and is therefore not objectionable on that ground. It deals with no

Supreme Court of Kentucky seems to take a different view, in an opinion wherein it held the original Kentucky Act invalid and said: "Some provision should be made in the Act whereby the employé signifies his acceptance of the Act by some affirmative act. Silence should not be construed into acceptance."⁴⁴ When the elective compensation provisions are not intended to apply to the employment of minors, the notice must be given by or to the guardian of the minor; a notice posted in the works or by means of the pay envelope does not suffice.⁴⁵ A requirement of the Massachusetts Act that every subscriber give notice to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employés by the association, and that he file a copy of the notice with the Industrial Accident Board, is merely directory to the employer, and his failure to comply with same does not prevent the employé from being held to have waived his common-law right of action through failure to give notice at the time of the making of the employment contract.⁴⁶ Where employer and employé assent, whether expressly or by implication of the statute, to an Act, they assent to the whole scheme of the

property right after it has come into being. It affects a situation which antedates any property right arising out of tort and simply establishes a status between subscribers under the Act and their employés in the absence of express action by the latter manifesting a desire to elect a different status. (St. 1911, c. 751, pt. 1, § 5) *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1. "No complaint can be made that the employé is thereby compelled to elect without sufficient knowledge. Ignorance of law is commonly no excuse for conduct or failure to act. The employé is not required to act without inquiry as to the fact of insurance by the employer. He has only to ask for information. That is nothing more than is required in most of the affairs of life in order that one may act intelligently." *Id.*

⁴⁴ *State Journal Co. v. Workmen's Compensation Board*, 162 Ky. 387, 172 S. W. 674, L. R. A. 1916A, 402, affirming 161 Ky. 562, 170 S. W. 1166, L. R. A. 1916A, 389, Ann. Cas. 1916B, 1273, on rehearing.

⁴⁵ (P. L. 1911, p. 136, § 2) *Troth v. Millville Bottle Works*, 86 N. J. Law, 558, 91 Atl. 1031, 98 Atl. 435.

⁴⁶ (St. 1911, c. 751, pt. 4, § 21, as amended by St. 1912, c. 571, § 16) *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1.

Act.⁴⁷ An acceptance filed by the employer five days before an Act took effect has been held valid, and to give the employer the benefit of the Act from the time it took effect.⁴⁸ Under the Washington Act, when the injured employé has once exercised his option, his decision is final and may not be withdrawn.⁴⁹ An employer who elects not to come under the compensatory part of the Minnesota Act is governed by the liability part, and cannot relieve himself of his liability by notifying his employés that he will not be liable for any damages or compensation whatever.⁵⁰

Under the Wisconsin Act, which permits railway companies to adopt compensation as to all their employés, not merely as to shop and office employés,⁵¹ a notice filed by a railroad company, stating that the company accepted the provisions of the Act, and that the nature of the employment was office and shop work, was sufficient to include all employés.⁵² Where an employé, whose contract of hiring had been made several months prior to the employer's election to come under this Act, has given no notice in writing to come under the Act, and thirty days have not elapsed after the employer's election and before the accident, the employé is not under the Act and cannot recover.⁵³ Nor can there be any recovery in case of a claim filed against an independent contractor as employer, who has not filed his election to come under this Act prior to the time of the accident.⁵⁴

⁴⁷ *Scott v. Payne Bros., Inc.*, 85 N. J. Law, 446, 89 Atl. 927.

⁴⁸ (Pub. Laws, 1911-12, c. 831, art. 1, § 5, became operative in October, 1912) *Coakley v. Mason Mfg. Co.*, 37 R. I. 46, 90 Atl. 1073.

⁴⁹ (Wk. Comp. Act Wash. § 8) *Rulings Wash. Indus. Ins. Com.* 1915, p. 19.

⁵⁰ *Op. Atty. Gen. on Minn. Wk. Comp. Act*, Bul. 9, p. 17.

⁵¹ *Minneapolis, St. P. & S. S. M. Ry. Co. v. Industrial Commission*, 153 Wis. 552, 141 N. W. 1119, Ann. Cas. 1914D, 655.

⁵² (Laws 1911, c. 50; St. 1911, §§ 2394-1 to 2394-31) *Id.*

⁵³ (Wis. Wk. Comp. Act, §§ 2394-8 [1], [2]). *Wambold v. Fox Ice Co.*, Rep. Wis. Indus. Com. 1914-15, p. 36; *Selsus v. Case Threshing Machine Co.*, Rep. Wis. Indus. Com. 1914-15, p. 22.

⁵⁴ *Zobel v. Godlevski*, Rep. Wis. Indus. Com. 1914-15, p. 12.

Where an employer files notice of an election not to come under the provisions of the Illinois Act, the employé has no right to elect either way, and his declaration, in an action for damages, need not allege either acceptance or rejection.⁵⁵ In such action, damages are to be assessed the same as in any common-law action for personal injury, except that any contributory negligence of which the workman may have been guilty may reduce the amount of the damages.⁵⁶ The elective nature of this Act requires that a reasonable time be given by it in which to exercise the election.⁵⁷ But where the employer had more than a month in which to learn of the Compensation Act and file notice of election, prior to the accident, it could not complain of want of sufficient time in which to make an election.⁵⁸

Where the employer did not elect to come under the Michigan Act until December 23d, the relations existing between the parties at time of the injury on October 7th preceding were not affected by the Act.⁵⁹ There was a like ruling in a case under the Wisconsin Act, which allows the workman thirty days in which to elect, where the employer had elected but the workman had not, and the thirty days had not expired, and the employment contract was made before the employer's election.⁶⁰

The act of the treasurer of a corporation in filing a notice accepting the provisions of the Rhode Island Act was ratified by the corporation where its directors acquiesced in it and failed to disaffirm or repudiate it.⁶¹ A notice of acceptance posted in the em-

⁵⁵ *Favro v. Superior Coal Co.*, 188 Ill. App. 203.

⁵⁶ *French v. Cloverleaf Coal Mining Co.*, 190 Ill. App. 400.

⁵⁷ *Victor Chemical Works v. Industrial Board of Illinois*, 274 Ill. 11, 113 N. E. 173.

⁵⁸ *Id.*

⁵⁹ *Shevchenko v. Detroit United Ry. (Mich.)* 155 N. W. 423.

⁶⁰ *Green v. Appleton Woolen Mills*, 162 Wis. 145, 155 N. W. 958.

⁶¹ *De Pasquale v. Mason Mfg. Co. (R. I.)* 97 Atl. 816.

ployer's place of business was sufficient, where it was a copy of the notice filed with the Commissioner of Industrial Statistics.⁶²

That a workman received two vouchers for indemnity under the Washington Act did not estop him from denying that he was within the terms of the Act, where he did not exact the vouchers or receive any money on them.⁶³

Where notice of an election to remain outside the provisions of an Act is required, and an employer has filed such notice, he will remain outside until the notice is withdrawn, without filing a new notice at the beginning of each year.⁶⁴ Likewise when one brings himself within an Act as an extrahazardous employer of labor, either by direct election or by operation of law, he remains under its provisions and is bound thereby until taken out according to the specific manner and methods provided in the Act.⁶⁵

In a Connecticut case, where the employer, who did not regularly employ any one, and whose only employé at the time of the injury was the claimant, had not given notice of his acceptance of the Act, the claim was dismissed by the commissioner.⁶⁶ In another case, where the employer gave the "written or printed notice from the employer or employé to the other * * * served by personal presentation or by registered letter" required by the Connecticut Act, by means of a clause in the contract of employment acknowledging receipt of notice of the employer's nonelection of the Act, signed by the employé at the time of his employment, without any threat of dismissal for failure to sign, but with the understanding that he was required to sign it, it was held the employer was not under the Act. Even if such contract was pro-

⁶² *Id.*

⁶³ *Puget Sound Traction, Light & Power Co. v. Schleif*, 220 Fed. 48, 135 C. C. A. 616.

⁶⁴ *Bateman v. Carterville & Big Muddy Coal Co.*, 188 Ill. App. 357; *Synkus v. Big Muddy Coal & Iron Co.*, 190 Ill. App. 602.

⁶⁵ *Flash v. Pattridge Metal Equipment Co.*, Bulletin No. 1, Ill., p. 46.

⁶⁶ *Gertel v. H. W. Dorman & Co.*, 1 Conn. Comp. Dec. 616.

cured by duress or undue influence, it was only voidable, and was affirmed by the employé's failure to repudiate or demand rescission after discussing the effect of the contract with his coemployés, he understanding that it affected his right to compensation, though he did not read it.⁶⁷ It was also held that where the defendant had filed a notice of refusal to accept the Act with the commissioners, and his two sons testified that they saw the notice served on the claimant, though he claimed never to have received notice, the employer was not under the Act;⁶⁸ and that where an employer had filed notice of his refusal to accept the Act with the commissioner, but had not served such notice on the claimant workman, he could be held under the Act.⁶⁹ Part B of this Act applies to all employers who have not rejected it as provided, regardless of whether they employ more than five persons.⁷⁰

§ 24. Pleading, and proof of election

A certified copy of a required notice of an election to remain outside the provisions of an Act is competent evidence of it.⁷¹ A legal presumption that both employer and employé are under the provisions of the Act can be rebutted only by showing that they have filed an election to the contrary.⁷² Evidence is admissible, of course, to show that the employer has elected not to be bound.⁷³

⁶⁷ *O'Rourke v. Cudahy Packing Co.*, 1 Conn. Comp. Dec. 8.

⁶⁸ *Smith v. Forseythe*, 1 Conn. Comp. Dec. 190.

⁶⁹ *Mazura v. Klingon*, 1 Conn. Comp. Dec. 296.

⁷⁰ *Neumann v. Turner*, 1 Conn. Comp. Dec. 130; *Brewer v. Belcher*, 1 Conn. Comp. Dec. 111.

⁷¹ *Id.*

⁷² *Krisman v. Johnston City & Big Muddy Coal & Mining Co.*, 190 Ill. App. 612; *Synkus v. Big Muddy Coal & Iron Co.*, 190 Ill. App. 602; *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244.

The presumptive rule herein established merely affects a question of pre-

⁷³ (Laws 1911, p. 314) *Crooks v. Tazewell Coal Co.*, 263 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C, 304.

It is not essential, under the Kansas Act, that the authority of the officer of the employer corporation to make and file the statement of election be affirmatively shown, where it clearly appears that notices of the employer's election to come under the Act were posted in all parts of its plant long prior to the injury.⁷⁴ By accepting payments in accordance with an Act and making settlement under it, the employé admits that the employer has elected to come under the Act.⁷⁵

§ 25. Abolition of defenses in common-law actions

Under the common-law rule, an employé assumes all ordinary risks incident to his employment, and his employer is only liable when he is negligent and the employé not contributorily negligent, and the injury not caused by the negligence of a fellow servant.⁷⁶ The Compensation Acts either modify or abrogate this rule. They ordinarily endeavor to induce acceptance of their compensatory provisions by abolishing the common-law defenses of contributory neg-

sumption or burden of proof, which it is entirely within the control of the Legislature to regulate so long as the parties are left entirely free to make whatever contract they choose, as does this Act. *Sexton v. Newark District Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 451. Where the complaint sets up a contract of hiring, made after the taking effect of the New Jersey Act, and does not aver that the contract contained any express statement in writing that the elective compensation provisions were not intended to apply or that any written notice to that effect was given, it will be presumed that the parties accepted and were bound by such provisions. *Gregutis v. Waclark Wire Works*, 86 N. J. Law, 610, 92 Atl. 354.

However, where it appeared that at the time of the injury the Workmen's Compensation Act (Laws 1911, c. 218, § 8) was in force, and there was neither allegation nor proof that the defendant corporation had elected to come within its provisions, but there was some evidence that it had done so, the court properly assumed and instructed that such an election had not been made. *Spottsville v. Western States Portland Cement Co.*, 94 Kan. 258, 146 Pac. 356.

⁷⁴ (Workmen's Compensation Act Kan. § 44) *Piatt v. Swift & Co.* (Mo. App.) 176 S. W. 434.

⁷⁵ (Workmen's Compensation Act Kan. § 44) *Id.*

⁷⁶ (Wk. Comp. Act Wash. § 8) *Rulings Wash. Indus. Com.* 1915, p. 19.

ligence, assumption of risk, and negligence of fellow servant, in common-law actions for damages,⁷⁷ and by saving these defenses to the employer where the employé refuses to accept such provi-

⁷⁷ *Lydman v. De Haas*, 185 Mich. 128, 151 N. W. 718. *Consumers Lignite Co. v. Grant* (Tex. Civ. App.) 181 S. W. 202. *Boody v. K. & C. Mfg. Co.*, 77 N. H. 208, 90 Atl. 859, L. R. A. 1916A, 10, Ann. Cas. 1914D, 1280, 5 N. C. C. A. 840; *Crucible Steel Forge Co. v. Moir*, 135 C. C. A. 49, 219 Fed. 151, 8 N. C. C. A. 1006; *Cavanaugh v. Morton Salt Co.*, 152 Wis. 375, 140 N. W. 53.

Where the employer has elected not to come under the provisions of the Compensation Act, it is not a defense to an action by the servant that he assumed the risk or that his contributory negligence proximately caused the injury. *Bell v. Toluca Coal Co.*, 272 Ill. 576, 112 N. E. 311; *Synkus v. Big Muddy Coal & Iron Co.*, 190 Ill. App. 602; *Price v. Clover Leaf Coal Mining Co.*, 188 Ill. App. 27.

The Legislature intended to penalize every employer who neglected to provide insurance by fixing his liability as under the common law, modified by Code Supp. 1913, § 2477m(c) 1, 2, 3, and 4. Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 36. In the event the employer elects to reject the act, or fails to provide the insurance required under section 2477m41, Supplement to the Code, 1913, he will be liable to his injured employé the same as under the common law, as modified by statute, and he can no longer plead contributory negligence, fellow servant rule, or assumption of risk. *Id.*

Where the employer was not a subscriber under this act, the only question before the jury was defendant's negligence; contributory negligence and assumption of risk not being available as defenses. (St. 1911, c. 751) *Pope v. Heywood Bros. & Wakefield Co.*, 221 Mass. 143, 108 N. E. 1058. Where, in an employé's action under the common law, it appeared that the Workmen's Compensation Act was in force at the date of plaintiff's injuries, and that defendants were not subscribers under the terms of the statute, neither contributory negligence nor assumption of risk was available as a defense. *Dooley v. Sullivan*, 218 Mass. 597, 106 N. E. 604.

The Michigan Act provides that in any action to recover damages for personal injury sustained by an employé in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense: (a) That the employé was negligent unless and except it shall appear that such negligence was willful; (b) that the injury was caused by the negligence of a fellow employé; (c) that the employé had assumed the risks inherent in or incidental to or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances. It is then enacted that the above provisions shall not apply to actions to recover damages for the death of, or for personal injuries sustained by, employés of any employer who has elected, with the approval of the Industrial Accident Board thereafter created, to pay compensation in the

sions.⁷⁸ But where the employer is not under the Act, the employé need not elect to be under it that the common-law defenses

manner and to the extent thereafter provided. *Adams v. Acme White Lead & Color Wks.*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283.

If the employer has elected not to become subject to part 2, he cannot interpose as a defense, in an action brought under part 1, that the employé was negligent, unless such negligence was willful; nor that he had assumed the risk; nor that the injury was caused by the negligence of a coemployé. Depriving the employer of the three defenses named, in case he elects not to become subject to part 2 of the act, is the only substantial change made by part 1 in the previously existing law. If the employer declines to accept the provisions of part 2, he loses the benefit of these three defenses; if he accepts the provisions of part 2, but the employé declines to accept such provisions, the employer retains the benefit of such defenses. *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71.

Contributory negligence will not bar recovery, where the employer has not elected to take the benefit of the Workmen's Compensation Act. (102 Ohio Laws, p. 529, Act June 15, 1911, § 21—1) *Denver-Laraine Realty Co. v. Wyoming Trout & P. Co.*, 219 Fed. 155, 135 C. C. A. 53. Section 26 of the Workmen's Compensation Act of 1913, abolishing defenses; relates to civil actions maintained in the courts, and it has no application to proceedings before the Industrial Commission of Ohio brought under favor of section 27 of said Act. *Biddinger v. Champion Iron Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 70; *Skinner v. Stratton Fire Clay Co.*, Id. p. 103.

Assumption of risk is no defense. *Memphis Cotton Oil Co. v. Tolbert* (Tex. Civ. App.) 171 S. W. 309.

The defenses abolished by the Washington Act, commonly referred to as "contributory negligence," "assumption of risk," and "fellow servant rule," are: (1) That the employé was not, when injured, in the exercise of due care, or was guilty of contributory negligence; (2) that the injury received by the employé was one of the ordinary risks incident to the contract of employment; (3) that the injury was the result of the negligence of a fellow servant. (Wk. Comp. Act Wash. § 8) *Rulings Wash. Indus. Ins. Com.* 1915, p. 19. Under the Washington Act, the defaulting employer cannot avail him-

⁷⁸ The policy of the law to preserve such defenses to an employer who shall elect to come under the act, respecting an employé who does not, is a constitutional method of coercing both parties to accept the benefits and burdens of the new system in place of those of the old one. (St. 1911, § 2394—1) *Karny v. Northwestern Malleable Iron Co.*, 160 Wis. 316, 151 N. W. 786.

The effect of this part B, § 4, is to save to the employer his common-law defenses where the employé has refused to accept part B. *Bayon v. Beckley*, 89 Conn. 154, 93 Atl. 139.

may be cut off.⁷⁹ Whether these defenses are abolished is sometimes made to depend on the number of workmen employed by one employer.⁸⁰ Abolition of these defenses does not render an Act unconstitutional,⁸¹ since, having been evolved by the courts, they

self of the "common-law" defenses, which have been so effective in defeating personal claims heretofore, where the fact of the injury of his employé is not contested. *Id.*

The common-law defenses of contributory negligence, assumption of risk, and negligence of fellow servants are denied an employer who has not elected to pay premiums. (Wk. Comp. Act, § 26 [Code 1913, c. 15P, § 23 (sec. 682)]) *Watts v. Ohio Valley Electric Ry. Co.* (W. Va.) 88 S. E. 659. Abolition of the doctrine of assumption of risk does not prescribe acts on the part of an employer which, by the common law, were rightful and free from negligence. Its purpose is to forbid an application of the principle of waiver by which, at common law, the servant is made to assume the risk of known negligence on the part of the master, by reason of his continuing in the service with knowledge thereof. *De Francesco v. Piney Mining Co.* (W. Va.) 86 S. E. 777.

The defense of contributory negligence is expressly abolished where the negligence was not willful. *Besnys v. Herman Zohrlaut Leather Co.*, 157 Wis. 203, 147 N. W. 37.

⁷⁹ (Laws 1911, pp. 315, 316, §§ 1, 3) *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 105 N. E. 289. Where an employer rejects the Act, he loses his right to set up the common-law defenses, though the employé does not elect to come under the Act. *Snykus v. Big Muddy Coal & Iron Co.* (1914) 190 Ill. App. 602; *Favro v. Superior Coal Co.* (1914) 188 Ill. App. 203.

⁸⁰ The act induces its acceptance by depriving an employer of more than five, who refuses to accept its terms, of the three common-law defenses, contributory negligence, assumption of risk, and fellow servant. This deprivation is "merely a declaration of the Legislature of the public policy of the state in that regard." *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245; *Deibeikis v. L. Belt Co.*, 261 Ill. 454, 464, 104 N. E. 211, 215, Ann. Cas. 1915A, 241. Where neither party accepts part B, or when the employé accepts and the employer refuses to accept it, the common-law defenses are not available to an employer who has more than five employés, but are available to those having less than that number. *Bayon v. Beckley*, 89 Conn. 154, 93 Atl. 139.

The defense of assumed risk is not denied to a nonsubscribing employer who does not have in his service more than five employés, and is not available to employers who have in their employment more than five employés. *Hodges v. Swastika Oil Co.* (Tex. Civ. App.) 185 S. W. 369.

⁸¹ See § 18, ante.

represent no vested rights, and may be abolished by the Legislature.

Some Acts, instead of entirely abolishing the defense of contributory negligence, establish the doctrine of comparative negligence.⁸²

An Act, such as that of Wisconsin, which abolishes the defense of assumption of risk, but not contributory negligence, makes it important to distinguish between these two defenses.⁸³ Within

⁸² An employer, not having elected to come within the Act, could not avail himself of the defenses of assumption of risk and contributory negligence, save in mitigation of damages. *Spottsville v. Western States Portland Cement Co.* (1915) 94 Kan. 258, 146 Pac. 356 (Acts 1911, c. 218, § 8). Contributory negligence may be considered in reduction of damages in common-law action. *French v. Clover Leaf Mining Co.* (1914) 190 Ill. App. 400. Contributory negligence would not defeat recovery, but would merely diminish the damages recoverable. *Memphis Cotton Oil Co. v. Tolbert* (Tex. Civ. App.) 171 S. W. 309.

⁸³ "So far as the decision below rests upon the theory that the defense of negligence of a fellow servant was available under section 1816, Statutes, it is wrong. The statute was superseded by the Workmen's Compensation Act. So, if appellant was injured by negligence of his associate, respondent is liable unless contributory negligence, strictly speaking, on his part—inadvertence, as distinguished from assumption of risk—proximately contributed to produce the injury." *Salus v. Great Northern Ry. Co.*, 157 Wis. 546, 147 N. W. 1070. In any action founded upon negligence, brought by an employé or his personal representative against an employer to recover for personal injuries or death resulting therefrom, incurred by the employé in this state while engaged in the line of his duty, the defense of assumption of risk is by section 2394—1 abolished. By this statute in the same class of cases the so-called fellow servant defense was also abolished where there are four servants or more engaged in a common employment. By chapter 599, Laws of 1913, the defense of contributory negligence was in the same class of cases taken away, "when such want of ordinary care was not willful." One effect of these statutes is to make it more than formerly necessary to distinguish between assumption of risk and contributory negligence. *Puza v. C. Hennecke Co.*, 158 Wis. 482, 149 N. W. 223. From the viewpoint of their effect in defeating plaintiff's recovery, assumption of risk and contributory negligence were formerly very much alike. They can no longer be considered from that viewpoint, because there is now no such common viewpoint with reference to cases arising after September 1, 1911, and before June 30, 1913, where there were less than four employés engaged in a common employment, and in such last-mentioned cases where there were more than four employés engaged in a common employment,

such an Act, an intended and continued use of a known defective appliance or a known unsafe place by the employé in substantially the same way as the employer instructed or intended it should be used falls under the definition of assumption of risk and is not to be considered contributory negligence.⁸⁴ Thus, an employé's use of a visibly defective stepladder pursuant to his employer's commands constitutes assumption of risk, rather than contributory negligence; but where he uses the ladder in a way which may not be required in the exercise of ordinary prudence to carry out his employer's instructions, and the evidence leaves in doubt this question, and also the question whether such use of the ladder contributed to the injury, such questions are for the jury.⁸⁵ That a penalty imposed for violation of an Act is to be paid into the state treasury does not make the violation criminal within the case holding that, "when the violation of a statute designed to protect persons against bodily injuries is made a criminal offense, such violation should be classed with gross negligence," and the guilty person held liable for injuries to others, regardless of the contributory negligence of the person injured.⁸⁶ It does not, therefore, take away the defense of contributory negligence.⁸⁷

An accepting employer does not waive his statutory right to the common-law defenses of assumption of risk, negligence of a fellow

but where there was willful want of ordinary care on the part of the injured employé. Under such statutes the effect of assumption of risk and that of contributory negligence on the plaintiff's right of recovery are dissimilar. It would be rash to attempt to indicate in a single decision all the points of difference between assumption of risk and contributory negligence, or to attempt to set limits to the meaning of the expression 'want of ordinary care not willful.' " *Id.*

⁸⁴ *Puza v. C. Hennecke Co.*, 158 Wis. 482, 149 N. W. 223.

⁸⁵ (St. 1913, § 2394—1 and Laws 1913, c. 599) *Id.*

⁸⁶ *Besnys v. Herman Zehrlaut Leather Co.*, 157 Wis. 203, 147 N. W. 37, citing: *Pizzo v. Wiemann*, 149 Wis. 235, 134 N. W. 899, 38 L. R. A. (N. S.) 678, Ann. Cas. 1913C, 803; *Pinoza v. Northern Chair Co.*, 152 Wis. 473, 140 N. W. 84.

⁸⁷ *Besnys v. Herman Zohrlaut Leather Co.*, *supra*.

servant, and contributory negligence, by objecting to the employé's having the benefit of the Wisconsin Act.⁸⁸

The provision of the Massachusetts Act that it shall not be a defense that the employé has assumed the risks of the injury has no application to a contractual assumption of risk; i. e., a risk assumed by the employé by virtue of his contract of employment, as distinguished from a voluntary assumption of risks outside those assumed under the contract of employment, as, for instance, the employer's failure to furnish safe tools and appliances. This arises from the fact that the contractual assumption of risk is not a defense, and that with reference to such risks the employer owes no duty and cannot be guilty of negligence.⁸⁹

A workman, whose injury was due wholly to his own negligence, cannot recover under the West Virginia Act against an employer who has not elected to pay premiums.⁹⁰ But a declaration in an action against an employer who has not elected to pay premiums is good, where its allegations show that the injury directly resulted from the negligence of some employé or officer other than plaintiff, or resulted from the negligence of such other combined with his own.⁹¹

Elective compensation depends, not upon the negligence of the employer as is the case where there has been no election and it is sought to recover compensation by action at law,⁹² but rests upon

⁸⁸ *Karny v. Northwestern Malleable Iron Co.* (1915) 160 Wis. 316, 151 N. W. 786.

⁸⁹ (St. 1911, c. 751, § 1) *Ashton v. Boston & Me. R. Co.*, 222 Mass. 65, 109 N. E. 820, L. R. A. 1916B, 1281. An experienced workman employed to repair defects in an electric wire system assumed the risks arising out of such defects. (St. 1911, c. 751, § 1) *Id.*

⁹⁰ (Wk. Comp. Act, § 26 [Code 1913, c. 15P, § 26 (sec. 682)]) *Watts v. Ohio Valley Electric Ry. Co.* (W. Va.) 88 S. E. 659.

⁹¹ *Id.*

⁹² See § 4, ante. Where the employer has not brought himself under the Act, he is not liable for accidents attributable to the negligence of no one. *Salus v. Great Northern R. Co.*, 157 Wis. 546, 147 N. W. 1070.

the simple fact of the relationship of employer and employé.⁹³ Under the Washington Act, employers who have not contributed to the state insurance fund are deprived of the common-law defenses, and it would seem that the only effective defense available in an action for damages for an alleged injury occurring to an employé in the course of his employment would be that no injury in fact had been sustained, or that the injury received was self-inflicted, or that the employer was himself free from fault. The amount of the recovery should be determined by the "comparative negligence" of all parties.⁹⁴

The provision of the Iowa Act which establishes the presumption that the injury resulted from the negligence of an employer who has rejected the Act does not abolish the defense of contributory negligence, but merely places on the employer the burden of affirmatively showing that he was without fault,⁹⁵ nor does it preclude the employer from proving want of negligence.⁹⁶

The burden of proving that the workman was contributorily negligent, and that such negligence was willful, so as to relieve from liability his employer, who has not accepted the Michigan Act, rests on the employer.⁹⁷

⁹³ *American Radiator Co. v. Rogge*, 86 N. J. Law, 436, 92 Atl. 85, 94 Atl. 85.

⁹⁴ (Wk. Comp. Act Wash. § 8) *Rulings Wash. Indus. Ins. Com.* 1915, p. 19.

⁹⁵ An employer who has rejected the Act has the burden of proving that the employé was willfully negligent with intent to cause his own injury, or that the injury was due to the employé's intoxication, and that the injury did not result from the employer's negligence. *Hunter v. Colfax Consol. Coal Co. (Iowa)* 157 N. W. 145. Where an employer elects to reject the provisions of the Act, there is a presumption raised that the employé's injury grew out of and resulted directly and proximately from the negligence of the employer. (Code Supp. 1913, tit. 12, c. 8a) *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 3.

⁹⁶ *Hunter v. Colfax Consol. Coal Co. (Iowa)* 154 N. W. 1037.

⁹⁷ *Freeman v. East Jordan & S. R. Co. (Mich.)* 158 N. W. 204.

CHAPTER III

PERSONS AND FUNDS LIABLE FOR COMPENSATION

Section

26-31. Article I.—Employers, principals, and contractors.

32-40. Article II.—Insurers and funds.

41-48. Article III.—Third persons (indemnity and subrogation).

ARTICLE I

EMPLOYERS, PRINCIPALS, AND CONTRACTORS

Section

26. Primary liability—Who liable as employers.

27. Which of two employers liable.

28. Municipal corporations.

29. Contemporaneous employment by different employers.

30. Principals and contractors.

31. Principal and agent.

§ 26. Primary liability—Who liable as employers

The employer, being the person with whom the injured employé has contracted, is the person who is primarily liable, or who must provide the fund out of which compensation must be paid. He is not relieved from liability, even though he provides insurance in a private company under an Act authorizing only such insurance; the purpose of the insurance being to insure certain and prompt payment, and to reimburse him for any and all amounts which he has so paid. He remains primarily liable,¹ and, if the insurance company becomes insolvent, the fact that he insured will not relieve him from liability to pay compensation.²

¹ (Acts 35th Gen. Assem. c. 147, Code Supp. 1913, §§ 2477m46-2477m48) Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 3.

² Id. p. 35.

The word "employer" is defined by many of the Acts. As used in the Illinois Act it does not include a farmer,³ or an automobile owner who has not elected to accept the provisions of the Act.⁴ As used in the Ohio Act in reference to private employment, it means every person, firm, and private corporation, including any public service corporation, that has in its service five or more workmen or operatives, regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written.⁵ As used in the Washington Act, it includes owners, contractors, subcontractors, agents, and municipalities,⁶ but not the United States, though it is in fact the employer.⁷ A

³ Where a person was engaged to help a farmer deliver a threshing machine to the shop for the purpose of having it repaired and on the way the machine stopped, and the employé crawled over the top of the engine, when it suddenly started, throwing him to the ground, ran over and killed him, the employer, being a farmer, was not liable, as he did not come within the Act. *Poling v. Brown*, Bulletin No. 1, Ill., p. 21. One working for a farmer in the occupation of running a threshing machine that is operated by belt and pulleys, or corn shellers operated in the same way, who is injured while in such employment, is not entitled to compensation, as not coming within Workmen's Compensation Act. *Benton v. Wilson*, Bulletin No. 1, Ill., p. 54.

⁴ There is but one way a private automobile owner may come within the Workmen's Compensation Act of Illinois; that is, by notifying the Industrial Board of his election to accept the provisions of the Act. *Nelson v. Fitzgerald*, Bulletin No. 1, Ill., p. 95. Where an employé, primarily engaged as a private chauffeur by the president of a railway company, and paid out of his employer's private funds, while driving the automobile owned by the employer, met with an accident and was killed, the beneficiary was not entitled to compensation. *Id.*

⁵ (Wk. Comp. Act, 1913, § 13, par. 2) *Clements v. Columbus Sawmill Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 161.

A corporation owning and operating a sawmill not in operation on all of the working days of the year, but requiring when in operation five or more workmen to operate it, is an "employer." *Clements v. Columbus Sawmill Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 161. A partnership is an "employer." (Wk. Comp. Act, § 13, par. 2) *In re Cooper*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 180.

⁶ (Wk. Comp. Act Wash. § 3) *Rulings Wash. Indus. Ins. Com.* 1915, p. 5.

⁷ (Wk. Comp. Act Wash. § 3) *Op. Wash. Atty. Gen.* Sept. 20, 1911.

provision making the state an "employer" has been held not to make an employer of the state board of agriculture;⁸ but the board of trustees of the University of Illinois has been held to have such legal entity under the law as to be included within this term.⁹ Six corporations, which, acting independently, employed a watchman, did not constitute a "voluntary association," within a provision that the definition of employer shall include every voluntary association having any person in service under any appointment or contract of hire.¹⁰

The liability of one as an employer under any Act depends in the first place, of course, upon the existence of the relation of employer and employé, determined in accordance with the usual rules.¹¹ The employer's liability is not affected by the fact that the

⁸ *Agler v. Mich. Agriculture Col.*, 181 Mich. 559, 148 N. W. 341, 5 N. C. C. A. 897.

⁹ *North v. University of Illinois*, Bulletin No. 1, Ill., p. 63.

¹⁰ (*Wk. Comp. Act*, § 13) *Western Metal Supply Co. v. Pillsbury (Cal.)* 156 P. 491.

Whether or not the relation of master and servant exists in a given case, under oral contract, is often a question of fact, or of mixed law and fact, and is to be proved like any other question. *Tuttle v. Embury-Martin Lumber Co.* (Mich.) 158 N. W. 875.

¹¹ A chauffeur employed by an automobile owner is not in the employment of the proprietor of a garage where the automobile is kept, where such proprietor incidentally gives him opportunity in his leisure moments to aid in the sale of secondhand automobiles on commission, but he is under no duty to do so, nor under the control or direction of the proprietor. *Lane v. Herrick*, 3 Cal. I. A. C. Dec. 29.

The subscriber, E., needing financial assistance, entered into an agreement with one A. by the terms of which the latter made a cash deposit of \$3,500 to assist the former to secure a certain contract, and also agreed to furnish another sum to enable E. to fulfill the contract. When the contract was completed, A. was to be reimbursed and given a share of the profits. All the employés were hired by E. The employé S. received a personal injury arising out of and in the course of his employment, and the insurer of E. denied liability. It was held that S. was an employé of E. *Schuman v. Employers' Liability Assur. Corp. Ltd.*, 2 Mass. Wk. Comp. Cases, 599 (Decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

A vessel was chartered under an oral agreement by which a second party

employé worked but a short time before the injury,¹² or was employed and paid through an agent,¹³ or that he has a contract with a third person, by virtue of which compensation will eventually fall

gave directions as to the times and places at which the work was to be carried on, but the handling and management of the vessel was under the control of the owner, and he was responsible for lost or destroyed goods. A captain of the vessel in the general employ of the owning company as captain was its employé in this instance. *Norman v. Empire Lighterage & Wrecking Co.*, 2 N. Y. St. Dep. Rep. 480. Where the architect in general supervision over the construction of a building recommended claimant as a superintendent to the owner of the building, the fact that the architect made some arrangement with the owner whereby he paid a part at least of the claimant's wages did not make him an employé of the architect, where his duties had nothing to do with the architect's work. *Dissosway v. Jallade*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 13.

Co-operative creamery.—Farmers' co-operative creamery companies are employers, and must provide insurance or be relieved from so doing. (Code Sup. 1913, §§ 2477m41, 2477m49) Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 13.

Hospital.—The Iowa Act applies to and includes charitable institutions such as public hospitals. Op. sp. Counsel to Iowa Indus. Com. (1915) p. 13. A nurse, accidentally injured while caring for a patient to whom she has been assigned by the hospital, can look to the hospital as her employer, though it was customary to make a special charge to the patient for the nurse, and only pay that amount to the nurse when it had been paid by the patient. *Williamson v. St. Catherine's Hospital*, 2 Cal. 1 A. C. Dec. 430.

Labor union, and individual members.—Where a janitor belonging to the Central Labor Council, a union of workingmen, was accidentally injured while working for such labor union, he was entitled to an award for disability compensation against it. *Gerber v. Central Council of Stockton*, 2 Cal. I. A. C. Dec. 580. Where a janitor of an unincorporated association is accidentally injured and the claim is made that where such association has no funds the individual membership liability is such that an award made against it would avail nothing, the members of the association cannot avoid personal liability. If so, a wide door would be opened for avoiding responsibility where the public interest requires that responsibility exist. *Id.*

¹² Although a workman had worked but two days before he was injured, he was an employé within the Act. *Lysons v. Knowles (Andrew) & Sons, Ltd.* (1901) 3 W. C. C. I. 1, H. L. The fact that a workman who was killed by accident had only worked four days did not disentitle his dependents to compensation. *Stuart v. Nixon & Bruce* (1901) 2 W. C. C. 101, 104, C. A. (Act of 1897).

¹³ See § 31, post.

on such third person;¹⁴ nor does he cease to be an employer because he temporarily lends or hires the workman's services to another, though such other person pays the wages,¹⁵ particularly where the workman remains under the directions of the former.¹⁶ But the sending of a workman to another by one who has not first employed him does not constitute a hiring,¹⁷ nor does work done for another than his employer by a workman solely on his own responsibility.¹⁸

¹⁴ Where an employé, on the pay roll of the defendant, was working on its premises when injured, doing work which was part at least in its interest, and under its foreman, he was entitled to compensation from the defendant, although it had a contract with another company under the terms of which it was possible that the compensation might eventually fall upon that company. Had he so chosen, he might have held that company under the terms of its contract, but he could not be compelled to have recourse to them for compensation, since he had no knowledge of their relation to his work and was an employé of the defendant. *Gallagher v. New York Central R. R. Co.*, *The Bulletin*, N. Y., Vol. I, No. 11, p. 21.

¹⁵ Where the respondents hired a threshing machine to farmers, and employed two men to take care of the machine and a third as road man, and this latter workman was injured while helping with the threshing, which he commonly did, and for which he was paid by the farmer, he was nevertheless in the employment of the respondents. *Reed v. Smith, Wilkinson & Co.* (1910) 3 B. W. C. C. 223, C. A. Where a charter party required the registered owner of the tug to provide and pay two men as crew, and one of them was drowned, he was in the employ of the owner, not of the charterer. *Mackinnon v. Miller* (1910) 2 B. W. C. C. 64, Ct. of Sess.

¹⁶ An employer, after engaging a man to work at an oil well, permitted him to aid in the installation of machinery for another. While such installation was delayed, the workman was killed from an explosion, he being at the time engaged in the work of installation, but under the general control and direction of his employer. It was held that the employer remained such at the time of the accident and was liable. *Walker v. Santa Clara Oil & Development Co.*, 2 Cal. I. A. C. Dec. 1.

¹⁷ Where a workman who hired out among the farmers, on applying to one, was sent on by him to another, who had asked the first to loan him a man for threshing, the services were not lent or hired by the first farmer. *Boswell v. Gilbert* (1910) 2 B. W. C. C. 251, C. C.

¹⁸ Where a stage hand made a business of contracting with theatrical companies to haul their baggage, and was given early information of their move-

A receiver, conducting a business of the employer corporation, is bound to pay the compensation for which the corporation became liable prior to his appointment; the obligation being contractual, and the compensation being in legal effect indistinguishable from wages, and the payments made by the receiver being properly classed as operative or administrative expenses.¹⁹ A workman, hired by a partnership the management of which is later taken over by a creditor who, in consideration of paying off an attachment, is given a power of attorney and assumes the management and takes over the tangible assets for the purpose of securing himself and rehabilitating the firm, the actual administration of the business being still continued by the original partners, is employed by the partnership and not by the creditor.²⁰

Failure to guard a saw in compliance with statutory safety regulations will not take a corporation out from under the Illinois Act, unless it be shown that the failure was intentional on the part of some elective officer of the corporation.²¹

§ 27. — Which of two employers liable

In determining whether, in the doing of a particular act, a workman is the servant of his original master or of the person to whom he has been furnished, the general test is whether the act is done in business of which the person is in control as a proprietor, so that he can at any time stop it or continue it, and determine the way in which it shall be done, not merely in reference to the result to be

ments by the lessee, so that he might do this, his services were not lent, but he was an independent contractor. *Huscroft v. Bennett* (1914) 7 B. W. C. 41, C. A.

¹⁹ (N. J. Emp. Liab. Act, P. L. 1911, p. 134, § 2, par. 8) *Wood v. Camden Iron Works* (D. C.) 221 Fed. 1010.

²⁰ *Maffia v. Aquilino*, 3 Cal. I. A. C. Dec. 15.

²¹ *Burnes v. Swift & Co.* (1914) 186 Ill. App. 460.

reached, but in reference to the method of reaching the result.²² Thus it has commonly been held, in cases where a horse and driver have been let by a general employer into the service of another, that the driver is subject to the control, and therefore is the agent, of his general employer as to the care and management of the horse and vehicle.²³ That one pays a workman his wages, exercises supervision over his work, selects the workmen, and has power to dismiss him, though matters proper to consider, do not necessarily determine that he is the employer.²⁴

²² *Pigeon v. Employers' Liability Assur. Corporation*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737; *Knowlton, C. J., in Shepard v. Jacobs*, 204 Mass. 110, 90 N. E. 392, 393, 26 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648.

In *Grischuck v. S. Borden & Co.*, 1 Conn. Comp. Dec. 633 (affirmed by superior court on appeal), where the deceased workman had been employed as a day laborer at odd jobs by the respondent for a number of years, and on the day of the injury was loaned by him to another firm for the purpose of making repairs in an elevator used by them in their business, the employer was held liable to the dependent widow, and the firm to whom he was loaned was released from liability.

²³ *Pigeon v. Employers' Liability Assur. Corporation* (Mass.) supra, supported by *Shepard v. Jacobs*, 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648; *Hussey v. Franey*, 205 Mass. 413, 91 N. E. 391, 137 Am. St. Rep. 460; *Corliss v. Keown*, 207 Mass. 149, 93 N. E. 143; *Waldock v. Winfield* [1901] 2 K. B. 596; *Hunt v. N. Y., N. H. & H. R. R.*, 212 Mass. 102, 107, 98 N. E. 787, 40 L. R. A. (N. S.) 778; *Rongo v. R. Waddington & Sons*, 87 N. J. Law, 395, 94 Atl. 408.

²⁴ *Pollard v. Goole & Hull Steam Towing Co., Ltd.*, 3 B. W. C. C. 366, C. A.

Where a lumber company requested a transfer company to supply teams and drivers for \$5.50 a day, and the transfer company called upon a contract teamster to supply a team and driver at \$5 a day, and the contract teamster directed a driver, regularly employed by him at \$2.50 a day, to take his team for work at the lumber company's yard, and there the driver hitched his team to a wagon of lumber supplied by the lumber company and hauled it away, the loading and designation of place being under the direction of the lumber company and the control over details and power to discharge residing in the contract teamster, the "employer" was the contract teamster, and he was primarily liable for compensation for injury sustained by the driver while doing such driving. *McLeod v. Kirkpatrick*, 3 Cal. I. A. C. Dec. 19.

Wages.—Where a section boss requests his men to assist a rancher to fight a fire from which the railroad was not in danger, and the rancher hires and

Workmen engaged in mining coal are employés of the mine owner, though the mining operations are carried on under a con-

pays the men, the rancher, not the railroad, is the employer. *Mazzini v. Pacific Coast Ry.*, 2 Cal. I. A. C. Dec. 962. Where a golf club authorizes a boy to act as caddie for members playing on its links, on condition that he be under the direction of the club's caddie master and that the power to reduce wages, reprimand, suspend, or discharge lies with the club; that the caddie report to the caddie master upon arriving at the links each day, and stay in the caddie house until called for, the rate of his pay being fixed by the club, although paid by the individual player, such rate of pay not to be exceeded in any case, and the presence of caddies upon the links is secured by the club to make the links more valuable to members, the boy is an employé of the club, and not of the member whom he may be serving when injured. *Harris v. Claremont Country Club*, 2 Cal. I. A. C. Dec. 1047. Where one who has agreed to furnish labor and material to repair a machine in consideration of a per cent. of the profits in addition to a payment to be made, calls in the service of an employé of the owner of the machine, to superintend and assist in the repair work, and such employé is paid by the repairer as agreed, such employé is an employé of the repairer and not of the owner of the machine. *Younger v. Gilro Machine Co.*, 2 Cal. I. A. C. Dec. 908. Where the appointment and amount of pay of a workman hired by a board of guardians was subject to the approval of the Local Government Board, he was notwithstanding in the employ of the guardians.

In *Iacovazzi v. Coppolo*, 1 Conn. Comp. Dec. 476, where the workman at the time of his injury was working for the benefit of a firm of plumbers, to whom he had been assigned by the respondent under a contract between respondent and the plumbers, but was paid his wages by the respondent, he was in respondent's employ. In *Brady v. Grove*, 1 Conn. Comp. Dec. 240, where the employé was engaged in creosoting a building built by one respondent, who was a building contractor, upon land owned by him, and was paid by him, though he worked under the immediate supervision of another respondent who acted as superintendent and foreman for the first, it was held the workman was the employé of the former, and the latter was discharged from liability. In *Fiorio v. Ferrie*, 1 Conn. Comp. Dec. 459, where respondent engaged a driver and his team, and paid him, and furnished man and team for a price per day to the city, which directed his work, but could not discharge him, the driver working sometimes for respondent after hours or on rainy days, when he was not needed by the city, and being occasionally hired to others, he was an employé of respondent and not of the city. In *Sinner v. Town of Colchester*, 1 Conn. Comp. Dec. 286, where claimant was employed by a supervisor in employ of the town, and his services paid for to the supervisor by the town, compensation was awarded against both the supervisor and the town, and the question of which of the two was properly

tract with a third party, who selects and pays the workmen, where the mine owner has reserved control and supervision over the working of the mine.²⁵

responsible was left for them to decide among themselves. In *De Palma v. Home Construction Co.*, 1 Conn. Comp. Dec. 358, where respondent company employed De Palma Bros. to build its houses, they in turn employing any one they wanted to work for them, keeping the time, but the wages being paid by respondent, and it being understood that respondent could discharge or transfer any one so employed, it was held that claimant, a brother of the De Palma Bros. and employed by them under this arrangement, was an employé of the respondent. Where on a rehearing it appeared that the claimant, a "shenango" or longshoreman who worked by the day for whoever would hire him, without having any definite contract for any length of time, but being paid each night and being free to work for whom he pleased the next day, had started work for the defendants, but later was sent to work for another company, because defendants had not sufficient men to do their work, and other men sent with him were paid by the latter company, that company was his employer, and the former award against defendants was rescinded. *Sala v. Martorella & Giannesi*, *The Bulletin*, N. Y., Vol. I, No. 6, p. 11. *Finlay v. Tullamore Guardians* (1914) 7 B. W. C. C. 973, C. A. Where a workman on a ship received his pay from a stevedore, who worked for the respondents and also other firms, and who testified that he handled the money merely for the convenience of the respondents, the workman was in respondent's employ. *Pollard v. Goole & Hull Steam Towing Co., Ltd.* (1910) 3 B. W. C. C. 366, C. A.

Supervision.—Where a man contracted with a shipowner to clean the boilers of a vessel, and paid the men he got to do it, the fact that they were to some extent supervised by the shipowner's foreman did not make them his employés. *Spiers v. Elderslie Steamship Co., Ltd.* (1910) 2 B. W. C. C. 205, Ct. of Sess. Where a ganger, employed by a firm of drug grinders to unload for them a barge of sulphur and to carry it in their bags into their warehouse, brought his own gang, and divided the money received among them, one of them who was injured was not in the employ of the drug firm. *Bobby v. Crosbie* (1915) 8 B. W. C. C. 236, C. A. Where the master of a trading schooner was killed, it was the managing owner, and not all of the registered owners, who was liable. *Carswell v. Sharp et al.* (1910) 3 B. W. C. C. 552, Ct. of Sess. Where a workman was engaged in plating in a shipbuilders' yard as a member of a squad, in which he was placed by the head of the squad, but with the consent of the shipbuilders' foreman, this squad working the regulation hours of the yard, and being paid by the shipbuilders

²⁵ *Skinner v. Stratton Fire Clay Co.*, vol. I, No. 7, *Bul. Ohio Indus. Com.* p. 103.

§ 28. — Municipal corporations

The Acts usually include municipalities when they become employers,²⁶ regardless of the number of workmen employed by

for overtime, having the shipbuilders' foreman as overseer, and obeying printed rules "to be observed by the workmen in the employment of" the shipbuilders, although they apportioned their work as they liked, and paid for their own unskilled labor when needed, the man working in this squad was in the employ of the shipbuilders. *McCready v. Dunlop & Co.* (1900) 2 F. 1027, Ct. of Sess. (Act of 1897). A., the owner of a coal mine, entered into a contract with B. to operate the mine, by the terms of which contract A. was to furnish all posts, timbers, and track material and implements, and B. was to mine the coal in a workmanlike manner, do necessary track laying and timbering, preserve the entry in good condition, do draining, etc., and furnish all labor necessary for the mining of the coal. The coal was to be placed in A.'s car as taken from the mine, and B. was to receive from A. a stated price per ton for all coal so taken from the mine, it being part of the agreement that A. was to take and pay for all the coal so mined. The mining was done subject to the supervision of a mine foreman employed by A. C. was employed as a miner in the mine so operated, and was killed while in the course of his employment. The commission held that C. was an employé of A. *McAllister v. National Fireproofing Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 107. In *Soloski v. Strickland*, 1 Conn. Comp. Dec. 562, where the respondent engaged another man to cut wood on his lot at a rate per cord under certain specifications, and this third party hired claimant, making a profit on his work, having the power to discharge him and to direct

²⁶ *City of Butte v. Indus. Acc. Bd.* (Mont.) 156 Pac. 130 (Code Supp. 1913, tit. 12, c. 8A, § 2477m[b]) *Op. Sp. Counsel to Iowa Indus. Com.* (1915) pp. 7, 8.

A city is an "employer." (Wk. Comp. Act, § 13, par. 1) In *re Frances E. Lyman*, vol. I, No. 7, Bul. Ohio Indus. Com. p. 182.

The city of Superior was liable under the act for the death of a caretaker of a park from injuries received while he was mowing grass in the space between the sidewalk and the curb. (St. 1913, § 925—171a, and St. 1913, § 925—3) *City of Superior v. Industrial Commission*, 160 Wis. 541, 152 N. W. 151.

Where the Act applies to employers "building or maintaining any structure," a municipal corporation which operates and maintains its own water system is an employer within the Act. (Act 1911, p. 314, § 2; *Jones & A. Abu*, St. 1913, par. 5450) *Brown v. City of Decatur*, 188 Ill. App. 147. A municipality, or quasi public municipality, such as the Sanitary District of Chicago, comes within the Workmen's Compensation Act. *Radigen v. Sanitary Dist. of Chicago*, Bulletin No. 1, Ill., p. 138.

them,²⁷ and supersede charter provisions relative to presentation of claims against a city.²⁸

§ 29. — Contemporaneous employment by different employers

Employment by more than one employer at the same time does not prevent recovery of compensation. Thus the fact that deceased was employed in the dual capacity of employé of the defendant and of the United States government did not make him any the less an employé of defendant; the applicant having a right to elect which of the employers to proceed against.²⁹ Likewise the fact that a night watchman is contemporaneously employed by several owners of buildings does not prevent him from being the employé of each.³⁰ In the absence of any joint agreement among them, such

what trees should be cut, claimant was not an employé of the respondent, but of the contractor.

Selection.—Men for measuring and weighing cargo, licensed by a port authority, were sent out in turn as called for by shipowners, and the charges per ton, which were collected by the headman, were divided, after taking out certain expenses of the port authority, between himself and the workmen. One of these meters, who was injured, was in the employ of the shipowner. *Wilmerson v. Lynn & Hamburg Steamship Co.* (1913) 6 B. W. C. C. 542, C. A.

Dismissal.—Although the foreman of a squad of coal trimmers, working on coal which a firm of shipping agents were loading on a ship, had the power to dismiss the men, and was appointed by the harbor commissioners, one of the squad who was injured was in the employ of the firm, which prepared the plan by which the work was done, and which controlled and supervised the work. *Gorman v. Gibson & Co.* (1910) S. C. 317, 47 S. L. R. 394.

²⁷ Countries, cities, townships, incorporated villages, and school districts are employers within the meaning of the Ohio Act, regardless of the number of workmen employed by them. (Wk. Comp. Act, § 13) *In re Horvat*, vol. I, No. 7, Bul. Ohio Indus. Com. p. 155.

²⁸ (Wk. Comp. Act Ex. Sess. 1912, pt. 6, § 5) *Purdy v. City of Sault Ste. Marie* (Mich.) 155 N. W. 597.

²⁹ *M. Johnston v. Mountain Commercial Co.*, 1 Cal. I. A. C. Dec. 100.

³⁰ *Mason v. Western Metal Supply Co.*, 1 Cal. I. A. C. Dec. 284.

A night watchman, who had contracts of hire with six independent con-

owners do not constitute a "voluntary association," within a provision of the California Act that the term "employer" may include voluntary associations.³¹ That a policeman hired by a mining company is also a deputy sheriff and receives fees from the county does not relieve the company from liability where he is stabbed and killed while making an arrest.³²

§ 30. Principals and contractors

The principal is a person who undertakes to do work, either for himself or another, which forms part of his particular trade or business,³³ and has engaged a contractor to do part or all of this

cerns and acted as watchman for all of them, is an employé of any one, and may recover from the one on whose premises he is injured. *Western Metal Supply Co. v. Pillsbury* (Cal.) 156 Pac. 491.

³¹ (Wk. Comp., etc., Act, § 13) *Western Metal Supply Co. v. Pillsbury* (Cal.) 156 Pac. 491.

³² *James v. Witherbee, Sherman & Co.*, 2 N. Y. St. Dep. Rep. 483.

³³ Where a man, hired to keep an airship on show on the grounds of the defendant show company, hired a lecturer, who was killed when the airship exploded, the defendants were principals. *Waites v. The Franco-British Exhibition, Inc.* (1910) 2 B. W. C. C. 199, C. A. Where a man purchased by contract with a municipal corporation, the bricks of an old building, with the stipulation that he clear all the bricks and rubbish off the place, and one of his workmen was killed while at work, the corporation was a principal. *Mulrooney v. Todd & The Bradford Corporation* (1910) 2 B. W. C. C. 191, C. A.

Work not part of trade or business.—A surveyor, while supervising the repairing of a house he had taken under contract, was not a principal. *Brine v. May Ellis, Grace & Co.* (1913) 6 B. W. C. C. 134, C. A. Nor were the tradesmen liable as principles where a builder had by contract employed two tradesmen to remove a building and re-erect it on another location, where they intended to set up a skating rink, and one of the builder's workmen was injured (*Skates v. Jones & Co.* [1910] 3 B. W. C. C. 461, C. A.); or the farmer where a man who owned a threshing machine upon renting it to a farmer sent his son to operate, and the son was injured (*Walsh v. Hayes* [1910] 2 B. W. C. C. 202, C. A.); or the manufacturers, where the workman of a contractor was employed to do some tarring on the premises of chemical manufacturers and was injured (*Zugg v. J. & J. Cunningham, Ltd.* [1909] 1 B. W. C. C. 257, Ct. of Sess); or other manufacturers who employed a deal porter by contract to pile timber on their premises, and who never did such work

work. Under the English Act and Acts following it in this regard, the principal or contractor is liable only when the injury occurred on, in, or about the premises on which he has undertaken to do any work, or when such premises or work are otherwise under his control or management. The burden of proof in this respect is on the workman.³⁴ The term "premises" includes a ship.³⁵ The word "about" is employed in this connection in a geographical sense, and denotes close propinquity.³⁶

themselves, it not being customary for persons in their trade to do it, a workman of the contractor being injured (*Hockley v. West London Timber & Joinery Co.* [1914] 7 B. W. C. C. 652, C. A.); or the firm, where the workman in a ganger employed by a firm of drug grinders to unload a barge of sulphur and store it in their warehouse was injured, the arrangement being that the ganger procure his own gang, and divide among them the money he received from the firm (*Bobbey v. Crosbie* [1915] 8 B. W. C. C. 236, C. A.); or shipowners, where they hired a contractor to scale the boilers of their ship, and one of his workmen was injured (*Luckwill v. Auchen Steam Shipping Co., Ltd.* [1913] 6 B. W. C. C. 51, C. A.; *Spiers v. Elderslie Steamship Co., Ltd.* [1910] 2 B. W. C. C. 205, Ct. of Sess.); or owners of a barge, where they employed the captain to overhaul it, and he in turn employed the mate to help, and the mate was injured (*Hayes v. S. J. Thompson & Co.* [1913] 6 B. W. C. C. 130, C. A.).

³⁴ Where an injured factory worker offered no evidence as to just where the accident happened, it was held that there was a burden of proof upon him to show that it occurred on, in or about the factory premises. *McAdam v. Harvey* (1903) 2 I. R. 511, C. A. (Act of 1897).

³⁵ Where a man, hired under contractor by a firm of coal merchants and lightermen to take two lighters on a voyage, providing everything, including the crew, for the compensation of a lump sum, appointed another man to command one of the lighters, and the boatswain of that boat was injured on ship during the voyage, the firm were liable as principals. *Dittmar v. Wilson, Sons & Co.* (*Dittmat v. Owners of the Ship V 393*), (1910) 2 B. W. C. C. 178, C. A.

³⁶ An accident resulting in the death of a workman, which occurred while he was uncoupling wagons on the mail line of track near the extremity of a siding, which was made a part of the mine by statutory provision, occurred about the mine. *Monaghan v. United Collieries, Ltd.* (1901) 3 F. 149, Ct. of Sess. (Act of 1897). Where a workman who was carrying goods from a factory building to his lorry, which was about 32 feet distant on the other side

An owner of land does not stand to a lessee in the position of principal to a contractor or subcontractor under him. In a Wisconsin

of the street, was injured at his work, the injury occurred about the factory. *McGovern v. Cooper & Co.* (1902) 4 F. 249, Ct. of Sess. (Act of 1897).

Not about the premises.—The injury did not occur about the premises, where a workman hired by a subcontractor to cart rubbish was killed in the road two miles from the site of his work. *Andrews v. Andrews & Mears* (1909) 1 B. W. C. C. 264, C. A. An injury received by a workman who was unloading goods from a wagon a mile and a half from the factory, did not happen about the premises. *Lowth v. Ibbotson* (1899) 1 W. C. C. 46, C. A. (Act of 1897). Where a workman on a new building was killed on a public road from 110 to 160 yards away from the building, while carting water to the place, the accident did not occur about the premises. *Fenn v. Miller* (1900) 2 W. C. C. 55, C. A. (Act of 1897). An injury sustained by a workman while stacking rails 700 yards from the "engineering work" of his employers was not received about the premises of the "engineering work." *Back v. Dick, Kerr & Co., Ltd.* (1906) 8 W. C. C. 40, H. L. (Act of 1897). Where a workman was injured while doing some work he had been sent to do, on a ship at dock some 550 yards from the factory of his employers, he was not injured about the factory. *Barclay, Curle & Co., Ltd., v. McKinnon* (1901) 3 F. 436, Ct. of Sess. (Act of 1897). An injury to a workman, doing work he had been sent to do on a locomotive half a mile from his employer's factory, was not sustained about the factory. *Ferguson v. Barclay, Sons & Co., Ltd.* (1903) 5 F. 105, Ct. of Sess. (Act of 1897). The accident did not occur about the mine, where a miner transferring lumber from a railroad wagon in a colliery cart 400 yards away from the mouth of the pit was fatally injured. *Coylton Coal Co. v. Davidson* (1905) 7 F. 727, Ct. of Sess. (Act of 1897). An accident to the driver of a coal train running on a private railway owned by the colliery company, which happened three-quarters of a mile from the mouth of the pit, did not occur about the mine. *Turnbull v. Lambton Collieries, Ltd.* (1900) 2 W. C. C. 84, C. A. Where a horse which a carter was driving bolted while on a public road 800 yards from the factory, the resulting injury to the carter was not about the factory. *Kent v. Porter* (1901) 38 S. L. R. 482, Ct. of Sess. (Act of 1897). The death of a workman who was engaged in carting sand from the pit to an "engineering work," the accident happening 2½ miles from the work, was not due to an injury sustained about the engineering work. *Pattison v. White & Co., Ltd.* (1904) 6 W. C. C. 61, C. A. (Act of 1897). Where the driver of a load of lumber going from a factory to a building in course of construction met with an accident on the public road two miles from the factory, causing his death, the accident did not occur about the factory. *Whitton v. Bell & Sime, Ltd.* (1899) 1 F. 942, Ct. of Sess. (Act of 1897). Where a carter's horse bolted just as he was passing through the gate of a railroad station on his way to the stables, and

sin case, the Commission said that it was not the intention of the Legislature to make an owner of land liable for compensation to employés of the tenant.³⁷

In respect to the liability of one as principal, there is a striking distinction between the English Act and the California Act. The Compensation Act of England provides that the principal shall be liable to pay to any workman employed in the execution of work "any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him." The Compensation Act of California provides that the principal must pay "any compensation which the immediate employer is liable to pay."³⁸ Under the former, the liability of the principal is to be tested by his own circumstances, while under the latter the test of liability is the liability of the immediate employer.³⁹

the carter was injured, the injury did not occur about the railway. *Bathgate v. Caledonian Railway Co.* (1902) 4 F. 313, Ct. of Sess. (Act of 1897).

Where injury to a workman occurred while he was engaged in loading a cart in the street near the entrance to his employer's premises, he was about the premises. *Powell v. Brown* [1899] 1 Q. B. 157, C. A., 1 W. C. C. 44 (Act of 1897). Where one buying window frames, to be made up, orders from the millman a definite number at a definite price, and the work is all done on the millman's premises, the buyer is not a principal, or liable to a carpenter employed by the millman to fill the order. *Hale v. Johnson*, 2 Cal. I. A. C. Dec. 339.

Where an exhibitor secures floor space in an exhibition building, and arranges to have a booth erected and decorated by a contractor, and employé of the contractor is injured upon the premises upon which the work of erecting and decorating is being done, and where the work of decorating was to some extent directed by the exhibitor, such exhibitor is liable as a principal for injuries received by employés engaged upon such work. *Brain v. Eisfelder*, 2 Cal. I. A. C. Dec. 30.

³⁷ *Puddy v. Fitch*, Rep. Wis. Indus. Com. 1914-15, p. 17.

³⁸ *Wallace v. Pratchner*, 2 Cal. I. A. C. Dec. 661.

³⁹ "In this respect a striking distinction exists between the wording of the California Compensation Act and the wording of the English statute and those of the other American states which are, in the main, founded upon the English law. The provision of the English law in this connection is as follows: 'Where any person (in this section referred to as principal), in the

Thus, under the California Act, where a contractor is liable for an injury to his employé, his principal is also liable, although the employment, while in the usual course of business of and not casual as to the contractor, is both casual and not in the usual course of business of the principal.⁴⁰

course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act, which he would have been liable to pay if that workman had been immediately employed by him.' Under this provision it clearly appears that the liability of a principal is to be tested by his own circumstances; i. e., if the injured man were working for him directly, doing the same kind of work. Under the California law, on the other hand, the provision is as follows: 'Sec. 30. (a) The principal, any general contractor and each intermediate contractor who undertakes to do, or contracts with another to do, or to have done any work, shall be liable to pay any employé injured while engaged in the execution of such work, or to his dependents in the event of his death, any compensation which the immediate employer is liable to pay.' The test of liability is therefore the liability of the immediate employer, and the principal cannot claim any defenses not open to such immediate employer. In other words, if the immediate employer is liable to pay compensation under the Act, then the principal is also liable to pay (if the immediate employer does not). The liability of the principal being strict and onerous, under the California law, the Act allows him unusual defenses not given to other parties. He can at any time within the period allowed by law recover back from the immediate employer any compensation which he has been obliged to pay because of the default of the latter. He can also require the contractor to carry compensation insurance, and if the latter does so, the principal is relieved from all liability. His position is, therefore, no worse than that of owners of buildings under our mechanics' lien laws, and, indeed, is much better by reason of his ability to require insurance from his contractors or subcontractors and also in his ability to insure his own liability at a reasonable rate." Id.

⁴⁰ *Neel v. White*, 2 Cal. I. A. C. Dec. 933. A principal or general contractor, upon whose premises an employé of a contractor has been injured, has a position analogous to that of a surety, and must pay any compensation for which the immediate employer is liable. He cannot resist liability upon the ground that the employment of the injured man, as to him, was both casual and outside of his usual course of business, where the employment of such injured person is in the usual course of business of the immediate employer. (Wk. Comp. Act, § 30) *Wallace v. Pratchner*, 2 Cal. I. A. C. Dec. 661. In this

The provisions of this Act relative to the liability of contractors and principals have been construed by the California Industrial Accident Commission in several decisions. According to these decisions, a municipal corporation may be held liable as a principal.⁴¹ And where an employé is injured while working for a subcontractor in the construction of a building, the subcontractor is primarily liable as the immediate employer. The general contractor and owner of the premises as principal, is also liable if the subcontractor

case the immediate employer, whose regular business was that of painting, employed a painter to assist him in painting the house of the principal. The job was for but two days, and casual as to both the principal and the immediate employer. It was in the usual course of business of the immediate employer, and not of the principal. The commission held that, the immediate employer being liable under the Compensation Act for injuries sustained by the employé, the principal is also liable, though he would not have been liable if the workman had been employed directly by him.

⁴¹ A municipal corporation is liable as principal under section 30 for compensation for injuries received by a contractor's employé while doing street improvement work. Since the liability is not contractual, but statutory, decisions holding that the city is not liable on the contractor's default to pay for work, labor, and material, do not apply. Nor can the city be held liable on the theory that it is agent for the assessment district. *Mihaica v. Mlag-enovich*, 1 Cal. I. A. C. Dec. 174. The commission followed the *Mihaica* Case and held that a municipal corporation is liable as principal for compensation for injuries received by an inspector of engineering employed by the city to inspect work being done, pursuant to the improvement Act of 1911, under the usual form of assessments levied upon a district within the municipality instead of being paid for out of the general funds of the city. *Spears v. City of Santa Monica*, 2 Cal. I. A. C. Dec. 1016. Where a bid to do work on a county bridge is accepted by the county, but work is started and an employé is accidentally injured before execution of the written contract and filing of the required bonds, and afterwards the county accepts the work and settles with the contractor's creditors, the county is liable as principal if the contractor is uninsured. *Forbes v. County of Humboldt*, 2 Cal. I. A. C. Dec. 887. Where the owners of land in a farmer's protection district were permitted to pay their assessments in cash or by furnishing their teams and workmen, and one owner supplied a farm laborer to work under a foreman employed by the district, and while so engaged the laborer was injured, the district was the principal and the farm owner the immediate employer, and both were liable for compensation. *Mann v. Looke*, 2 Cal. I. A. C. Dec. 415.

is unsecured. The award of compensation will be made jointly and severally against the subcontractor, general contractor and owner.⁴² Where the owner of a lot contracts to sell it to another, and retains no interest except as security for the stipulated purchase price, and the purchaser commences to erect a building on the lot for his own benefit and in his own name, a workman injured in working upon the building cannot recover compensation from the vendor.⁴³ That one is lessor does not make him liable as principal for injuries to employés of his lessee.⁴⁴ Where a general contractor agrees with his principal that the right to discharge workmen shall be reserved to the contractor and the architect and that the contractor shall be responsible for any injury occurring in connection with the work, and where the business agent of a union procures the workmen and agrees with the general contractor that they shall be paid a definite sum per thousand for lathing, but neither the business agent nor the union receive any compensation

⁴² *Hattan v. Hattan*, 1 Cal. I. A. C. Dec. 324.

⁴³ *Anderson v. Mickelson*, 1 Cal. I. A. C. Dec. 189.

⁴⁴ A lessor of mining, oil, or other lands is not liable for compensation for injuries to employés of his lessee. One not the employer of the injured man can be held liable for compensation only under section 30, which provides that the principal, general contractor, or intermediate contractors who undertakes to do, or have done any work for them, are liable for injuries to employés of subcontractors. This section does not make a lessor liable for injuries to employés of his lessee. *Cypher v. United Development Co.*, 1 Cal. I. A. C. Dec. 425. Where a corporation owning oil wells, after default in payment of a mortgage thereon, turns the property over to the mortgagee as a lessee, such lessee to apply the proceeds to his indebtedness, and a workman employed by such lessee is injured, the owning corporation is not liable for injuries sustained by such employés of the lessee. *Farris v. Potomac Oil Co.*, 2 Cal. I. A. C. Dec. 487. Where an exhibitor secured floor space in an exhibition building, and an employé of his contractor was injured while working on a booth being erected upon such floor space, the owner of the building was not liable as a principal. A lessor is not usually liable for injuries to an employé of a lessee or his subcontractors, for the reason that the work upon which the employé is injured is not work which the lessor has undertaken to have done for himself, but is being done for the lessee's sole benefit. *Brain v. Eisfelder*, 2 Cal. I. A. C. Dec. 30.

for such service, or retain any control of right to discharge the workmen, and neither the agent nor the union assume any liability or responsibility for the amount of work to be done, or the time within which it is to be done, or the price of the job, the only agreement made being to gratuitously furnish men, the general contractor is the employer of the lathers and liable as such for compensable injuries. The union and its business agents are in no way liable as subcontractors.⁴⁵ Where the one who hires the injured employé is merely a superintendent engaged by the owner and not an independent contractor, the liability to pay compensation rests on the owner alone, and not on the superintendent.⁴⁶ Where the principal or general contractor has paid compensation to an injured employé for which a subcontractor is primarily liable, he is entitled to recover the amount thereof from the subcontractor. Upon the payment of such compensation to the injured employé, the Commission will upon request make a supplementary award in favor of such principal or general contractor against the immediate employer.⁴⁷ Under the express provisions of the California Act, a principal or general contractor is entitled to an order staying execution of the award against him until such execution be returned unsatisfied against the subcontractor and immediate employer. Where, however, it appears that such stay would be a mere formality by reason of the irresponsibility of the subcontractor, a stay will not be ordered unless specially requested.⁴⁸

The Connecticut Act provides that when any principal employer procures any work to be done, wholly or in part, for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business

⁴⁵ Tallman v. Hart Construction Co., 1 Cal. I. A. C. Dec. 568.

⁴⁶ Batchelder v. Kreis, 1 Cal. I. A. C. Dec. 63.

⁴⁷ Hattan v. Hattan, 1 Cal. I. A. C. Dec. 324.

⁴⁸ (Wk. Comp. Ins. & Safety Act, § 30) Hattan v. Hattan, 1 Cal. I. A. C. Dec. 324.

of such principal employer, and is performed in, on, or about premises under his control, such principal employer is liable to pay all compensation under the Act to the same extent as if the work were done without the intervention of such contractor or subcontractor.⁴⁹ In a recent case it was held by the commissioner, under this provision and a further provision of the Act that "no contract, express or implied, no rule, regulation or other device, shall in any manner relieve any employer, in whole or in part, of any obligation created by this Act, except as herein set forth," that where the claimant, a carpenter, was working for a subcontractor on premises owned and controlled by respondent, and doing work which was a part of respondent's business, and it further seemed very likely from the evidence that the contracts were mere subterfuges to escape liability, compensation should be awarded.⁵⁰

The Massachusetts Act provides that if a subscriber make a contract oral or written, with an independent contractor to do the subscriber's work, or if such contractor enter into a contract with a subcontractor to do all or any part of the work comprised in the contract with the subscriber, "and the association would, if such work were executed by employés immediately employed by the subscriber, be liable to pay compensation under this act to those employés, the association shall pay to such employés any com-

⁴⁹ P. A. 1913, c. 138, § 5. In *Camellier v. Cardilli*, 1 Conn. Comp. Dec. 215, where a principal contractor sublet the mason work on a building, and the subcontractor before the work was finished left the country, and turned the contract over to his brother-in-law, who was to pay the laborers required to finish the work, and to make a small profit, it was held that the brother-in-law was transferred to the position of the subcontractor, and both he and the principal were held liable. In *Murphy v. Blycher*, 1 Conn. Comp. Dec. 443, the respondent contended that, because claimant was the employé of a subcontractor who employed less than five men and who had not accepted the Act, claimant therefore did not come under the Act. The commissioner held this interpretation erroneous, and, the subcontractor being irresponsible and having left for unknown parts, awarded compensation against the principal contractor.

⁵⁰ (Wk. Comp. Act, pt. B., §§ 5, 33) *Mezansky v. Sissa*, 1 Conn. Comp. Dec. 430.

pensation which would be payable to them under this act if the independent or subcontractors were subscribers.”⁵¹ In a recent case applying this provision, it was held that the conveyance of picks, shovels, and wheelbarrows, and of constructed and fabricated parts of a building from the storehouse of a builder and contractor to the premises where they are to be used, or are to be combined into a proposed structure, may be found to be a part of the trade or business of a contractor and is not necessarily an act merely ancillary and incidental to the business of that contractor.⁵² Where the claimant's employer entered into an oral contract with a firm of building contractors to load and transport some materials through his servant, in his own way, such employer was an independent agent or contractor.⁵³

A company of wreckers having full and unrestricted charge of the work, together with the men employed thereon, are independent contractors and liable as the employer for the payment of compensation to the widow of a deceased employé.⁵⁴ An independent contractor, who undertook a job of renovating and furnished the tools, scaffolding, ropes, etc., could not escape liability by turning the doing of the work over to another, either his partner or his superintendent.⁵⁵

§ 31. — Principal and agent

An agent who hires an assistant in an emergency, though without express authority is not the immediate employer of the assistant. The immediate employer in such case is the principal whose

⁵¹ St. 1911, c. 751, pt. 3, § 17.

⁵² *In re Comerford*, *In re Contractors' Mut. Liab. Ins. Co.* (Mass.) 113 N. E. 460, supported by *In re Sundine*, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318.

⁵³ *Id.*

⁵⁴ *Opitz v. Chas. Hoertz & Son*, Mich. Wk. Comp. Cases (1916) 311.

⁵⁵ *Kramer v. Schalke*, *The Bulletin*, N. Y., vol. 1, No. 8, p. 8.

work is benefited, and the liability rests on him and his principals.⁵⁶ Where such hiring is with the principal's knowledge and acquiescence, the principal's conduct amounts to a ratification of the hiring.⁵⁷

⁵⁶ (Wk. Comp. Act, § 30) *Paul v. Nikkel*, 1 Cal. I. A. C. Dec. 648.

In *Dolan v. Judson*, 1 Conn. Comp. Dec. 362, where the claimant was employed by an agent of the respondent with full power and authority to do so, and the wages were paid by the respondent through such agent, he was an employé of such respondent.

Where a driver was employed to solicit sales of beer and make delivery of same, and, in performance of his duties, he was permitted to employ helpers, and a helper in performance of his duty was injured, the brewery company was liable for the injury sustained by the helper, just as though it employed the helper, paid him, directed him, and controlled his every action as an individual employé of the company. *Schmidt v. William Pfeifer Berlin Weiss Beer Brewing Co.*, Bulletin No. 1, Ill., p. 118.

Where an expert was hired by the owner of a factory to supervise the installation of machinery, and, besides having several of the owner's employés to assist him, employed claimant and another man also, both of whom were paid by the owner, claimant was an employé of the factory owner. *McNally v. Diamond Mills Paper Co.*, The Bulletin, N. Y., vol. 1, No. 11, p. 12 (on rehearing).

Where a town's agent, after refusing a contract, undertook the building of a bridge on the proposition that he furnish his own men and machinery and teams and be paid for his work and at a given rate per day per man for the balance of the crew, a member of the crew selected by him was an employé of the town. *Peabody v. Town of Superior*, Bul. Wis. Indus. Com. vol. 1, p. 99.

⁵⁷ *Paul v. Nikkel*, 1 Cal. I. A. C. Dec. 648.

ARTICLE II

INSURERS AND FUNDS

Section

32. Distinctive insurance features of Compensation Acts.
33. Option of state insurance, private insurance, or self-insurance.
34. Rights and liabilities of insurance companies.
35. Substitution of parties, subrogation and reimbursement.
36. Premiums.
37. State insurance.
38. Excessive contributions and credits.
39. Public work.
40. Pension roll and reserve fund.

§ 32. Distinctive insurance features of Compensation Acts

In respect to their optional and compulsory insurance or security features, the Acts of the various states and territories may be divided into three groups, designated as those which compel employers subject to their operation to carry insurance securing payment of compensation, or to satisfactorily show that they are able to pay compensation without carrying insurance,⁵⁸ those which compel insurance,⁵⁹ and those which leave the matter of insurance optional as to all employers.⁶⁰ Several of the Acts provide insurance in a fund administered by the state. In some states this is the only compensatory insurance permitted,⁶¹ while in some em-

⁵⁸ Colorado, Connecticut, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. In New York this requirement applies only in respect to hazardous employment; in Vermont it applies only to private employers, insurance being optional as to municipalities and other public employers.

⁵⁹ Insurance is compulsory in Kentucky, Massachusetts, Nevada, Oregon, Texas, Washington, and Wyoming.

⁶⁰ In respect to these matters, the Acts of Alaska, Arizona, California, Kansas, Louisiana, Minnesota, Nebraska, and New Jersey are optional.

⁶¹ Insurance in a state fund is compulsory under the Acts of Kentucky, Nevada, Oregon, Washington, and Wyoming.

ployers are permitted to insure in the state fund or carry their own risks under strict regulations,⁶² and in others they are given the option to insure either in the state fund or in private companies.⁶³ Two of these Acts authorize insurance either in private companies or in a mutual association, state in nature,⁶⁴ and eighteen permit insurance only in duly licensed private companies.⁶⁵

A provision requiring insurance, or, in lieu thereof, a satisfactory showing of financial ability to pay compensation, applies to all employers, including cities and counties.⁶⁶

§ 33. Option of state insurance, private insurance, or self-insurance

The present New York Act was intended to provide a state system of insurance,⁶⁷ of employé's engaged in hazardous employment

⁶² Ohio and West Virginia.

⁶³ California, Colorado, Maryland, Michigan, Montana, New York, and Pennsylvania.

⁶⁴ Massachusetts and Texas.

⁶⁵ Alaska, Arizona, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Minnesota, Nebraska, New Hampshire, New Jersey, Oklahoma, Rhode Island, Vermont, and Wisconsin.

⁶⁶ Section 42 of the Iowa Act requires that all employers under that Act insure their liability in some insurance company approved by the state department of insurance, and provides that, if they do not, they shall be liable as if they had rejected the Act (Code Supp. 1913, § 2477m41) Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 13. But section 50 further provides that this insurance will not be required where the employer furnishes satisfactory proof to the insurance department and industrial commissioner that he is solvent and financially able to make the payments of compensation when necessity arises (Supp. to the Code, 1913, § 2477m49), or where he deposits satisfactory security with the department. Id. All employers must do one or the other, if they expect to avail themselves of the provisions of the Act (Code Supp. 1913, §§ 2477m41-2477m49) Id. p. 3. Cities must carry insurance, or be relieved therefrom by Industrial Commissioner and Commissioner of Insurance. (Code Supp. 1913, tit. 12, c. 8a, § 2477m41) Id. p. 7.

⁶⁷ (Const. art. 1, § 19) *Winfield v. New York Cent. & H. R. R. Co.*, 168 App. Div. 351, 153 N. Y. Supp. 499.

and to provide in connection therewith a system of indemnification of the state.⁶⁸ It does not contemplate an accumulation of surplus profits to be derived from the assignment of causes of action for personal injuries.⁶⁹ To understand the real purpose of this Act, the provisions for self-insurance and insurance carriers other than the state fund should be treated as makeshifts, adopted for the employer's convenience, and not be permitted to in any way infringe on the real spirit of the Act.⁷⁰ An employer who becomes a self-insurer in effect takes the place of the state fund, and his liability ceases to be strictly that of an employer, and becomes that of an insurer. He has taken the place which the statute primarily intended that the state fund should take, and necessarily assumes corresponding liabilities.⁷¹ Likewise the fact that an em-

⁶⁸ (Wk. Comp. Law, §§ 95-97) *United States F. & G. Co. v. New York Rys. Co.*, 93 Misc. Rep. 118, 156 N. Y. Supp. 615.

⁶⁹ This is made evident by an examination of section 95, which provides that the premium rate shall be "the lowest possible rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve; and for such purpose [the Commission] may adopt a system of schedule rating in such a manner as to take a count of the peculiar hazard of each individual risk," and section 96, which permits the formation of employers' associations for accident prevention, and provides that "every such approved association may make recommendations to the Commission concerning the fixing of premiums for classes of hazards, and for individual risks within such group," and also section 97. *United States F. & G. Co. v. New York Rys. Co.*, 93 Misc. Rep. 118, 156 N. Y. S. 615. This is not a law fixing liability for negligence, or fixing liability upon or creating a cause of action against the employer, but is in substance a provision that the state will make compensation to injured employes in hazardous employments from what it has collected or secured from them. It is a state system of insurance. No liability other than the premiums is imposed on the employer except by way of penalty. (Wk. Comp. Law § 21) *Winfield v. New York Cent. R. R. Co.*, 168 App. Div. 351, 153 N. Y. Supp. 499.

⁷⁰ *Id.*

⁷¹ *Id.*

The risks and changes of business are such that the ordinary individual or firm cannot qualify as a self-insurer. The large corporations whose continuous existence is assured, or who are able to deposit the securities required,

ployer makes a sufficient showing of financial ability to pay the required compensation and deposits the required securities, thereby becoming its own "insurance carrier," does not relieve it from liability for compensation for which a stock corporation or mutual association would have been liable, had it been the insurer.⁷²

Where an employer has insured in the New York state fund, the insurance premium rests on the basis that, when at work for his employer, the employé is to be engaged in the hazardous employment all the while, and the premium having been exacted on that basis, *prima facie* the loss should be met on that basis.⁷³ This law should be strictly construed, so as to give to the employé and employer alike the protection intended, and to cast on the fund the burden equitably resting upon it. The state, having compelled the employer, under heavy penalties, to pay to it his money on the promise that it will protect him from loss on account of injuries incurred in the employment, must be held strictly to its obligation.⁷⁴

§ 34. Rights and liabilities of insurance companies

Under a provision that no payment of insurance shall be made unless the same shall cover the entire liability of the employer,

can qualify as self-insurers. In effect, therefore, the law requires that the ordinary individual and firm, and perhaps the great mass of employers, must insure in the state fund or otherwise. The law, therefore, should be construed on the theory that it contemplates insurance in the state fund and employers who insure in the state fund or otherwise, or who are self-insurers, should fairly be governed by the same rule. It is the right of the individual employé and of the employer that they should be treated the same as all other employés and employers within the act. *McQueeney v. Sutphen & Hyer*, 167 App. Div. 528, 153 N. Y. Supp. 554; *Spratt v. Sweeney & Gray Co.*, 168 App. Div. 403, 153 N. Y. Supp. 505.

⁷² (Laws 1913, c. 816) *Kenny v. Union Ry. Co.*, 166 App. Div. 497, 152 N. Y. Supp. 117.

⁷³ *McQueeney v. Sutphen & Hyer*, 167 App. Div. 528, 153 N. Y. Supp. 554.

⁷⁴ *Id.*

and that every contract for the insurance of compensation or against liability therefor shall be deemed to be made subject to the requirements of the Act and provisions inconsistent therewith shall be void, an insurance company is given no greater rights than the employer. For example, a reasonable agreement made in good faith between the parties for the payment of a lump sum not inconsistent with the amount of the periodical payments previously determined, will bind the insurance company equally with the employer, and the company cannot block a settlement by objecting to payment in a lump sum merely because it was not consulted.⁷⁵ The provision of the Connecticut Act requiring that insurance policies "shall cover the entire liability of the employer thereunder" does not mean the entire liability of the employer named in the policy, but his entire liability within the terms of the business described in the policy. Hence a policy describing the employer's business as operating a farm will not sustain an award thereunder to an employé engaged in painting a building several miles from the farm and not connected in any way with the farming operations.⁷⁶ While a policy should be liberally construed to cover employés reasonably within its terms,⁷⁷ a policy of insurance against liability under the California Act will not be extended to cover any employés or departments of the employment not listed in the policy.⁷⁸ But where a policy purports to insure against all lia-

⁷⁵ *Bailey v. U. S. Fidelity and Guaranty Co.*, 99 Neb. 109, 155 N. W. 237.

⁷⁶ *Wright v. Barnes*, 1 Conn. Comp. Dec. 248 (superior court reversing commissioner).

⁷⁷ A company which had insured merchant tailors against liability under the Massachusetts Act was held liable to an independent contractor's employé, who was injured while making clothing for such merchant tailors in their workshop, though no insurance was carried by the independent contractor. (St. 1911, c. 751, pt. 3, § 17) *In re Sundine*, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318.

⁷⁸ Where the policy of insurance covers injuries to "laundry help," but no mention is made of carpenters employed by the laundry for outside work, carpenters are not included. *English v. Cain*, 2 Cal. I. A. C. Dec. 399. Where a policy issued to a water company provided that it would not cover tunnel

bility arising under the Act, whether for injuries to employés or for injuries to employés of subcontractors, and where no limitation of liability is set out in the policy in large type as prescribed by the Act, such policy protects the employer against accidents to employés of subcontractors, even though a statement be contained in the schedule of estimated pay roll to the effect that no work was being done by subcontract at the time the policy was taken out.⁷⁹ A breach of a warranty made in the policy may release the insurer from its obligations to pay the compensation awarded against the employer.⁸⁰

An insurance company can succeed in escaping liability under a policy issued by it on the ground of cancellation only by proof that it followed the statutory method literally or at least, if this is not done, that the statutory notice was in fact received by the insured.⁸¹

The fact that the insurance carrier is, subsequent to the suffering of the injury, deprived of its right to further transact such insurance business in the state, cannot be held to deprive the em-

work and an employé was accidentally killed while working in a tunnel, the insurance company was not liable, notwithstanding a provision that the policy should cover accidents arising in connection with work not specifically scheduled but more hazardous than that scheduled. *Robinson v. Durfy*, 2 Cal. I. A. C. Dec. 1060.

⁷⁹ (Wk. Comp. Act, § 35 [a]) *Walker v. Santa Clara Oil & Development Co.*, 2 Cal. I. A. C. Dec. 1.

⁸⁰ Where the policy provides that the statements set forth in the schedule are warranted by the employer to be true, and one of the statements is "that no person is or will be employed by the assured in violation of law as to age," and thereafter the employer innocently or willfully employs, in violation of law as to age, a minor who is injured in the course of his employment, the insurance carrier is not liable. *Stanton v. Masterson*, 2 Cal. I. A. C. Dec. 707.

⁸¹ *Miner v. Turnbull*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 21.

Where the employer was under the impression up to the day of the accident that he was protected by insurance, and the insurer knew that its notice of cancellation had not reached him, its claim that it had canceled the policy could not be sustained, and an award was made against both employer and insurer. *Skoczylois v. Vinocour*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 14.

ployer of the right to make any service of notice upon it that is essential to full compliance with the terms of the statute.⁸²

Under the Michigan Act, the insurance carrier is directly liable to the injured workman or his dependents, and the Board has authority in making its award to determine and fix the liability of the insurer.⁸³

§ 35. — Substitution of parties, subrogation and reimbursement

The provision of the California Act that any "employer" who is insured at the time of an accident may, after serving notice upon the insurer and employé, and filing a copy of such notice with the Commission, be dismissed from the compensation proceedings, and the insurer substituted as defendant,⁸⁴ includes principals as well as immediate employers. Consent by the insurer to such substitution is not necessary.⁸⁵ The statute must however, be complied with. An unsigned notice of substitution is ineffectual.⁸⁶

Acceptance of compensation from the insurance carrier by the injured employé does not estop him from denying notice of substitution.⁸⁷ The subrogation to the rights of the employer, which is provided for by this Act in favor of the insurer, acts automatically on the happening of the accident. The insurer may at once succeed to all the rights and duties of the employer, including the right to direct that the injured employé change physicians and submit to medical treatment furnished by the insurer.⁸⁸ However, the insurer can exercise no control over the medical treatment until it

⁸² *Weiser v. Industrial Accident Commission of State of California* (Cal.) 157 Pac. 593.

⁸³ *Opitz v. Chas. Hoertz & Son*, Mich. Wk. Comp. Cases (1916), 311.

⁸⁴ Wk. Comp. Act Cal. § 34, (e), subd. 2.

⁸⁵ *Turner v. Oil Pumping & Gasoline Co.*, 2 Cal. I. A. C. Dec. 496.

⁸⁶ *Frandsen v. J. Llewellyn Co.*, 3 Cal. I. A. C. Dec. 23.

⁸⁷ *Id.*

⁸⁸ *Hotchkiss v. Boter*, 2 Cal. I. A. C. Dec. 51.

has either paid the compensation for which the employer was liable, or has assumed the employer's liability by giving notice of such assumption to the employé and the Commission.⁸⁹ Where the insurance carrier of the principal or general contractor has paid compensation to an injured employé of the subcontractor believing him to have been directly employed by the assured, and the carrier has not insured the principal or general contractor for injuries to employés of subcontractors, but only for injuries to their own employés, the insurance carrier is entitled to an award against the subcontractor for reimbursement equally as if it were liable under its policies for the compensation.⁹⁰

§ 36. Premiums

The fact that the insurance carrier trusts the assured for payment of the premiums, instead of collecting the amount thereof when the policy is delivered, cannot be permitted to jeopardize the rights of injured employés,⁹¹ and hence failure of the employer to pay the premium on his policy does not relieve the insurer from liability, if the policy was in effect at the time of injury.⁹² Whether the employer's failure to pay an insurance premium, and forfeiture of his insurance, will deprive an employé of his remedy against the insurer, depends on whether the employer's default was before or after the injury.⁹³ That he has evaded contribution to

⁸⁹ Wk. Comp., etc., Act, § 34 (f), (e) (1); *Mullan v. Rogers*, 2 Cal. I. A. C. Dec. 927.

⁹⁰ Wk. Comp., etc., Act, § 30 (c); *Hattan v. Hattan*, 1 Cal. I. A. C. Dec. 324.

⁹¹ *Graves v. Pacific Coast Casualty Co.*, 2 Cal. I. A. C. Dec. 22.

⁹² A policy becomes effective on the delivery on the date when, by its terms, it is to go into effect. Where a policy is issued to go into effect upon certain date, and no deposit premium is exacted, and an accident occurs to an employé of the assured after such date, the insurer is liable, regardless of non-payment of premium. *Lakos v. Pacific Coast Casualty Co.*, 2 Cal. I. A. C. Dec. 21.

⁹³ The employers of an injured workman having gone into bankruptcy, he claimed against their insurers. Although later the employers defaulted by

the state fund does not, however, bar his employés from receiving compensation from the fund.⁹⁴

An agreement exacted or voluntarily obtained from an employé by the employer, obligating the employé to pay premiums on insurance against risks covered by a Compensation Act, is void as against public policy, notwithstanding a provision of the Act authorizing an agreement under which the employé pays premiums on insurance against risks not covered by the Act.⁹⁵ But contribu-

the nonpayment of a call, and ceased to be "entitled to any indemnity in respect to any accident," the insurers were liable to the workman. *Daff v. Midland Colliery Owners' Mutual Indemnity Co., Ltd.* (1913) 6 B. W. C. C. 799, H. L.; (1912) 5 B. W. C. C. 67, C. A. Where the employers of an injured workman had defaulted in their insurance and no longer had any claim upon the insurance company, the company was not liable to the workman upon a suit brought by him against them in consequence of his employer's bankruptcy. *Northern Employers' Mutual Indemnity Co., Ltd., v. Kniveton* (1902) 18 T. L. R. 504, Div. Ct., 4 W. C. C. 37 (Act of 1897).

⁹⁴ The injured employés of a defaulting employer are to be compensated even when the employer fails or refuses to report. (Wk. Comp. Act Wash. § 8). *Rulings Wash. Indus. Inc. Com.* 1915, p. 19. Loaders and unloaders of tramp ships and other vessels are entitled to compensation from the funds of class 42 when they are injured, even though the owner or master has evaded contribution to the fund. (Wk. Comp. Act Wash. § 4, class 42) *Id.* p. 13. An injured employé of a defaulting employer may receive an award for injuries, even though excluded from the pay roll; demand on the employer or listing the workman is not a condition to payment of compensation. (Wk. Comp. Act Wash. § 8). *Opinion Atty. Gen.* Feb. 1, 1912.

⁹⁵ Section 31a of the Minnesota Act provides that "it shall be lawful for the employer and the workman to agree to carry the risks covered by part 2 of this Act in conjunction with other and greater risks and providing other and greater benefits such as additional compensation, accident, sickness or old age insurance or benefits, and the fact that such plan involved a contribution by the workman shall not prevent its validity if the employer pays not less than the cost of the insurance of the risks otherwise covered by part 2 of this Act, and the workman gets the whole of the additional compensation or benefits." *Gen. Laws* 1913, c. 467, § 31a (*Gen. St.* 1913, § 8227). This provision simply authorizes the employer and workman to insure the workman for something which he could not recover under the Workmen's Compensation Act, and the premium for such extraordinary insurance could be deducted, with the consent of the workman, from his wages, but on any insurance against

tions by employés to a hospital fund, or funds to provide resident physicians in remote camps, and to procure first aid and competent care in sickness and injury, are not prohibited by a provision making it unlawful for the employer to deduct his premiums from the wages of the employés.⁹⁶

That the Compensation Act, under which insurance is taken out, is declared unconstitutional after expiration of the policy, will not prevent recovery of unpaid premiums.⁹⁷

§ 37. — State insurance

Payment of a premium into the Ohio state insurance fund has no retroactive effect, so as to relieve an employer from a direct liability accruing prior to such payment.⁹⁸

Under the Washington Act, an employer who defaults in the payment of any premium is in default in all of his operations.⁹⁹ The hazard of the business or enterprise determines the application of this Act, rather than the degree of hazard to which the individual

any accident mentioned in part 2 of the Act the employer would have no right or authority to collect from the workman a sufficient amount to pay the premium, and any agreement that might be forced from or voluntarily obtained from the workman to pay any premium on accidents covered by the Workmen's Compensation Act would be void as against public policy. Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 11.

⁹⁶ (Wk. Comp. Act Wash. § 4) Rulings Wash. Indus. Ins. Com. 1915, p. 10. As to administration of Washington Act, see § 11, ante.

⁹⁷ *New Amsterdam Casualty Co. v. Olcott*, 165 App. Div. 603, 150 N. Y. Supp. 772.

⁹⁸ In a case under the Ohio Act the Industrial Commission held that an employer who was not a subscriber to the state insurance fund prior to January 1, 1914, and who failed to pay his premium into the fund until May 2, 1914, was in default from January 1, 1914, until the date of such payment, and that the payment had no retroactive effect, and that therefore the employer was liable to pay compensation direct to injured employés and the dependents of those killed, on account of injuries or death occurring between January 1, 1914, and May 2, 1914. *Biddinger v. Champion Iron Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 70.

⁹⁹ (Wk. Comp. Act Wash. § 8) Rulings Wash. Indus. Ins. Com. 1915, p. 18.

workman is subjected. Hazardous departments are the unit of contribution, even though embracing employés who are rarely in danger of injury.¹ This Act divides employments into forty-seven different classes, and the amount of the premium each employer must pay is based upon whatever class he is in.² When the

¹ (Wk. Comp. Act Wash. § 4) Op. Atty. Gen. Sept. 8, 1911.

² Class 1 of "Construction Work" includes all underground work of whatever character in connection with sewer construction, includes tunneling and shafting and work at the entrance thereof, and also such work in open trenches exceeding six feet in depth, but does not include excavations. (Wk. Comp. Act Wash. § 4, class 1) Rulings Wash. Indus. Ins. Com. 1915, p. 10. The absence of power driven machinery does not exempt occupations named in this class, nor does the small number of employés engaged, nor the short time required to accomplish the work. Id. p. 7. Class 9 is construed as continuously operating plants or factories instead of construction or contracting enterprises, and exempts from automatic continuous monthly assessment. Id. p. 11. Class 13 does not include elevators and individual steam heating plants in office buildings, hotels, apartment houses, residences, retail and wholesale stores. Opinion Atty. Gen. Wash. Sept. 8, 1911. "Telegraph and telephone systems" (class 15) includes line and repair work, but excludes telegraph and telephone operators. Rulings Wash. Indus. Ins. Com. 1915, p. 11. "Coal mines" (class 16) includes shaft sinking in connection with coal mines, and excludes only the office force. Id. "Mines other than coal" (class 17) includes shaft sinking in connection with mines other than coal. Id. p. 12. "Quarries" (class 17) includes stone-cutting when such operations are conducted on territory contiguous to and subject to quarry operation hazard. Id. "Gas works" (class 19) excludes meter readers, complaint men, solicitors, storeroom employés, and chauffeurs. Id. "Grain elevators" (class 21) includes flouring mills (2 per cent.); grain warehouses, chop and feed mills (2 per cent.); operation of wholesale warehouses operated independently or in connection with another business; teaming operation of transfer companies; operations in retail lumber yards with or without machinery; and all operations of retail fuel yards; but excludes threshing machine and hay baling outfits, without machinery. Id. "Laundries" (class 22) excludes hand laundries, but otherwise only the office force. Id. Class 34 includes beveling glass (2½ per cent. rate), sheet metal and tin shops, whether equipped with hand, foot or mechanical power. Id. Class 35 includes the manufacture of glass jars, insulators, etc. Id. "Working in food" (class 39) includes candy and cracker factories, but excludes the office force of all factories in the class. Id. p. 13. Class 41 includes linotype compositors, proofreaders, and foremen in the room with machinery or shafting, and excludes bookkeepers and office force and hand engravers not in a room with machinery. Id. "Stockyards and

funds of any particular class are insufficient to pay an award the Commission will certify and the state auditor will issue warrants to be cashed by the individual employer.³ The legislative intent is that each of the forty-seven funds shall be automatic and self-adjusting. The rate is fixed; time of payment varies with the need. The actual premium (percentage of pay roll) cannot, however, be determined in advance.⁴ Since student trainmen are entitled to compensation if injured during the period of their studentship, the employer is required to make contribution on an amount equivalent to the average rate of pay for such work.⁵ A bonus system prevailing in connection with logging operations is regarded as additional compensation to employés and should be added to the pay roll.⁶ After December 31st of each year, whether the contributor operated at full capacity, with reduced force, on part time, or not at all, a credit found to exist is available for further assessments, or cash refund where the business ceases.⁷ Whenever

packing houses" (class 43) includes teaming in connection with stockyards and packing houses, but excludes retail meat markets and delivery wagons. Id. Class 44 includes ice wagon drivers and helpers, but excludes refrigerators of retail meat markets. Id. "Theater stage employés" (class 45) includes moving picture operators. Id. The following occupations have been ruled outside the act: Operating and maintaining of elevators and individual steam heating plants in office buildings, hotels, apartment houses, residences, and retail stores, and farm hands grubbing stumps, even with blasting powder, as an incident to the business of farming. (Wk. Comp. Act Wash. § 4) Id. p. 13.

³ (Wk. Comp. Act Wash. § 5) Id. p. 16.

⁴ Id. p. 9. The premium of any establishment given an average rate is credited pro rata to the respective classes represented by the department pay-rolls. Id. p. 13. After the 31st day of December of any year the actual pay roll of each establishment is obtained, and all contributions made during the year are adjusted to as many twelfths of such actual pay rolls as there have been monthly assessments paid into the fund during the year. (Wk. Comp. Act Wash. § 4) Id. p. 9.

⁵ (Wk. Comp. Act Wash. § 5) Id. p. 16.

⁶ (Wk. Comp. Act Wash. § 4) Id. p. 13.

⁷ Id. p. 9.

a special assessment is ordered on any particular class under this Act, the basis is the average monthly pay roll determined by reports on file in the Commission's office.⁸ A new establishment is required to contribute an initial premium on an estimated three months' pay roll, but is omitted from the list specially assessed for such months, except on the difference between the estimated and actual pay rolls.⁹

Claims for contributions to the Washington state fund are not entitled to any priority over a mortgage debt.¹⁰ The phrase "at the end of the year," within a provision of this Act that payment accounts shall be adjusted at the end of the year, necessarily contemplates the allowance of a reasonable time after the end of the year for the examination of the pay rolls and proofs in order to make adjustment.¹¹ The power given to make demand for a payment due the accident fund from an employer necessarily contemplates the power to allow a reasonable time after notice of demand for compliance.¹² Thirty days has been held not unreasonable.¹³

§ 38. — Excessive contributions and credits

Excess contributions collected under the Washington Act on any estimated pay roll over the proper premium on the actual pay roll stand as a credit to the contributor at the end of the year adjustment, and such contributor is entitled to exhaust such credit before making further payments into the accident fund.¹⁴ Where an establishment contributes as an operating concern under one

⁸ Id. p. 9.

⁹ Id.

¹⁰ *Mississippi Valley Trust Co. v. Oregon-Washington Timber Co.* (D. C.) 213 Fed. 988.

¹¹ *Barrett v. Grays Harbor Commercial Co.* (D. C.) 209 Fed. 95.

¹² Id.

¹³ Id.

¹⁴ (Wk. Comp. Act Wash. § 4) *Rulings Wash. Indus. Ins. Com.* 1915, p. 9.

class and afterwards performs construction work necessitating payment into funds of another class, the operating plant being shut down meantime, transfer of credits on the books of the Commission will be made.¹⁵ Contributions made to the insurance fund under a misapprehension of the scope of the Act will be promptly refunded.¹⁶

The provision of this Act that "any class having sufficient funds credited to its account at the end of the first three months, or any month thereafter, to meet the requirements of the accident fund, that class shall not be called upon for such month," does not seem equitably to apply to owners and contractors in construction work, as continuous monthly contribution is required to place operators in such work on the same competitive plane.¹⁷

§ 39. — Public work

Payments into accident fund for public work under the Washington Act are to be made out of the treasury of the city, county, school, port, drainage, or taxing district; abstracts of contractors' pay rolls, as well as of the direct employés in hazard, are to be forwarded to the insurance department monthly. Contractors in such work are required to file their pay rolls monthly with the city, county or district.¹⁸ Where public work of a city is done by contract, the city may collect from the contractor such sums as it is obligated to pay the accident fund on account thereof,¹⁹ or this sum may be retained from an amount due the contractor.²⁰ In the case of such contracts, the state may wait until the contracts are completed before attempting to collect payments and may then cal-

¹⁵ Id. p. 10.

¹⁶ (Wk. Comp. Act Wash. § 4) Id. p. 13.

¹⁷ Id. p. 9.

¹⁸ (Wk. Comp. Act Wash. § 17) Id. p. 22.

¹⁹ State v. City of Seattle, 73 Wash. 396, 132 Pac. 45.

²⁰ Id.

culate the percentages on the actual pay rolls during the period of the contractors' liability. Failure to collect the premiums in advance of the actual work does not constitute a waiver of the right to collect same.²¹ District auditors of the Insurance Commission, under the Washington Act, endeavor to audit pay rolls of city contractors quarterly in addition to making final audit when the Commission is notified of the completion of a public contract.²² No distinction in the rate of assessments under this Act can be made between contractors, or others, in public or private work. The same premium and necessity of contribution apply, determined by the pay roll of employes, hazard, accident experience of the class, and the sound discretion of the insurance department.²³

§ 40. — Pension roll and reserve fund

Under the Washington Act, the regular "pension roll" is certified to the state auditor for payment on the 15th of each month, and warrants are mailed on the 20th.²⁴ The reserve to be set apart is the present value of the series of monthly payments to be made.²⁵ The theory is that "the industries of to-day shall provide for the accidents of to-day." The reserve to guarantee the continuance of the pensions provided, "set apart for a beneficiary over thirty years of age, should be the proportionate part of \$4,000, determined by the relation of the expectancy of the life of the beneficiary to the expectancy of one thirty years of age."²⁶ To the reserve of a widow is added a reserve for children under 16, but not to exceed \$4,000 set apart "for the case."²⁷ Where a class has insufficient

²¹ Id.

²² (Wk. Comp. Act Wash. § 17) Rulings Wash. Indus. Ins. Com. 1915, p. 23.

²³ Id. p. 23.

²⁴ (Wk. Comp. Act Wash. § 5) Rulings of Wash. Indus. Ins. Com. 1915, p. 14.

²⁵ (Wk. Comp. Act Wash. § 5, Subd. [3]) Opinion Atty. Gen. Jan. 9, 1912.

²⁶ (Wk. Comp. Act Wash. § 16) Id.

²⁷ Id.

funds to permit the setting aside of the proper reserve, pension payment shall nevertheless be paid so long as any funds are available in the class. In such a case monthly assessments shall be called until a reasonable fund is accumulated.²⁸

²⁸ Rulings Wash. Indus. Ins. Com. 1915, p. 16.

ARTICLE III

THIRD PERSONS (INDEMNITY AND SUBROGATION)

Section

41. In general.
42. California—Exercise of option.
43. Massachusetts.
44. Minnesota.
45. New Jersey.
46. New York.
47. Washington.
48. Wisconsin.

§ 41. In general

Under Acts following the English Act in respect to injuries which arise out of and in the course of employment, and create a legal liability on the part of a third person to pay damages, for injuries caused by his negligence or fault ²⁹ without combining with any negligence of the employer or fellow workmen of the injured

²⁹ Where a workman hired by the owners of a warehouse was working at noon on the top story, and the men occupying the building closed it without allowing him sufficient time to get out, with the result that he fell down an insufficiently guarded hatchway, which was dark, there was a breach of their legal obligation to the workman as a licensee, and consequently they were liable to indemnify the owners. *Dickson v. Scott, Ltd.* (1914) 7 B. W. C. C. 1007, C. A.

Where a colliery company delivered its coal at the side of the ship in its own trucks according to its contract, and a gang of stevedores hired by the harbor authorities then loaded the coal from the trucks onto the ship, and one of the stevedores, being injured because a brake did not work properly, obtained compensation from his firm, the colliery company was not liable to indemnify the stevedore firm, since they owed no duty to the man who was injured. *Kemp & Dougall v. Darngavil Coal Co., Ltd.* (1909) S. C. 1314, Ct. of Sess. Where a horse which was temporarily standing in the yard of an employer kicked one of his workmen and killed him, but there was no evidence of negligence, the third parties who owned the horse were not liable. *Bradley v. Wallaces, Ltd.* (Thompson, McKay & Co., Ltd., third parties), (1913) 6 B. W. C. C. 706, C. A.

employé,³⁰ damages and compensation, though coextensive, are strictly alternative and an employé's recovery of one bars him from recovering the other.³¹ Though he may proceed concurrently against the person liable for compensation and the third person, he cannot recover both compensation and damages. If he recover compensation, the person paying the same is entitled to be indemnified by the third person³² in the sum paid out,³³ including

³⁰ There is no liability to indemnify if the injury was due to the combined negligence of the employer and the third person. *Cory & Son, Ltd., v. France, Fenwick & Co., Ltd.*, [1911] 1 K. B. 114, C. A.

³¹ The action of an injured workman against a third party for damages for pain and suffering was barred by a former recovery of compensation from his employer. *Tong v. Great Northern Ry. Co.* (1902) 4 W. C. C. 40, K. B. D. The action of a collier for damages against a railroad company, by whose negligence he had been injured, was barred where he knowingly accepted compensation from his employers. *Woodcock v. London & North Western Ry.* (1913) 6 B. W. C. C. 471, K. B. D.

Where an employé working on the streets is injured by a street car and thereafter settles with the street car company, releasing it from liability in consideration of a payment made, such release relieves the employer from all obligation to compensate the employé. Section 31 gives the employé his election either to claim compensation from the employer or to prosecute his claim for damages against the third party causing the injury. An election to accept either course bars the other remedy. *Silva v. Kopperud*, 2 Cal. I. A. C. Dec. 631.

As to election of remedies, see § 208, post.

³² The right of action of a workman's widow for the wrongful death of her husband, against the person causing such death, passes to the city, his employer, where such city has paid full compensation under the Act, and the city may do with such right as it chooses. *Saudek v. Milwaukee Electric Ry. & Light Co. (Wis.)* 157 N. W. 579.

³³ If compensation is accepted, the association or insurer is subrogated to the rights of the injured employé. *Turnquist v. Hannon*, 219 Mass. 560, 107 N. E. 443; *Barry v. Bay State St. Ry. Co.*, 222 Mass. 366, 110 N. E. 1031.

Where the injury to a workman is caused by the act of a third party, making him legally liable, and the employé recovers under the compensation act against the employer, the employer is then subrogated to the employé's rights, so that he may recover from the third party the amount he has paid the employé on account of the injury, but he cannot recover more than he has paid. *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 32.

doctor bills,³⁴ costs of arbitration,³⁵ and the like. The third person in such case may be a fellow workman.³⁶ Where a workman receives money payments from the third person, he has recovered damages from him, barring his right to recover compensation, though there has been no acknowledgment of liability,³⁷ or suit brought,³⁸ and even though he has attempted to reserve his claim against his employer,³⁹ and given receipts purporting to be "without prejudice."⁴⁰ Where an employé, without making claim

³⁴ An employer, against whom there has been a recovery for an injury caused by the act of a third party, can recover from that party the amount the employer has paid out for doctor bills for the employé. *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 33.

³⁵ *Great Northern Ry. Co. v. Whitehead* (1902) 4 W. C. C. 39, K. B. D. Where the driver of one of plaintiff's trucks was killed when, through the negligent management of defendant's driver, their truck collided with his, and the plaintiffs, after paying the driver's widow full compensation (£300), sued for this amount plus arbitration costs, they were entitled to recover the amount sought. *Daily News, Ltd., v. McNamara & Co., Ltd.* (1914) 7 B. W. C. C. 11, K. B. D.

³⁶ Two workmen, who by a breach of statutory rules caused the injury of a fellow workman, were not held subject to a fine, but were held liable to indemnify the employers. *Lees v. Dunkerley Bros.* (1911) 4 B. W. C. C. 115, H. L.; *Gibson v. Dunkerley Bros.* (*Lees & Sykes*, third parties), (1910) 3 B. W. C. C. 345, C. A.

³⁷ *Page v. Burtwell*, [1908] 2 K. B. 758, C. A.

³⁸ The injury to a workman being due to the negligence of third persons, he was paid damages by them without being required to bring suit; his later proceeding which he brought was barred, and it was held that he had already "proceeded" against them. *Mulligan v. Dick (John) & Son* (1904) 6 F. 126, Ct. of Sess. (Act of 1897).

³⁹ Where a workman received damages from the third party, although he did not resort to law, there being no admission of liability, and although he reserved "all claims against other parties," he was nevertheless barred from claiming compensation from his employers. *Murray v. North British Ry. Co.* (1904) 6 F. 540, Ct. of Sess. (Act of 1897).

⁴⁰ The claim of an injured workman against his employers was held to be barred by his recovery of damages from a third party, notwithstanding the fact that his receipts to the third party were "without prejudice." *Mulligan v. Dick & Son* (1904) 6 F. 126, Ct. of Sess. (Act of 1897).

or instituting proceedings, reports the injury and receives full compensation, he has "recovered" compensation.⁴¹ It has been held, however, that where all but the first of the receipts given by an injured workman to his employer for weekly payments were marked "without prejudice," and he later declined the payments and sued the third party for negligence, his option under the Act had not been exercised;⁴² also where the weekly payments of compensation paid an injured workman by his employers were accepted on the agreement that they would be paid back if he succeeded against a third party, the workman had not recovered compensation.⁴³ In a suit by an injured workman against third persons for negligence, after he had repaid money he received in weekly payments from his employer, saying that he did not understand the effect of the receipts he gave, which expressed that they were given for money received as compensation under the Act, it was a question for the jury whether he had recovered compensation.⁴⁴ That the dependent to whom the employer has paid compensation could not have recovered damages from the third person will not disentitle the employer to recover indemnity.⁴⁵ Nor does it take away the right to indemnity that the compensation was settled by agreement of which the third party had no notice.⁴⁶

⁴¹ *Mahomed v. Maunsell* (1907) 124 L. T. Jo. 153, 1 B. W. C. C. 269.

⁴² *Oliver v. Nautilus Steam Shipping Co., Ltd.*, [1903] 2 K. B. 639, C. A., 5 W. C. C. 65 (Act of 1897).

⁴³ *Wright v. Linsay* (1912) 5 B. W. C. C. 531, Ct. of Sess.

⁴⁴ *Huckle v. London County Council* (1911) 4 B. W. C. C. 113, C. A.; (1910) 3 B. W. C. C. 536, Div. Ct.

⁴⁵ Where employers, whose workman was killed by the negligence of servants of a third party, paid compensation to his sole dependent, an illegitimate child, who could not have successfully sued the third party, they were entitled, on suit, to indemnity from the third party. *Smith's Dock Co., Ltd., v. Redhead & Sons, Ltd.* (1912) 5 B. W. C. C. 449.

⁴⁶ *Thompson & Sons v. North Eastern Marine Engineering Co., Ltd.* (1903) 5 W. C. C. 71 (Act of 1897).

§ 42. California—Exercise of option

Where an injured employé knowingly, voluntarily, and while in possession of his faculties accepts from an employer full medical treatment for more than one month, including hospital treatment for two weeks, this constitutes "the making of a claim for compensation" within the meaning of a provision of the California Act that the making of a lawful claim against the employer shall operate as an assignment to him of the employé's claim for damages. The acceptance of emergency treatment for a short period of time is not, however, sufficient to constitute an election.⁴⁷ Where an employé without having made a lawful claim for compensation settles with and releases a third person whose negligence caused the injury, he thereby extinguishes the third person's liability and destroys the employer's right of subrogation.⁴⁸ But after the employé makes a lawful claim for compensation against his employer, the employer alone can settle with and release the third person, and any attempted settlement and release by the employé is void.⁴⁹ Where the employé has elected to take compensation from his employer, and while receiving same, but before filing his application with the Commission, accepts money from the third person in full settlement of his claim for damages for negligence of such person, such payment does not take away the employé's right to compensation.⁵⁰

⁴⁷ (Wk. Comp. Act, § 31) *Silva v. Kopperud*, 2 Cal. I. A. C. Dec. 631.

⁴⁸ *Lantis v. City of Sacramento*, 2 Cal. I. A. C. Dec. 680.

⁴⁹ *Silva v. Kopperud*, 2 Cal. I. A. C. Dec. 631. The Commission cannot credit an employer with payment received by injured employés on a settlement with the third person causing the injury, if the employé made a prior claim for compensation against the employer prior to the settlement. The payment, having been wrongfully made by the third person, cannot be permitted to impair the employer's right to proceed against him and recover damages. *Id.*

⁵⁰ *Id.*

§ 43. Massachusetts

The Massachusetts Act does not import into its terms the equitable principle of subrogation; it merely provides that, where the insurer has given prompt relief to the dependents or the employé as required by the Act, it may enforce for its own benefits the rights against tortious third persons causing his injury, which would otherwise have been available to the employé or his representative.⁵¹ This Act puts upon the insurer the burden of undertaking what in many instances might be litigation uncertain by reason of disputed facts or novel law, but gives the insurer all the advantages of the right of action which in substance is assigned to it. Hence it is an immaterial circumstance how much the insurer may have paid or be liable to pay under the Act.⁵² The rules of law applicable to executed contracts and to the doctrine of equitable estoppel have not been abrogated, and an insurer, having acted in good faith and fully complied with the Act, should not be deprived of its rights.⁵³ Under this Act, the remedies, damages, and compensation cannot be pursued concurrently, and the choice postponed until judgment has been recovered, and then, upon tender to the insurer of the amount of compensation received, the employé collect the judgment.⁵⁴

The compensation provided by the death statute is in substance a penalty, and hence the Legislature had power to provide that

⁵¹ (Wk. Comp. Act. pt. 3, § 15) *Turnquist v. Hannon*, 219 Mass. 560, 107 N. E. 443.

⁵² *Id.*

⁵³ *Barry v. Bay State St. Ry. Co.*, 222 Mass. 366, 110 N. E. 1031.

⁵⁴ (St. 1911, pt. 3, § 15) *Barry v. Bay State St. Ry. Co.*, *supra*; *Grace v. Adams*, 100 Mass. 505, 507, 97 Am. Dec. 117, 1 Am. Rep. 131; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 555, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; *O'Regan v. Cunard Steamship Co.*, 160 Mass. 356, 361, 35 N. E. 1070, 39 Am. St. Rep. 484; *Atlas Shoe Co. v. Bloom*, 209 Mass. 563, 95 N. E. 952; *Colonial Development Co. v. Bragdon*, 219 Mass. 170, 106 N. E. 633.

one who has afforded prompt relief to the dependents of the deceased shall receive same.⁵⁵

Where, in an action against a railroad for injuries to a third person's employé, the defense was that plaintiff, by taking advantage of the Compensation Act, had estopped himself from recovering, he could not successfully set up his ignorance of such Act to bar enforcement of its provisions.⁵⁶ But where defendant in such case set up an agreement between plaintiff and his employer, and alleged that same was filed and approved by the Industrial Accident Board, plaintiff was entitled to show invalidity of the agreement and want of jurisdiction in the board because his signature was procured by fraud,⁵⁷ though it is intended by the Act to give agreements of settlement which have been duly filed and approved by the Board the same effect as a decision of the Board.⁵⁸

§ 44. Minnesota

A section of the Minnesota Act which has been vigorously, but unsuccessfully, assailed is section 33, which provides for cases in which the employé is entitled to compensation for injuries which occurred under circumstances also creating a liability against a third party. In case such third party is also subject to the compensatory provisions of the Act (part 2), the employé may either recover from his employer the relief prescribed by the Act, or may bring an action against such third party, but cannot proceed against both. If he proceed against the third party, his recovery is limited to the relief prescribed by the Act. If he takes compensation from his employer under the Act, the employer becomes subrogated to his right of action against the third party, and may recover the

⁵⁵ (St. 1911, c. 751, pt. 3, § 15) *Turnquist v. Hannon*, 219 Mass. 560, 107 N. E. 443.

⁵⁶ *Barry v. Bay State St. Ry. Co.*, 222 Mass. 366, 110 N. E. 1031.

⁵⁷ *Id.*

⁵⁸ (St. 1911, c. 751, pt. 3, § 4, as amended by St. 1912, c. 571, § 9) *Id.*

aggregate amount payable to the employé with costs, disbursements, and reasonable attorney fees. In case such third party is not subject to the compensatory provisions of the Act, the employé may sue him, without waiving any rights against the employer, and the damages recoverable are not limited to the relief prescribed by the Act; but, if the employé recovers from such third party, the employer is entitled to deduct, from the compensation payable by him under the act, whatever amount is actually received by the employé from the third party. In other words, if a sum equal to or exceeding the compensation payable under the Act, is actually collected from the third party, the employer is relieved from liability; but, if the sum actually collected be less than the amount payable under the act, he must make good the deficiency. If, instead of prosecuting an action against such third party, the employé collects compensation from his employer, the employer becomes subrogated to the employé's rights against the third party, and may sue him for the damages sustained by the employé; but, after reimbursing himself for the compensation payable to the employé, and for the costs, attorneys' fees, and expenses of collecting the damages, he must pay over to the employé any surplus remaining of the amount collected.⁵⁹ The fact that the third person is an officer or agent of a corporation which is subject to the statute does not render the statute applicable unless the officer was acting in the course of his authority for the corporation, and to such an extent as to render the corporation liable for his act.⁶⁰

§ 45. New Jersey

The right to compensation under the New Jersey Act of 1911 and the right to recover damages for tort are of so different a

⁵⁹ *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71. Section 33 of the Workmen's Compensation Statute (Laws 1913, c. 467; Gen. St. 1913, § 8229), in respect to injuries to an employé, resulting from the act of a third person not his employer, has reference to cases where such third person

⁶⁰ *Id.*

character that the employer has no right by way of subrogation to the workman's claim against the tort-feasor. By the amendment of 1913 the employer is only released when the employé recovers of the tort-feasor a sum equal to or greater than the total payments for which the employer is liable, and the employer is only entitled to recover of the tort-feasor a sum equal to the amount of the compensation payments which he has paid to the injured employé or his dependents.⁶¹ It does not militate against an action under this Act that the representative of decedent has a right of action against a third person.⁶²

Where an employé was injured prior to the Act of 1913, through the negligence of one not his employer, under such circumstances as to entitle him to compensation from his employer under the Act of 1913, the employer could not recover from the third person for the compensation paid to the employé under the statute; the statutory compensation being part of the compensation of the employé for services rendered.⁶³

§ 46. New York

Where an employé is injured by the act of a third person in the course of his employment, he is entitled to claim compensation under the New York Act. The Legislature deemed it proper, however, that he be not allowed to recover compensation and at the same time recover damages. Accordingly provision has been made for the employer's subrogation to the employé's rights. Under this provision, where the employé claims compensation his cause of action against the third person is assigned to the state if

is also subject to the compensation statute; it has application where the third person is not subject to the Act. *Hade v. Simmons* (Minn.) 157 N. W. 506.

⁶¹ (P. L. 1913, p. 303) *Newark Paving Co. v. Klotz*, 85 N. J. Law, 432, 91 Atl. 91.

⁶² *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458.

⁶³ (P. L. 1913, p. 311, § 23; P. L. 1911, p. 520) *Interstate Telephone & Telegraph Co. v. Public Service Electric Co.*, 86 N. J. Law, 26, 90 Atl. 1062.

the compensation is payable from the state insurance fund, and otherwise to the person liable for payment of the compensation. In other words, the party who has to pay or secure the statutory compensation can then recover the damages for which the third person is liable.⁶⁴ Such provision does not, however, prevent an employé from suing the third person for damages, but recognizes his right to do so if he chooses. If he elects to do so, he can claim compensation under the statute only for the deficiency, if any, between the amount collected from the third person and the compensation.⁶⁵ In this respect the New York Act differs from the Acts of many states, which merely give the employé an election whether to sue or to claim damages.⁶⁶ "Subrogation," within this Act, does not mean substitution, but means rather indemnification, and therefore limits the amount recoverable by the state or insurer to the amount paid on the claim.⁶⁷ It has been said to be a sig-

⁶⁴ (Workmen's Compensation Act, § 29) *Lester v. Otis Elevator Co.*, 169 App. Div. 613, 155 N. Y. Supp. 524, affirming 90 Misc. Rep. 649, 153 N. Y. Supp. 1058. The receipt of compensation by an injured workman is an election subrogating the employer or insurer to the workman's remedies against an independent wrongdoer. *Miller v. New York Rys. Co.*, 171 App. Div. 316, 157 N. Y. Supp. 200.

⁶⁵ *Id.* The rights of the servant under this statute, and of the servant as an individual under the common law or the statutes, are alike remedies which are open to him. *Matter of Jensen*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276; *Miller v. New York Rys. Co.*, 171 App. Div. 316, 157 N. Y. Supp. 200.

⁶⁶ *Lester v. Otis Elevator Co.*, 169 App. Div. 613, 155 N. Y. Supp. 524, affirming 90 Misc. Rep. 649, 153 N. Y. Supp. 1058.

⁶⁷ (Wk. Comp. Law, § 29) *United States F. & G. Co., v. New York Rys. Co.*, 93 Misc. Rep. 118, 156 N. Y. Supp. 615. The clause, read in conjunction with the title of the section, does not necessarily import a right on the part of the insurer, under his assignment, to recover all the damages which the workman might recover if he elected to pursue his remedy against the third party tortfeasor, but only such recovery as is consistent with the purpose clearly defined in the title; i. e., the purpose of "subrogation." *Lester v. Otis Elevator Co.*, 90 Misc. Rep. 649, 153 N. Y. Supp. 1058. Subrogation is defined in the *Standard Dictionary* as follows: "The succession or substitution of one person or thing by or for another; in law, the putting of a person (as a surety) who

nificant feature supporting this construction of the statute that, notwithstanding the previous enactment of statutes in California, Connecticut, New Jersey, Massachusetts, and other states containing provision for part payment to the injured employé, or for the retention in the state insurance fund of any surplus amount collected by the insurer in excess of indemnification, no such provision is found in this Act.⁶⁸ The reason for the statutory declaration as to election is founded upon the common-law rule that there should not be a double satisfaction for the same injury.⁶⁹ Compensation received by an injured workman under the Act is not insurance such as will preclude a third person who has contributed to the injury from setting up the employé's election through receipt of the compensation and consequential subrogation of the employer or insurer to his right of action.⁷⁰

§ 47. Washington

Under the Washington Act the Commission must await the termination of suit before making any payment to a workman who is injured by a third person and elects to bring suit in lieu of accepting compensation.⁷¹ Workmen injured by third persons must

has paid the debt of another in the place of the creditor to whom he has paid it, so that he may use for his own indemnification all the rights and remedies that the creditor possessed against the debtor."

"The insurer, upon paying to the assured the amount of a loss, * * * insured is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss." *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235, 11 Sup. Ct. 554, 557, 35 L. Ed. 154.

⁶⁸ *Id.*

⁶⁹ *Walsh v. N. Y. C. & H. R. R. Co.*, 204 N. Y. 58, 62, 63, 97 N. E. 408, 37 L. R. A. (N. S.) 1137; *Gambling v. Haight*, 59 N. Y. 354; *Miller v. New York Rys. Co.*, 171 App. Div. 316, 157 N. Y. Supp. 200.

⁷⁰ *Miller v. New York Rys. Co.*, *supra*.

⁷¹ (Wk. Comp. Act Wash. § 3) *Rulings Wash. Indus. Ins. Com.* 1915, p. 5.

assign their right of action to the state as a condition of receiving compensation from the accident fund.⁷²

§ 48. Wisconsin

The right of action which the employer has under the Wisconsin Act against a third person whose wrongful act caused the injury is an incorporeal thing, resting in action—remediable by an ordinary judicial remedy, as distinguished from a thing in possession. It will survive,⁷³ and may be assigned by the employer so as to give the assignee a right to sue thereon in his own name.⁷⁴ Thus it will be seen that an ordinary claim for damages for a tortious injury to the person, notwithstanding it was otherwise at common law, is a property right which may pass by assignment or operation of law, with the incidental right to a judicial remedy, by and in the name of the real party in interest, to enforce it. That is the thing which, under the Act, in the circumstances there mentioned, is waived or becomes possessed by the employer, according to the facts.⁷⁵ The legislators seem to have contemplated that, equitably, a wrongdoer is the one primarily liable; that the statutory right of the injured man shall work for the wrongdoer's protection, but if insisted upon, the other right shall pass to the employer as an equivalent. The idea was not that the employer should become possessed of the common-law right for mere purposes of indemnity. That seems plain, because of the transition not waiting upon actual payment of the statutory claim, or the enforcement of such common-law claim being limited to the measure of the employer's payment to discharge the statutory liability. In the circumstances mentioned in the statute, the rights of all persons become fixed upon the event of the employé, by action in legal form,

⁷² *Id.*

⁷³ *McGarvey v. Independent Oil & Grease Co.*, 156 Wis. 580, 146 N. W. 895.

⁷⁴ *Id.*

⁷⁵ (Gen. St. 1913, § 2394—25) *Id.*

making a choice between the two ways open to him. That against the employer being chosen, that against the wrongdoer immediately passes, by operation of law, to such employer. The status, according to the statute, is as follows: The sole source of compensation for the employé is the employer, but without prejudice to the liability of the wrongdoer, he remaining answerable just the same, but to the then real party in interest, the employer.⁷⁶ In cases under this Act it has been held that the fact that a fireman, injured on a city street and not on his employer's premises, receives full pay during his disability, does not assign to the city his right of action against a third person who caused the injury;⁷⁷ also that where an employé, ignorant of his rights, goes to see the assistant city attorney, and is advised that he has been injured while performing service outside his duties, the attorney not intending to mislead him, and then decides to accept a sum offered him by the third party whose horses injured him, he has not exercised such election to waive compensation and accept damages as will bar his action against the city, his employer.⁷⁸

⁷⁶ *Id.*

⁷⁷ *Hornburg v. Morris* (Wis.) 157 N. W. 556.

⁷⁸ *Manis v. City of Milwaukee*, Bul. Wis. Indus. Com. 1912-13, p. 29.

CHAPTER IV

PERSONS ENTITLED TO COMPENSATION

Section

49-69. Article I.—Employés.

70-84. Article II.—Dependents.

ARTICLE I

EMPLOYÉS

Section

49. Persons entitled to compensation as employés.

50. New York.

51. Contract of service.

52. State employés.

53. Municipal employés.

54. California.

55. Federal employés.

56. Previous health of employé.

57. Minor employés.

58. Employés excepted.

59. Farm laborers.

60. Domestic and household servants.

61. Clerks.

62. Casual employés.

63. Connecticut.

64. California.

65. Iowa and Minnesota.

66. Independent contractor.

67. Federal Act.

68. Employé of independent contractor.

69. Officers.

§ 49. Persons entitled to compensation as employés

The test by which to determine whether one person is another's employé, within the rule making the employer liable for injuries resulting from the negligence of his employé, is whether the alleged

employer possesses the power to control the other person in respect to the transaction out of which the injury arose.¹ The court cannot

¹ *State ex rel. Virginia & Rainy Lake Co. v. District Court*, 128 Minn. 43, 150 N. W. 211; *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 20; *Kasovitch v. Wattis Co.*, 2 Cal. I. A. C. Dec. (Bulletins 1915) 319.

The test by which to determine whether a person is acting as another's employé is to ascertain whether at the time of injury he was subject to such person's orders and control, and was liable to be discharged for disobedience of orders or misconduct. *Mason v. Western Metal Supply Co.*, 1 Cal. I. A. C. Dec. 284; *United States Board & Paper Company v. Lander*, 47 Ind. App. 315, 93 N. E. 232. The term "employé" indicates persons hired to work for wages as the employer may direct, and does not embrace the case of the employment of a person carrying on a distinct trade or calling to perform services independent of the control of the employer. *Rep. Nev. Indus. Com.* 1913-14, p. 26. Where a photographer furnishes material to, and develops and prints pictures taken and sold by, a second person, but has no control over said second person, and cannot direct that person's movements, his time, his subjects, or his methods of work, and where the proceeds of the sales made are divided between them, and this is the only return on the investment received by either of them, they do not stand in the relation of employer and employé, as defined by section 14 of the Act, and, although the second person be killed while actually taking pictures, no compensation is due to his dependents. *Shaw v. Foley*, 1 Cal. I. A. C. Dec. 629. That a superintendent of construction, having peculiar skill and knowledge as an inventor, is allowed great liberty of action as to purchase of materials and manner of construction, did not show such lack of power of direction and control as prevented him from being an employé. *Turner v. Oil Pumping & Gasoline Co.*, 2 Cal. I. A. C. Dec. (Bulletins 1915) 496.

In *Gertel v. H. W. Dorman & Co.*, 1 Conn. Comp. Dec. 616, where it appeared that the claimant was employed by a man doing work on the premises of the respondents, standing to them in the relation of either tenant or licensee, and that they had nothing to do with the work, except that they permitted it to be done on the premises, claimant was not an employé of respondent. In *Fineblum v. Singer Sewing Machine Co.*, 1 Conn. Comp. Dec. 126, it was held that where an agent of the company employed others to assist him in making sales, deliveries, and collections, invested some of his own capital in the business, and was under no direction or supervision of his principals, he was not an employé. In *Reed v. Booth & Platt Co.*, 1 Conn. Comp. Dec. 121, it was held that a traveling salesman, selling goods for the defendant, receiving half profits for his work, paying his own expenses, and being forbidden to solicit regular customers of the company, was an employé within the meaning of the Act. But in *Stagg v. Benjamin*, 1 Conn. Comp. Dec. 405, where the claimant was employed by the respondent to do carpenter work about her properties,

determine, as a question of law, that the rule of respondeat superior does not apply, unless the evidence shows conclusively that the alleged employer possessed no such power of control.² Since the

and was paid by the day, and the respondent furnished the materials and paid a helper engaged by the claimant, claimant was held to have been an employé of respondent.

Where a lather was engaged to work to put on laths, at the price of 25 cents a bunch, and worked alone at first, and then obtained other men from the union to aid him in the work, paying them the same rate of wages, all the work being done under the direction of the foreman, he was a mechanic and entitled to compensation. *Jones v. Commonwealth of Mass.*, 2 Mass. Wk. Comp. Cases, 721 (Decision of Com. of Arb.).

The applicant owned a team and wagon, and was engaged in hauling dirt for appellant, receiving for the work of himself, team, and wagon \$6 per day. While so engaged he received injuries to two fingers, by which he was totally disabled for 2½ months, and which resulted further in causing a permanent stiffness, by reason of which the applicant has only partial use of such fingers. An arbitration committee awarded the applicant compensation for 43 weeks at 50 per cent. of his average weekly wage. Appellant contended that Ridler was not their employé within the meaning of the Act, and that the award of compensation was excessive. The Board held that the fact that the applicant worked under orders of defendant's foreman, and was required to conform in detail to the regulations and system of work of defendant, was sufficient to make him an employé of defendant within the meaning of the compensation law. *Ridler v. Little Co.*, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 27.

Defendant company hired wagons, horses, and drivers from a third party, and paid him a certain amount per day for each outfit. He in turn paid claimant, the driver, a day wage. The claimant, who was under the direction and control of defendant at all times during working hours, was an employé of defendant. *Nolan v. Cranford Co.*, 4 N. Y. St. Dep. Rep. 337 (affirmed in 155 N. Y. Supp. 1128).

Not an employé.—A coal company, which owned mineral lands and operated coal mines located thereon, having temporarily suspended the operation of its mines, leased a portion of its lands to two of its former employés, who opened up a small mine thereon and paid the company a stated sum per ton as royalty for the coal removed therefrom. In conducting their operations they employed, paid, and discharged their laborers, and were not under the supervision of the lessor. They sold their coal in the open market. They employed one of the lessor's employés, and he was fatally injured in the course of his employment. The Commission held that he was not an employé of the lessor at the time of injury. In *re Ida Bell Monroe*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 186.

² *State ex rel. Virginia & Rainy Lake Co. v. District Court*, supra.

Workmen's Compensation Acts are remedial in nature, and must, as a general rule, be given a liberal construction, to accomplish the purpose intended, provisions defining when the relation of employer and employé exists bring within the Acts all cases in which, under the above rule, such relation is found to exist.³ The question to be determined is, "What was the alleged employé doing, and what was his part in or the relation to the actual work?" rather than whether his contractual relation with the employer was such as to absolve the latter from common-law duties or of care for the safety of employés.⁴ In the ordinary acceptance of the term, one who is engaged to render services in a particular transaction is not an employé; the term "employé" embracing continuity of service, and excluding those employed for a single and special transaction.⁵ It does not usually include physicians, pastors,⁶ professional nurses,⁷ or public lecturers on a Chautauqua circuit.⁸ It may, however, include those not engaged in manual labor, such as school-teach-

³ *Id.*

⁴ *In re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598.

⁵ *Rep. Nev. Indus. Com.* (1913-14) p. 26. "The term 'employé' has a limited and restricted meaning, and cannot be applied to include one in the temporary service of a corporation, particularly when the service is of a highly scientific nature. The fact that a corporation temporarily engages the professional services of a mining engineer to make an examination of its property, and perhaps act in an advisory capacity, does not make the person so engaged or retained either a workman or employé within the meaning of the Act." *Id.* A mining engineer, or "an expert making trips underground from time to time for the purpose of making inspection of the workings," cannot be said to be "employed in the same general employment and in the usual and ordinary transaction of the business," or to be a workman or employé within the meaning of the Act. *Id.*

⁶ *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 15.

⁷ A professional nurse, performing her duties with a skill which is the result of training in that profession, is not a servant, but rather one who renders a personal service to an employer in pursuit of an independent calling. (*Code Supp.* 1913, § 2477m16) *Id.* p. 14.

⁸ (*Code Supp.* 1913, § 2477m41) *Id.* p. 16.

ers.⁹ The fact that a workman furnishes tools and materials, or undertakes to do a specified "job" or produce a given result, will not prevent his being an employé.¹⁰ A deaconess, living and working in a hospital and receiving an annuity to cover her clothing and personal expenses, is not an employé of the hospital; neither are nurses in training working under the same arrangement.¹¹ Nor is one an employé of a religious home for the aged, wherein he resides, where he has deeded all his property to the home and is in turn guaranteed food and shelter for the remainder of his life, though he does quite a little work around the home for which he is paid no stipulated amount, or any at all, except at the option of the persons managing the home.¹² Under the English Act one is not ordinarily deemed an employé who is to be compensated by a share of the profits;¹³ but under some of the state Acts, neither

⁹ In *Skinner v. Connecticut School for Imbeciles*, 1 Conn. Comp. Dec. 106, it was held that it is not necessary that an employé be doing manual labor in order for the Compensation Act to apply. The duties of a school-teacher require just as much expenditure of energy of mind and body as other employments.

¹⁰ In *re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598.

¹¹ Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 13, p. 32.

¹² Id. p. 33.

¹³ The remuneration was by the share, and compensation was not recoverable where the engineer of a steam fishing vessel was guaranteed a minimum weekly wage, but was paid by a share in the profits (*Admiral Fishing Co., Ltd., v. Robinson* [1910] 3 B. W. C. C. 247, C. A.); where members of the crews of fishing vessels received, besides wages, board, and lodging, a poundage on the net profits of the trip (*Costello v. Kelsall Bros. & Beeching, Ltd., Canwell v. Kelsall Bros. & Beeching, Ltd., and Tindall v. Great Northern Steam Fishing Co.* [1913] 6 B. W. C. C. 480, H. L., and 5 B. W. C. C. 667, C. A.); where a cook on a fishing vessel, who received, besides the wages named in his contract, liver money, trip money, and stocker money (*Burman v. Zodiac Steam Fishing Co.* [1914] 7 B. W. C. C. 767, C. A.); where a deck hand, who received "stocker" money in addition to his wages, was transferred to another steam trawler on the same pay as before, and the second vessel was lost with all on board two days out, before there was any "stocker" to divide (*Stephenson v. Rossall Steam Fishing Co.* [1915] 8 B. W. C. C. 209, C. A.); where the mate of a trawler was paid by a certain part of the price which the catch brought,

the fact that the wages are fixed in part by the profits,¹⁴ nor that they are not definitely fixed in amount,¹⁵ nor that they are payable on a commission basis, in whole or in part, determines the relation of employer and employé.¹⁶ Nor, as a general rule, will it preclude one from being an employé that he is to be paid by the job,¹⁷ or on a piece basis,¹⁸ that he is employed merely by the day,¹⁹

after certain current expenses had been deducted (*Aberdeen Steam Trawling & Fishing Co., Ltd., v. Gill* [1909] 1 B. W. C. C. 274); and where a share hand on a trawler was injured while working at storing fish in a cutter, which was to take the fish to the market, although he was free to refuse the work, but was paid \$1 for it, which sum was divided among the crew on the trawler (*Whelan v. Great Northern Steam Fishing Co., Ltd.* [1910] 2 B. W. C. C. 235).

Where workmen on fishing vessels received, in addition to their wages, stocker money, trip money, etc., but also received additional wages, because the share money was so little as to not be worth considering, they were not paid by share, but were workmen. *Williams v. Steam Trawler Duncan (Owners of)*, and *McCord v. Steam Trawler City of Liverpool (Owners of)*, (1914) 7 B. W. C. C. 767, C. A.

¹⁴ Employers are no doubt entitled to compensation, even though their wages are fixed in part by the profits of the concern for which they work. *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 3.

¹⁵ Where a manager of the defendant's business had been offered an interest in the business, but refused, and, though he had no agreement as to the amount of his wages, drew large sums from time to time with the full knowledge and permission of his employer, accounts being kept of the amounts drawn, and this amount was listed under his schedule of income for taxation as salary and wages, he was an employé, even though he was not included in the pay roll upon which the insurance premium was paid. *Howard v. George Howard, Inc., The Bulletin, N. Y.*, vol. 1, No. 11, p. 14.

¹⁶ *Id.* p. 20.

Where an employé was hired at a fixed salary for fixed hours per day, during which time his employer had full direction and control over his work, but was allowed a commission on all new business which he was able to get for his employer, not neglecting any assigned duties to search for such new

¹⁷ *In re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598.

¹⁸ Piece workers, who are not independent contractors, with a chance to gain or lose upon the employment of others, are employés to the same extent as if they were working for wages. *Malott v. Healey*, 2 Cal. I. A. C. Dec. 103.

¹⁹ *Gove v. Royal Indemnity Co.*, 223 Mass. 187, 111 N. E. 702.

or is a student workman,²⁰ or that he is an officer or director of the corporation employing him.²¹ It is essential, however, that some wages be in fact paid or payable.²² The fact that one is a director of a bank gives him no right to compensation as an employé thereof.²³

business, the arrangement on a commission basis did not create a dual relationship, and he was an employé, regardless of which work he was doing at the time of the injury. *Cameron v. Pillsbury* (Cal.) 159 Pac. 149.

²⁰ *Rulings Wash. Ins. Com.* 1915, p. 16.

²¹ *Craycroft v. Craycroft-Herrold Brick Co.*, 2 Cal. I. A. C. Dec. 654.

An officer of a corporation, even though he be the principal stockholder, is not debarred from compensation by that reason alone. *Kennedy v. Kennedy Mfg. Co.*, *The Bulletin*, N. Y., vol. 1, No. 5, p. 12. An officer and director of a company is nevertheless an employé of the company, where he receives regular wages and performs the ordinary duties of an employé of the business. *Bowne v. S. W. Bowne Co.*, *The Bulletin*, N. Y., vol. 1, No. 12, p. 17. A mechanic, operating a machine for making moldings at a day wage, was an employé, even though he was president and stockholder of the employing company. *Cantor v. Rubin Musicant Co.*, 3 N. Y. St. Dep. Rep. 392.

In *Welton v. Waterbury Rolling Mill*, 1 Conn. Comp. Dec. 78, it was held, where the claimant had a contract as supervisor of defendant's casting department and spent half his time traveling in the interests of the company, that he was a director and treasurer of the company, though receiving no salary for the latter duties, did not preclude him from being an employé.

²² In *Loveland v. Parish of St. Thomas Church*, 1 Conn. Comp. Dec. 14, it was held that a choir boy, paid 25 cents a month for singing, but more in the nature of a reward for punctuality and regularity than wages, was not an employé. In *Lynch v. Abel*, 1 Conn. Comp. Dec. 520, where the respondent lived upon a farm owned by his father, in return providing a home for his father, who occasionally did small things around the house, but received no pay and was under no obligation to work, the father was not an employé of the respondent. In *Varine v. Sargeant*, 1 Conn. Comp. Dec. 194, where, after finishing one job, the workman was sent to a shanty to wait till the weather became so certain other work could be started, whether or not he paid any board being disputed, it was held that it had not been shown that he had entered the employment.

²³ In *Burnham v. Thames National Bank*, 1 Conn. Comp. Dec. 339, it was held that the director of a bank is not an employé of the bank, though he be paid for attendance at meetings, such pay bearing no relation to the amount or value of the work done, and being no inducement to undertaking such

"The California Commission has held that where the corporate stock is all in the hands of the directors, two directors, father and son, as president and secretary, being authorized to exercise full control of the business, the son, on being injured while acting in the course of his employment as secretary, can recover compensation against such close corporation;²⁴ also that the fact that one was general manager on a salary conclusively showed the fact of his employment, though he was also president of the corporation.²⁵ A mere secret intention to terminate an employment does not terminate it, in the absence of notice or an abandonment of the undertaking by the employé's failure to perform the work assigned him.²⁶ Convicts from the different state penal institutions are not engaged in any contract of employment within the meaning of the Washington Act.²⁷ A seaman under contract with a ship is outside the scope of that Act.²⁸

The provisions of the Connecticut Act do not extend to include a prisoner working in a chair factory in a jail, under no contract and receiving no pay; the county receiving a lump sum from the chair factory for the work done.²⁹

§ 50. — New York

Many of the statutes define "employé." By the New York Act, "employé" is defined as "a person who is engaged in a hazardous employment in the service of an employer, carrying on or conducting the same upon the premises or at the plant, or in the course of

duties; the duties of the directors are regulated as much by law as by the bank, and they have no power individually, except as a member of the board.

²⁴ *Id.*

²⁵ *Rosenberg v. Western Mercantile Co.*, 2 Cal. I. A. C. Dec. 673.

²⁶ *Goering v. Brooklyn Mining Co.*, 2 Cal. I. A. C. Dec. 141.

²⁷ (Wk. Comp. Act Wash. § 17) *Opinions Atty. Gen.* Sept. 17, 1913.

²⁸ (Wk. Comp. Act Wash. § 4, class 20) *Rulings Wash. Indus. Ins. Com.* 1915, p. 12.

²⁹ *Ryan v. Metropolitan Chair Co.*, 1 Conn. Comp. Dec. 37.

his employment away from the plant of his employer.”³⁰ It has been said that, in determining who is an “employé” within the meaning of that Act, only decisions under it or similar Acts based on the same identical principles can be recognized as controlling, influential, or even interesting.³¹ The applicability of the statutory enumeration or definitions of employments deemed entitled to protection is not to be determined narrowly, but rather in a reasonable and common-sense manner, so as to render the Act valid and operative.³² If an employé is hired for work exclusively and predominantly within one or more of the enumerated occupations, his right to compensation for injury in the course of his employment cannot be fairly made to depend on whether he was at the moment of injury engaged in an act clearly constituting the direct doing of work within the Act.³³ Thus a painter’s right to compensation for injuries sustained in his daily trade does not depend on a showing that he was at the moment applying a brush, mixing paints, or mounting a scaffold.³⁴ If an employé’s duties are exclusively or predominantly within an enumerated employment or employments, or he is injured in doing work fairly within the scope of the ordinary fulfillment of such duties, his injury is compensable, though the particular act he was doing at the time of injury would not ordinarily be described as the doing of work enumerated in the statute.³⁵ To construe the statute otherwise would defeat its pur-

³⁰ (Workmen’s Compensation Law, § 3) *Newman v. Newman*, 169 App. Div. 745, 155 N. Y. Supp. 665; *Matter of Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158; *In re State Workmen’s Compensation Comm’n, Dale v. Saunders Bros.*, 218 N. Y. 59, 112 N. E. 571, affirming 171 App. Div. 528, 157 N. Y. Supp. 1062.

³¹ *In re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 596.

³² *Gleisner v. Gross & Herbener*, 170 App. Div. 37, 155 N. Y. Supp. 946.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

One does not cease to be an employé because at certain instants of time he is not actually engaged in work. *Scott v. Payne Bros., Inc.*, 85 N. J. Law, 446, 89 Atl. 927.

pose, and make its operation and benefits depend on harsh, arbitrary, and unworkable distinctions, which would inevitably defeat its practical workings.³⁶ Where, however, an employé's ordinary duties and customary scope of activity do not come exclusively or predominantly within the enumerated employments, and he only casually and incidentally does work falling within that category, his right to remuneration depends upon whether he sustained injury while actually and momentarily doing work named in the statute. Where it appears that the employé was not so engaged when he met with injury, he is not entitled to compensation, even though he at times did work embraced within the Act.³⁷ That the workman procured his employment by means of a false written statement, in violation of a penal statute, did not prevent him from being an "employé," or the one employing him from being his employer.³⁸ The question whether the relation of employer and employé existed is one of law, where the facts are conceded.³⁹

§ 51. — Contract of service

To constitute one an employé, it is essential that there be a contract of service,⁴⁰ an implied consideration of which is usually provision for compensation for injury to him arising in the course of

³⁶ *Gleisner v. Gross & Herbener*, *supra*.

³⁷ *Matter of McQueeney v. Sutphen & Meyer*, 167 App. Div. 528, 153 N. Y. Supp. 554; *Matter of Kohler v. Frohmann*, 167 App. Div. 533, 153 N. Y. Supp. 559; *Smith v. Price*, 168 App. Div. 421, 153 N. Y. Supp. 221; *Matter of Parsons v. Delaware & Hudson Co.*, 167 App. Div. 536, 153 N. Y. Supp. 179; *Gleisner v. Gross & Herbener*, *supra*.

³⁸ (Laws 1913, c. 816, Consol. Laws, c. 67, §§ 3, 4) *Kenny v. Union Ry. Co.*, 166 App. Div. 497, 152 N. Y. Supp. 117.

³⁹ *Id.*

⁴⁰ *Hillestad v. Indus. Ins. Com.*, 80 Wash. 426, 141 Pac. 913, Ann. Cas. 1916B, 789, 6 N. C. C. A. 763; *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 18.

Where a county gives a contract for the construction of roads to a private party, the county is not liable to the employés of the contractor for injuries

his employment and not through his intentional or willful misconduct,⁴¹ and that the services be not merely voluntary.⁴² The requisite "contract of service" is not a contract "for" services. The former relationship constitutes one an employé, and brings him within

sustained, unless there is a contract of hire between the county and the workmen. *Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 23.*

A boy, injured while sawing up lumber to be used for the University Extension department and paid for by it, was not an employé of that department, where it was not a party to the hiring of the boy and had nothing to do with it. *Schmitz v. City of Appleton, Bul. Wis. Indus. Com. 1912-13, p. 31.*

Existence of contract.—Where a quarryman received beer or supper from a neighboring farmer in return for helping in the evening with the hay-making, there was no contract of service, or at least no legal contract. *Kemp v. Lewis (1914) 7 B. W. C. C. 422, C. A.* But where a casual laborer, hired by a farmer to help with threshing, was injured while helping the driver of the machine, who had been hired with the machine, in accordance with custom, to remove the machine from the farm, he was injured in the farmer's employ. *Newson v. Burstall (1915) 8 B. W. C. C. 21, C. A. Connecticut.* Where a small boy was in the habit of daily assisting a grocer's employé to deliver packages, going with the wagon and taking the packages into the house, while the driver remained in the wagon, and receiving his reward in the way of candy and fruit from the store, there was no contract of employment, and he was not an employé within the Act. *Taylor v. New York Supply Co., 1 Conn. Comp. Dec. 182.*

⁴¹ *Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245.*

⁴² That the contractee, a carpenter by trade, was injured while voluntarily aiding the contractor, did not make him an employé of the contractor. *Artenstein v. Employers' Liability Assur. Corp., Ltd., 2 Mass. Wk. Comp. Cases 699 (Decision of Com. of Arb.).*

Whether services merely voluntary.—Where a carpenter voluntarily works on a church building, which is being constructed, in the mere hope that he may be later hired if seen on the job, and he is permitted so to work by a member of the church, he was not in the employ of the owners or builders of the church, in the absence of any ratification by them. *Steiman v. Sford, 2 Cal. I. A. C. Dec. 1018.* But where the members of a partnership enter into a contract with a person, by which the latter is to install certain machinery at his own expense, and one of the partners living at the place of business aids in unloading a wagon containing machinery, billed to the contractor, and is injured by an accident while so doing, such evidence is insufficient to show that the partner was at the time of the accident an employé of the contractor. *Anderson v. Perew, 2 Cal. I. A. C. Dec. (Bulletins 1915) 736.*

the Act, while the latter relationship makes one an independent contractor—that is, a self-serving employé—and excludes him from the Act.⁴³ The contract of service need not be express, but may be implied,⁴⁴ as where a substitute is engaged by an employé in accordance with a well-established custom,⁴⁵ or it may arise from the ratification of an unauthorized employment of a workman by a subordinate.⁴⁶ It is immaterial whether the employment was under a contract concededly valid as to both parties, or under a con-

⁴³ Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 18.

⁴⁴ Where the applicant had on several occasions been employed by the hour by defendant, and on the day of the accident was asked by the driver of one of the defendant's auto trucks to assist him, the driver telephoning to defendant's office for permission to employ the applicant, and the applicant standing by and understanding that the employment was authorized, there was at least an implied employment by defendant. *Gallagher v. Federal Transfer Co.*, 1 Cal. I. A. C. Dec. 39. Where a building manager employs A. to reshingle a building by the day, with permission to hire B. to help him, and A. finds that he cannot get B. to do the work, and employs C. without the consent of the employer, C. is in the employ of the manager. *Petersen v. Pellasco*, 2 Cal. I. A. C. Dec. (Bulletins 1915) 199.

Where the claimant, employed by the owner of the premises on which the defendant was having its work done as a general handyman, had been discharged by the owner, but continued to work for the defendant at the request of one of its employés, for whom he had done work with the permission of the owner while in his employ, and was injured five days after his former employment had ceased, he was an employé of the defendant. *Gallini v. Magnesite Products Co.*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 12.

⁴⁵ Where it is an established custom for a waiter to get a substitute occasionally, providing he is acceptable to the steward, and a substitute is injured while at work, without the employer's knowledge or there being any express contract of employment, the substitute is impliedly an employé of such employer. *Clark v. Morrison & Burns*, 2 Cal. I. A. C. Dec. 90.

⁴⁶ Where a railroad company had two roundhouse men on duty at night, and, one of them quitting, the other hired claimant, telling him the next morning that he could not work any longer unless hired by a certain secretary, and the company paid him the regular wages for his work and \$25 in compromise adjustment for an injury received during the night, such acts constituted a ratification of the employment without authority, and made the workman an employé of the company. *McCutcheon v. Marinette, Tomahawk & Western R. R. Co.*, *Rep. Wis. Indus. Com.* 1914-15, p. 13.

tract voidable at the election of the employer, or whether the liability of the employer for wages was fixed or determinable under quantum meruit.⁴⁷ A contract of service does not arise from the existence of the relation of landlord and tenant,⁴⁸ carrier and passenger,⁴⁹ bailor and bailee,⁵⁰ from the rendition of professional services,⁵¹ from a partnership relation,⁵² from the performance of man-

⁴⁷ *Kenny v. Union Ry. Co.*, 166 App. Div. 497, 152 N. Y. Supp. 117.

⁴⁸ Where a steel tester making £2 a week obtained an agreement with his employers which allowed him to live in a cottage near by without paying rent, in return for which he saw to the cleaning of the offices (his daughters doing the work), and was killed by gas which escaped from the offices into his bedroom, there was no contract of service. *Wray v. Taylor Bros. & Co., Ltd.* (1913) 6 B. W. C. C. 529, C. A.

⁴⁹ Where one seeking employment visited defendant's office and was directed by the person in charge thereof to go to defendant's camp, and where he did so, riding on defendant's logging train, and was injured before leaving the vicinity of the train, without having done any work or received any pay from the defendant, the relation between the parties was that of passenger and carrier, and not employer and employé. *Susznik v. Alger Logging Co.*, 76 Or. 189, 147 Pac. 922.

⁵⁰ The fact that the driver of a taxicab was allowed to keep 75 per cent. of his receipts, minus the price of the petrol he used, and that he was very little or not at all under the control of the owners, although he wore a uniform they furnished, and although they used the words "servant" and "dismissal" in their posted notices, was held sufficient evidence that he was not a workman, but a bailee. *Smith v. General Motor Cab Co., Ltd.* (1911) A. C. 188. The fact that the driver of a taxicab was allowed to retain 25 per cent. of his day's receipts, minus the value of the petrol he had used, was no evidence of a contract of service, the relation probably being one of bailment. *Doggett v. Waterloo Taxicab Co., Ltd.* (1910) 3 B. W. C. C. 371, C. A.

⁵¹ There was no contract of service where a laundry girl taught music to a neighbor's children, for which she received pay (*Simmons v. Heath Laundry Co.* [1910] 3 B. W. C. C. 200); where for compensation a lecturer was explaining the different parts of an airship (*Waites v. Franco-British Exhibition, Inc.* [1910] 2 B. W. C. C. 199); or where a board of guardians employed a doctor (*Murphy v. Enniscorthy Board of Guardians* [1910] 2 B. W. C. C. 291, C. A.); but a man playing professional football for his club was under a contract of service (*Walker v. Crystal Palace Football Club, Ltd.* [1910] 3 B. W. C. C. 51, C. A.). Where the employer directs and controls the

⁵² See note 52 on following page.

ual labor without subjection to the alleged employer's control,⁵³ or where one sails on a ship on the sharing system without being subject to the owner's control,⁵⁴ or where a workman's son is engaged

route of a vaudeville performer, time of performance, and manner of putting on the act, the performer is under contract of service. Her vocation is not to be classed with such professional services as are rendered by lawyers and physicians. *Howard v. Republic Theater*, 2 Cal. I. A. C. Dec. (Bulletins 1915) 514.

⁵² A member of a partnership, who performs services for the partnership, for which he receives money designated as "wages," is not an employé of the partnership. *In re C. E. Cooper*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 180.

Where the owner of several teams agrees with applicant that he may take a team and find work for it with himself as driver, the team to be fed by the owner, and the earnings and losses to be divided equally, the parties are copartners, not employer and employé. *Sayers v. Girard*, 1 Cal. I. A. C. Dec. 352.

In *Ferranti v. Kennedy*, 1 Conn. Comp. Dec. 196, where a mason and his helper, working together, agreed to do a certain piece of work for \$75, and between themselves agreed that each should draw union wages according to his trade, and that the remainder should be divided equally, they were held to be partners, and there was no contract of employment.

A partner, although he worked as a foreman and received a compensation for his work, was not a workman within the Act of 1897. *Ellis v. Ellis & Co.* (1905) 7 W. C. C. 97 C. A. (Act of 1897). Where a trustee, who was closing up a business, hired one of the former partners to work with him for half an hour each day, and promised to give him a part of any sum which might be left of the business, but exercised no control of him, there was no contract of service. *Pears v. Gibbons* (Nelson, third party), (1913) 6 B. W. C. C. 722, C. A. But where a man, who had been employed by another workman in charge of a boat which made a business of carrying cargo from fishing vessels to the ports, and who like the other received as pay a third of the gross earnings, and who was not liable for losses, but was compelled to obey the orders of the owners, was drowned, it was held that he was a workman. *Jamieson v. Clark* (1910) 2 B. W. C. C. 228, Ct. of Sess. Nor does the owning of shares in the vessel keep the master of the ship from being a workman, a shareholder not being a partner. *Carswell v. Sharpe et al.* (1910) 3 B. W. C. C. 552, Ct. of Sess.

⁵³ See § 66, post.

⁵⁴ There was no contract of service with the owner, where the master employed and paid the crew, and carried any cargoes that he pleased, receiving as his compensation two-thirds of the gross earnings (*Boon v. Quance* [No. 1], [1910] 3 B. W. C. C. 106, C. A.); where a vessel's captain was paid half the

by the workman to help him in his own⁵⁵ or his employer's business.⁵⁶ Whether a contract of service arises from the performance of work given out of charity depends on the circumstances of the particular case.⁵⁷

gross receipts after port charges had been paid, and had charge of the hiring and paying of the crew, and was free to trade with any ports he chose (*Hughes v. Postlethwaite* [1911] 4 B. W. C. C. 105, C. A.); where, in a case involving the drowning of the master of a ship, it appeared that the ship's captain paid all disbursements and expenses, receiving for it two-thirds of the gross receipts (*Jones v. Ship Alice and Eliza* [Owners of], [1910] 3 B. W. C. C. 495, C. A.); or where a mate of a ship, which was sailed on the sharing system, was engaged by the captain and promised as pay a part of the freight (*Hoare v. Barge Cecil Rhodes* [Owners of], [1912] 5 B. W. C. C. 49, C. A.). But there was such contract of service with the owner, where a man, who was employed as captain of a vessel to use it "on the best paying trade for the benefit of all concerned," employed and paid the crew of the ship, receiving for the purpose and his own compensation two-thirds of the gross receipts (*Kelly v. S. S. Miss Evans* [Owners of], [1913] 6 B. W. C. C. 916, C. A.); where the owner fixed the route, freight, and destination, although the captain, the person injured, received a share of the profits as remuneration, and out of it paid the wages of the mate and a part of those of another hand (*Smith v. Horlock* [1913] 6 B. W. C. C. 638, C. A.); and where the mate of a ship was drowned at sea, and it was alleged that the vessel sailed on the sharing system, but the only facts proven were that defendants owned the ship on which the man was mate (*Victoria* [Owners of Ship] *v. Barlow* [1912] 5 B. W. C. C. 570, C. A.).

⁵⁵ A son, who worked for his father and lived with him, although paying for board and lodging, and who was injured on a journey he was making for his father's business, was not a workman. *McDougall v. McDougall* (1911) 4 B. W. C. C. 373, Ct. of Sess.

⁵⁶ A timber merchant, who had contracted with a workman to fell some timber he had bought and agreed to carry away, was not liable as a principal for an injury to the workman's son, engaged by the workman to help in the work, since the son was not a "workman." *Marks v. Carne* (1910) 2 B. W. C. C. 186, C. A.

⁵⁷ A man working for the Central (Unemployed) Body of London under the Unemployed Workmen Act of 1905 is under a contract of service, and upon injury by accident is entitled to recover. *Porton v. Central (Unemployed) Body for London* (1910) 2 B. W. C. C. 296, C. A. A workman has been held to be under a contract of service while doing work which he obtained through a distress committee serving under the Unemployed Workmen Act of 1905.

Where it does not appear that the employé's misstatement of his name and age induced the employer to enter into the employment contract, such misrepresentation does not constitute fraud such as will relieve the employer from liability.⁵⁸

§ 52. — State employés

Neither the regents of the University nor the state board of agriculture come within the Michigan Workmen's Compensation Act by reason of the provision that the state shall be subject to the Act; and hence an employé of the Agricultural College is not an employé of the state, where the College has not voluntarily come within the Act.⁵⁹ Regular employés of the state working upon state highways come within the Washington Act.⁶⁰ Where a member of the California National Guard is injured by an accident arising out of his employment and caused by the falling of his horse, on which he was riding while on duty, he is entitled to compensation for the resulting disability.⁶¹ A school-teacher employed to supervise gymnasium classes in a state imbecile school of Connecticut is an employé of the state, and the Compensation Act applies to injuries received in her employment.⁶²

Gilroy v. Mackie et al. (Leith Distress Committee), (1910) 2 B. W. C. C. 269, Ct. of Sess. Where a blind man injured while working in an industrial institute for blind people, which institution was partly supported by charity, and which paid him 5s. a month over his board and lodging, he was under a contract of service. *Macgillivray v. Northern Counties Institute for the Blind* (1911) 4 B. W. C. C. 429, Ct. of Sess.

Where a man worked in a labor yard maintained by a charitable institution, so that unemployed workmen could earn their board and lodging, and sometimes trifling sums besides, there was no evidence of a contract of service. *Burns v. Manchester & Salford Wesleyan Mission* (1909) 99 L. T. 581, C. A.

⁵⁸ *Havey v. Erie R. Co.*, 87 N. J. Law, 444, 95 Atl. 124.

⁵⁹ (Pub. Acts 1912 [Ex. Sess.] No. 10, pt. 1, § 5) *Agler v. Michigan Agricultural College*, 181 Mich. 559, 148 N. W. 341.

⁶⁰ (Wk. Comp. Act, Wash. § 17) Opinion Atty. Gen. Sept. 17, 1913.

⁶¹ *Peterson v. State of California*, 2 Cal. I. A. C. Dec. (Bulletins 1915) 48.

⁶² *Skinner v. Connecticut School for Imbeciles*, 1 Conn. Comp. Dec. 106.

§ 53. — Municipal employés

Jurors, since they are not under any contract of hire, express or implied, with the county, and are not subject to its control or supervision, are not employés of the county.⁶³ Clerical employés in the office of the city clerk are not employés of the city in conducting a light and water plant as contemplated by the Kansas Act.⁶⁴ Employés under civil service appointment are not under the Washington Act.⁶⁵ A horseman and trained member of a fire company, who was classified as in the "official service" and not in the "labor service," has been held not to belong to the class of city employés entitled to compensation under the Massachusetts Act as "laborers, workmen and mechanics."⁶⁶ But a fireman or policeman is an employé of the city in Minnesota, where he was in the service of the city and not appointed for a regular term of office.⁶⁷ County engineers and laborers employed by the county are employés under the Iowa Act.⁶⁸ A civil engineer, appointed by a Minnesota district court to supervise the construction of a judicial ditch, is an employé of the counties interested in the construction of the ditch.⁶⁹ The source from which the money for carrying on work on the roads

⁶³ (Laws 1913, c. 467, § 34, subd. 1 [Gen. St. 1913, § 8230]) Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 27.

⁶⁴ (Wk. Comp. Act, § 6, Laws 1911, c. 218) *Udey v. City of Winfield*, 97 Kan. 279, 155 Pac. 43.

⁶⁵ (Wk. Comp. Act, Wash. § 17) *Rulings Wash. Indus. Ins. Com.* 1915, p. 23.

⁶⁶ *Devney v. City of Boston*, 223 Mass. 270, 111 N. E. 788.

A laborer ordinarily is a person without particular training, who is employed at manual labor under a contract terminable at will, while workmen and mechanics broadly embrace those who are skilled users of tools. *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300; *Ellis v. U. S.*, 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589, *Breakwater Co. v. U. S.*, 183 Fed. 112, 114, 105 C. C. A. 404.

⁶⁷ *State ex rel. City of Duluth v. District Court (Minn.)* 158 N. W. 790, 791.

⁶⁸ (Code Supp. 1913, tit. 12, c. 8a, § 2477m16[b]) Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 7.

⁶⁹ Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 13, p. 31.

of the state is derived has no bearing on the question of liability, and although the funds consist in part of money appropriated by the county board and part of funds appropriated by the state, the employé being hired by the county, the county is solely liable.⁷⁰ A prisoner of the county serving sentence on a work farm, his wife being paid a small amount by the county, is not an employé of the county.⁷¹

§ 54. — — — California

Employés of municipal corporations, entitled to compensation under the California Act, include a street inspector under control of the city and paid indirectly out of a paving assessment, but directly by the contractor,⁷² a street commissioner, a manager of waterworks,⁷³ a substitute fireman appointed by a municipal officer, where his services are accepted and paid for by the city,⁷⁴ or his appointment is according to an established custom, though he be not under the civil service rules,⁷⁵ a deputy marshal, who has acted as such and been paid therefor by the city, though his appointment has never been ratified or approved as required by law,⁷⁶ and a deputy appointed by a town marshal and under control of the town authorities, though he is not on the town pay roll.⁷⁷ Where a city

⁷⁰ Id.

⁷¹ Id. p. 32.

⁷² *Barron v. City of Venice*, 2 Cal. I. A. C. Dec. 25.

⁷³ Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 8.

⁷⁴ The appointment by a municipal officer of a substitute fireman, the acceptance of the fireman's services, and payment of his wages by the municipality make him an "employé," though he be not under the civil service rules. *Campbell v. City of Los Angeles*, 2 Cal. I. A. C. Dec. 300.

⁷⁵ Where it is customary for a battalion fire chief to appoint a substitute fireman in place of a fireman on leave of absence, a substitute so appointed and injured was entitled to disability compensation, though the civil service rules neither permitted nor prohibited such employment. Id.

⁷⁶ *Olsen v. Rogers Development Co.*, 2 Cal. I. A. C. Dec. 586.

⁷⁷ *Eastman v. State Compensation Insurance Fund*, 2 Cal. I. A. C. Dec. 390.

marshal places his son in charge of a pump, which it is the marshal's duty to care for, and the son is injured, compensation sought against the city must be denied, if it does not appear that the marshal had express authority to employ his son.⁷⁸ The director of an irrigation district is an employé within the meaning of this Act.⁷⁹ Where a city charter provides for creating and maintaining a relief, health, life insurance, or pension fund for municipal employés, and such system covers the subject of compensation for accidental injury or death in line of duty, such charter provisions, not the Compensation Act, govern the city's liability to employés or their dependents covered by it; the Compensation Act being excluded from operation by virtue of section 6 of article 11 of the Constitution.⁸⁰

§ 55. — Federal employés

An "artisan," within the original federal Act, continued in force as to injuries prior to the Act of 1916, is one who practices an industrial art, a trained workman, a superior mechanic.⁸¹ The term "laborer," though not so easily susceptible of accurate definition, was evidently used by Congress to designate men who do work requiring little skill, as distinguished from artisan.⁸² These terms

⁷⁸ Noonan v. City of Ferris, 2 Cal. I. A. C. Dec. 89.

⁷⁹ Kiernan v. Turlock Irrigation District, 2 Cal. I. A. C. Dec. 259.

⁸⁰ Crehan v. City of Los Angeles, 1 Cal. I. A. C. Dec. 252.

⁸¹ In re Grant, Op. Sol. Dept. of L. 94.

⁸² The ordinary and popular understanding of the word "laborer" accords with the definition given by the Standard Dictionary, whereby a laborer is described as "one who performs physical or manual labor requiring little skill or training other than regular domestic servants, one who gains a living by manual toil," and the definition given by the dictionary accords with the view taken by probably a decided majority of the courts. 24 Cyc. 810 et seq. According to general understanding, the occupation of a laborer is distinguished from other occupations by the fact (1) that his work is essentially physical and toilsome; (2) that it makes a demand primarily upon his physical or mechanical powers and not upon his intellectual faculties except in a

have been determined to include a storekeeper in the Canal Zone,⁸³ an inspector whose duties involved no manual labor,⁸⁴ a messen-

minor degree; (3) that it requires on his part relatively little skill, except of a manual or mechanical sort, and relatively little training, except such as comes from examples and experience; (4) that it calls for the exercise of little or no independent judgment or discretion; and (5) that it is performed by rule of thumb or under the immediate direction of a superior. In *re Grant*, Op. Sol. Dept. of L. 94.

In its ordinary and usual acceptation, the word carries with it the idea of actual physical and manual exertion or toil. *Farinholt v. Luckhard*, 90 Va. 936, 21 S. E. 817, 44 Am. St. Rep. 953. A laborer is one who labors with his physical powers in the service of and under the direction of another for fixed wages. *Blanchard v. Railroad Co.*, 87 Me. 241, 32 Atl. 890. A laborer is one whose work depends upon mere physical power to perform ordinary manual labor, and not one engaged in services consisting mainly of work requiring mental skill or business capacity, and involving the exercise of the intellectual faculties. *Kline v. Russell*, 113 Ga. 1085, 39 S. E. 477. Primarily a clerk in a mercantile establishment is not a laborer, even though the proper discharge of his duties may include the performance of some amount of manual labor. If the contract of employment contemplated that a clerk's services were to consist mainly of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties rather than work the doing of which properly would depend upon the mere physical power to perform ordinary labor, he would not be a laborer. If, on the other hand, the work which the contract required the clerk to do was, in the main, to be the performance of such labor as that last above indicated, he would be a laborer. *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300. "Laborer" should be construed according to its common acceptation, and to mean men who do work which requires little skill, as distinguished from an artisan. *Guisse v. Oliver*, 51 Ark. 356, 11 S. W. 515. When we speak of laboring or working classes, we do not intend to include therein persons like civil engineers, the value of whose services rests rather in their scientific than in their physical ability. In one sense the engineer is a laborer; but so is a lawyer, a doctor, and a banker, yet no statistician has ever been known to include these among the laboring classes. *Railroad Co. v. Berry*, 31 Tex. Civ. App. 408, 72 S. W. 1049. The word "laborers" refers to those whose services are manual or menial, those who are responsible for no independent action, but who do a day's work or stated job under the direction of a superior. *Wildner v. Ferguson*, 42 Minn. 112, 43 N. W. 794,

⁸³ In *re Inniss*, Op. Sol. Dept. of L. 81.

⁸⁴ In *re Shetler*, Op. Sol. Dept. of L. 108; In *re Creamer*, Op. Sol. Dept. of L. 109.

ger in the government printing office carried on the clerical roll,⁸⁵ and the master of a dredge, where the work performed was in the nature of that of a "handy man,"⁸⁶ but not a ship's draftsman,⁸⁷ the matron of an Indian school,⁸⁸ a transit man,⁸⁹ a surveyor,⁹⁰ a clerk engaged in office work,⁹¹ an instrument man in a surveying party, where his work was manual and physical, rather than clerical or professional,⁹² an assistant veterinarian, engaged in treating sick animals, giving medicine, and dressing wounds,⁹³ a laboratory assistant engaged in making tests of materials in a chemical laboratory,⁹⁴ a dockmaster, having the care of a dock and the supervision of the dock force,⁹⁵ a "laboratory assistant" at the Picatinny Arsenal,⁹⁶ or a cement tester and chemist in the reclamation service, whose work was semiprofessional in nature.⁹⁷ The class of workmen designated by the term "laborer" has been determined to include a policeman or watchman,⁹⁸ a time inspector,⁹⁹

6 L. R. A. 338, 18 Am. St. Rep. 495. In the language of the business world, says Mr. Chief Justice Peters, a laborer is one who labors with his physical powers, in the service and under the direction of another, for fixed wages; this is the common meaning of the word, and hence its meaning in the statute. *Blanchard v. Railroad Co.*, 87 Me. 241, 32 Atl. 890.

⁸⁵ In re Ellett, Op. Sol. Dept. of L. 112.

⁸⁶ In re Waters, Op. Sol. Dept. of L. 110.

⁸⁷ In re Ripley, Op. Sol. Dept. of L. 110.

⁸⁸ In re Humphreys, Op. Sol. Dept. of L. 111.

⁸⁹ In re Grant, Op. Sol. Dept. of L. 94.

⁹⁰ In re Sheppard, Op. Sol. Dept. of L. 98.

⁹¹ In re Alcee, Op. Sol. Dept. of L. 61.

⁹² In re Sanders, Op. Sol. Dept. of L. 114.

⁹³ In re Brown, Op. Sol. Dept. of L. 102.

⁹⁴ In re Ransom, Op. Sol. Dept. of L. 103.

⁹⁵ In re Trahey, Op. Sol. Dept. of L. 105.

⁹⁶ In re Miller, Op. Sol. Dept. of L. 108.

⁹⁷ In re Fenz, Op. Sol. Dept. of L. 116.

⁹⁸ In re Golden, Op. Sol. Dept. of L. 68.

⁹⁹ In re Sittert, Op. Sol. Dept. of L. 90.

a rigger and diver,¹ an employé designated a messenger, but engaged in work of the laboring class,² a sailor working on a dredge and assisting in dredge work,³ an employé appointed as a special laborer messenger engaged on laborer or messenger work, except when detailed to clerical work,⁴ a packer employed in a navy yard storeroom, to handle, arrange, and list stock,⁵ a "survey man" required to render assistance to surveyors,⁶ a working foreman of laborers,⁷ though an acting inspector,⁸ an employé designated an inspector, engaged in marking and passing cross-ties, piling, and lumber, and without any duty of supervision or superintendence,⁹ but not a foreman or superintendent, who directs the work of others and whose work is mental and administrative or executive,¹⁰ a draftsman whose duties resemble those of a clerk or artist,¹¹ or a concrete inspector engaged in inspecting and directing the work of others.¹² In respect to a sanitary inspector in the Canal Zone, it has been authoritatively said that, if he was employed principally on account of his expert or professional knowledge of disease germs and the like, he should be regarded as belonging to the professional class, and the fact that his duties required him to visit different parts of the canal cut would not bring him within the scope of the Act, but that if he was employed on labor which was essentially

¹ In re Lagerholm, Op. Sol. Dept. of L. 104.

² In re Mullins, Op. Sol. Dept. of L. 58.

³ In re Zacias, Op. Sol. Dept. of L. 62.

⁴ In re Adler, Op. Sol. Dept. of L. 63.

⁵ In re Crandall, Op. Sol. Dept. of L. 77.

⁶ In re Hott, Op. Sol. Dept. of L. 89.

⁷ In re Kline, Op. Sol. Dept. of L. 92.

⁸ In re Keating, Op. Sol. Dept. of L. 91.

⁹ In re Baker, Op. Sol. Dept. of L. 100.

¹⁰ In re Little, Op. Sol. Dept. of L. 78.

¹¹ In re Reeves, Op. Sol. Dept. of L. 73.

¹² In re Cunningham, Op. Sol. Dept. of L. 81.

physical, or at least manual, even though requiring skill in its performance, and if his duties required no more special knowledge or training than an ordinarily intelligent person might readily acquire after entering upon the discharge of the duties of the position, he should be regarded as of the laboring class, to which the Act applies.¹³

§ 56. — Previous health of employé

Compensation legislation does not confine its protection to healthy employés. The previous condition of health is of no consequence in determining the amount of relief to be afforded. It has no more to do with it than the employé's lack of ordinary care or the employer's freedom from simple negligence, though it is a circumstance to be considered in ascertaining whether the injury resulted from the work or from disease.¹⁴

§ 57. — Minor employés

The fact that the injured employé, in view of his youth, is employed unlawfully, does not bar the recovery of compensation in Iowa¹⁵ and California;¹⁶ but a different rule prevails in Minnesota,¹⁷ in view of a provision making the Act applicable to minors

¹³ In re Pickett, Op. Sol. Dept. of L. 80.

¹⁴ (Wk. Comp. Act, pt. 5, § 2) In re Madden, 222 Mass. 487, 111 N. E. 379; Crowley v. City of Lowell, 223 Mass. 288, 111 N. E. 786.

See §§ 98, 125, post.

¹⁵ Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 22.

¹⁶ Where an employer, either willfully or in good faith, employs a minor under fifteen years of age in violation of a law which requires that a permit be secured from the superintendent of schools prior to such employment, the minor on being injured in the course of his employment, is entitled to compensation notwithstanding the illegality of the employment. The employer cannot avoid the requirements of the Workmen's Compensation Act by urging that he had no lawful authority to employ the minor. Stanton v. Masterson, 2 Cal. I. A. C. Dec. 707.

¹⁷ Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 22.

"who are legally permitted to work under the laws of this State,"¹⁸ and also in Wisconsin.¹⁹ However, in the latter state, where the minor is legally permitted to work, but cannot legally work in the hazardous employment at which he was injured, he is within the Compensation Act.²⁰ Contrary to the rule applicable to common-law actions, compensation cannot be recovered under the Washington Act for the death of a child under 14 and employed in a mill in violation of statute, though there is no causative connection between the violation of the law and the death of the boy.²¹ The New Jersey Act does not apply in case of injury to a child under 14 years of age who is unlawfully employed in a factory.²²

An apprentice who is qualifying himself to operate an elevator is an "employé" within the Minnesota Act.²³

§ 58. Employés excepted

Many of the Acts provide in substance that "employé" shall include every person in the service of another under any contract of hire, express or implied, oral or written, except one whose employment is casual or is not in the "usual course of the trade, business, profession or occupation" of his employer, or not for the purposes of his employer's trade or business.²⁴ These, as well as other ex-

¹⁸ (Wk. Comp. Act, § 34 [Gen. St. 1913, § 8230]) *Pettee v. Noyes* (Minn.) 157 N. W. 995.

¹⁹ The Compensation Act does not govern where a minor is employed in violation of law. *Stetz v. F. Mayer Boot & Shoe Co.* (Wis.) 156 N. W. 971.

²⁰ St. 1913, § 2394—7 (2)—8; *Foth v. Macomber & Whyte Rope Co.*, 161 Wis. 549, 154 N. W. 369; *Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847.

²¹ *Hillestad v. Indus. Ins. Com.* (1914) 80 Wash. 426, 141 Pac. 913, Ann. Cas. 1916B, 789.

²² *Hetzel v. Wasson Piston Ring Co.* (N. J.) 98 Atl. 306.

²³ *Pettee v. Noyes* (Minn.) 157 N. W. 995.

²⁴ The employment was for the purposes of the business within the English Act in case of the casual employment of a laborer hired to repair the roof of a building in which a grocery and drapery shop were run, although

ceptions contained in the various Acts, should be construed reasonably to effectuate the legislative intent,²⁵ and should be held inapplicable where the employé is engaged in the business for which he was hired and has no reason to think there is any change in the business, and where there is no change of employer.²⁶ In the absence of a clearly expressed legislative intent to that effect, an Act will not be construed to exempt from its operation nonresident employés of alien employers who, while working within the state, may receive personal injuries arising out of and in the course of employment.²⁷

the upper part was used as living quarters by the assistants (*Johnston v. Monasterevan General Store Co.* [1909] 2 Ir. R. 108, C. A.); where a retired doctor, farming for profit, hired a man in casual employment to trim some trees which seemed liable to injure a wall of the haggard, and he was injured while doing the work (*Cotter v. Johnson* [1912] 5 B. W. C. C. 568, C. A.); where a laborer asked a farmer to cut an intervening hedge which shaded the laborer's garden, and was told by the farmer he would pay him to do it himself, the farmer saying he would use part of what was cut off for hop poles (*Tombs v. Bomford* [1912] 5 B. W. C. C. 338, C. A.); but not where a widow managed property, part her own and part in which she owned a share, making no charge to her relatives for looking after their shares, and employed a workman to whitewash some of the cottages (*Bargewell v. Danies* [1908] 98 L. T. R. 257, C. A.); where a shopkeeper employed a casual laborer to repair some buildings occupied by his tenants, and entirely disconnected with the shop (*Kelly v. Buchanan* [1913] 47 Ir. L. T. 228, C. A.); or where a workman was hired to clean the windows of a physician's residence, including the window of his consulting room (*Rennie v. Reid* [1909] 1 B. W. C. C. 324; Ct. of Sess.).

²⁵ *Panama-Pacific International Exposition Co. v. Hopper*, 1 Cal. I. A. C. Dec. 429.

²⁶ (St. 1911, c. 751, pt. 5, § 2) *In re Howard*, 218 Mass. 404, 105 N. E. 636. Where an employé was engaged in trimming trees for his employer, an electric company, under directions of the company's agent, which work he had been hired to do, the work was not "casual" or outside the "usual course of the trade, business, profession or occupation," though the company may have no interest in trimming the particular tree on which the employé was working at the time of the injury. *Id.*

²⁷ The Massachusetts Act does not disclose such legislative intent. *In re American Mut. Liability Ins. Co.*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372.

§ 59. — Farm laborers

A provision excepting "farm laborers" from the operation of an Act,²⁸ places outside the Act one employed to do the ordinary work done by one hired by a farmer to aid in the common incidents of agricultural employment,²⁹ but does not except employes working

²⁸ The Act was not intended to confer its advantages on farm laborers or impose its burden on farmers. *In re Keaney*, 217 Mass. 5, 104 N. E. 438.

The Compensation Act does not apply to farmers. (Code Supp. 1913, tit. 12, c. 8a) *Op. Sp. Counsel to Iowa Indus. Com.* (1915) pp. 9, 5.

²⁹ (St. 1911, c. 751, pt. 1, § 2) *In re Keaney*, 217 Mass. 5, 104 N. E. 438.

A farmer, operating his own threshing machine and using it exclusively for his own private use, is engaged in an agricultural pursuit, and therefore excluded. *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 11.

Where a farm hand is ordered to haul a load of lumber from a point in a city to a railroad depot for shipment to another farm, and is injured while so doing, he is a farm laborer, and engaged as such when injured, and his employer is exempt from liability, even though the goods carried are not for use or connected with the farm upon which he is employed. *Ratcliff v. De Witt Co.*, 1 Cal. I. A. C. Dec. 639. Where one is employed on a farm to milk the cows and take care of the poultry, he is engaged in farm labor, and not within the protection of the Act. *Wolf v. Scripps*, 1 Cal. I. A. C. Dec. 509. Where a general farm hand, employed to cut wood and do general work as required about a country resort and vineyard, lost the sight of an eye from a flying wedge which he had been driving into a stump which he was cutting up for firewood to be used in such resort and vineyard, he was engaged in farm labor at the time of injury. *Boschetti v. Lecas*, 3 Cal. I. A. C. Dec. 39.

Carpentry.—Where a carpenter is engaged by a farmer for the sole purpose of building a barn, and is injured while working upon said barn upon the farm, he is not at the time of his accident engaged in farm labor, and is therefore under the protection of the Act. *Craig v. Hartson*, 2 Cal. I. A. C. Dec. 235. Where a carpenter by trade works at both carpentry and farm labor, but is hired out as and engaged as a carpenter when injured, and was hired for the job of building a cottage, he is a carpenter, and not a farm laborer. *Blaine v. McKinsey*, 1 Cal. I. A. C. Dec. 641.

Hay Baling.—A workman engaged in the operation of a hay baling machine on the ground where the hay is produced, although the employer is not a farmer or an agriculturist, but one who goes about the country baling hay with his machine by the ton for farmers, is engaged in farm and agricultural labor, and his accidental injuries are not compensable. *Neimeyer v. Volger*, 2 Cal. I. A. C. Dec. 305. Where a contractor engages in baling hay with different farmers upon their ranches, and his employé is injured while on the

for one engaged in a commercial or other non-agricultural enterprise,³⁰ though he be a farmer.³¹

A provision excepting employes engaged in horticulture excludes an employé working as nurseryman and gardener in setting out trees and plants and embellishing a townsite.³² The right to compensation is determined by the character of the labor actually being done when the accident occurs, or the major portion of the tasks to be performed,³³ rather than by the fact that the employé occa-

farm baling hay for his employer and for the farmer, such injured employé is engaged in farm labor at the time of the accident, and is not within the protection of the Act. *Vincent v. Louis*, 2 Cal. I. A. C. Dec. 130. Where an employer owns a hay press, which he moves from farm to farm, baling hay on contract for the owners of said farms, and his employé is injured while working on the hay press on a farm of a person for whom hay is being baled on contract, such employé is engaged in farm labor at the time of his injury, and his employer is not liable under the Act. *Morris v. Spears*, 1 Cal. I. A. C. Dec. 317.

³⁰ Operators of threshing machines upon a commercial basis are within the act when they thresh other people's grain for hire. *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 11.

Where a woodchopper is injured at the end of a year's continuous employment cutting wood on a 40-acre tract of timber land, one acre of which is under cultivation as a garden, and all the cut wood is shipped away by the employer for sale, the returns therefrom being the only income of the tract, the employé is not engaged in farm labor, even though the employer is clearing the land to make a farm of it. *Pappas v. Warren*, 2 Cal. I. A. C. Dec. 874.

³¹ Where a farmer owning a sugar mill goes about the community grinding cane for hire, he is engaged in a commercial enterprise, and is not engaged in an agricultural pursuit. (*Code Supp.* 1913, § 2477m [a]) *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 12.

When a farmer engages in ordinary teaming, such as hauling water for a mine, he has stepped outside the exempted classes of "farm, dairy, agricultural, viticultural or horticultural labor, stock or poultry raising, or household domestic service," and his employé automatically comes within the protection of the Act. *Jenkins v. Pieratt*, 1 Cal. I. A. C. Dec. 114.

³² *Ruprecht v. Dominguez Land Corporation*, 3 Cal. I. A. C. Dec. 5.

³³ Where a person is employed to work about a city residence, a principal portion of his duties being to take care of and exercise blooded horses (not involving stock raising), but a minor portion of his duties consists in gardening and performing incidental tasks in connection with the upkeep of the

sionally does farm labor.³⁴ The purpose for which the work was being done determines its character. Plowing is commonly farm labor, as is also the clearing of brush and shrubs to prepare land for cultivation.³⁵ But if done to make the land ready for railroad

premises, such employé is not engaged in farm labor, particularly where at the time of the accident he is engaged in exercising horses, and not in gardening. *Cleveland v. Hastings*, 2 Cal. I. A. C. Dec. 15.

³⁴ The fact that an employé, whose regular trade was that of a carpenter, and who was employed on a farm to do carpentry, sometimes did farm labor, when there was no carpenter work to be done, does not suffice to class him as a farm laborer. *Feehan v. Tevis*, 2 Cal. I. A. C. Dec. 434.

³⁵ *Mann v. Locke*, 2 Cal. I. A. C. Dec. 415.

Clearing land.—Where a farmer, clearing his land of brush and timber to make the land available for agricultural purposes, engages a teamster to haul the wood and brush to town for sale, the employé is engaged in farm labor while doing such work, and is not within the Act. *Hanson v. Scott*, 2 Cal. I. A. C. Dec. 730. Where a person is employed to cut and burn brush and trees in clearing land, the land to be set out to fruit trees when cleared, he is engaged in farm labor. *Whitney v. Peterson*, 1 Cal. I. A. C. Dec. 306. Where an employé was injured in the operation of a portable sawing machine while cutting cordwood into stove length on a farm, the wood having been cleared from the land incidental to the operation of the farm, to be disposed of by sale and partly for farm use, he was engaged in farm labor. *Miller v. Algar*, 2 Cal. I. A. C. Dec. 584. Employés engaged in forestry are, ordinarily, not within the classes excluded by section 14 of the Act; but in cases where the essential purpose is the clearing of land for agriculture, and not lumbering or other branches of forestry, and the wood-sawing is only a matter of disposing of the by-product of the clearing of land for the purpose of making a farm, it is proper to regard the labor of cutting such wood as farm labor. *Id.* Where land was presently being operated as a dairy farm, and it was necessary to remove old stumps from a considerable area to change the use of the land from grazing to fruit raising, the laborers employed for such purpose were farm laborers, excluded from the compensation provisions (sections 12 to 35, inclusive) under the definition of "employé" contained in section 14. *Martin v. Russian River Fruit & Land Co.*, 1 Cal. I. A. C. Dec. 18. In determining the classification of employés, as defined in section 14, it is proper to take into consideration modern progress and contemporary methods in industrial pursuits. The use of high explosives and power agencies has become, in a large measure, incident to agricultural industry, the use of blasting powder was held to be an agricultural use, and the laborers employed in the use thereof to be engaged in farm labor. *Id.*

construction, or for the construction of expensive reservoirs, dams, or canals for irrigation purposes, the workmen so engaged are not engaged in farm labor.³⁶ In Iowa, farmers can make the Act a part of their contract with their hired help, and then insure their liability under such contract.³⁷ Likewise the Michigan Act does not exclude farmers from accepting the provisions of the law, but exempts them from its operation merely in the sense that they suffer no harm by not coming under it.³⁸

In the words of Chief Justice Rugg, of the Supreme Judicial Court of Massachusetts, the Massachusetts Act "is a practical measure designed for use among a practical people. A farmer may adopt it if he desires. Any contract of insurance made by him under its terms is enforceable. On the other hand, if he does not desire to make it available to all his employes, he may procure insurance for a limited portion of them. If there are those, separable from others by classification and definition, whose labor is more exposed or dangerous, or whom he may desire to protect for any other reason, there is nothing in the Act to prevent him from doing so. The purposes of the Act are such that, if feasible, it ought to be extended to include cases within its scope interpreted in the

³⁶ Where an employé of a farmer was clearing a levee in a farmer's protection district, under the superintendence of the protection district foreman, for the purpose of preparing the ground to be raised two feet by scrapers, thus enabling the farm owners to safeguard their lands against overflow, and a willow branch struck the employé in the eye, the employé was not engaged in farm labor. *Mann v. Locke*, 2 Cal. I. A. C. Dec. 415. The impounding and distributing to farmers of water for irrigating purposes is not farm, dairy, agricultural, viticultural, or horticultural labor, and an employé of a corporation engaged in such an occupation is subject to the Compensation Act. *Matney v. Azusa Irrigating Co.*, 2 Cal. I. A. C. Dec. 898. Where a carpenter was employed on a farm to do carpentry and other work, and met with an accident while actually doing carpenter work, at carpenter's wages, in the construction of a dam for an artificial lake, such work was not farm labor, and the employer was liable for compensation. *Feehan v. Tevis*, 2 Cal. I. A. C. Dec. 434.

³⁷ *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 9.

³⁸ *Shafer v. Parke, Davis & Co.*, Mich. Wk. Comp. Cases (1916) 7.

light of its purpose, and to encourage its adoption by those who for reasons of legislative policy were excepted from its express operation. If construed to compel farmers to insure for all their laborers if they undertake to insure for any of them, the inevitable tendency would be to discourage resort to the Act in any respect.”³⁹ That a farmer engaged in selling produce procured insurance for “drivers and helpers” did not render him liable under this Act for injuries to a farm laborer.⁴⁰

§ 60. — Domestic and household servants

The term “domestic servant,” within Acts excluding domestic and household servants, means one who lives and works in the house, and does not exclude a servant whose employment is out of doors.⁴¹ Whether a chauffeur is excluded from the provisions of the Act depends upon the circumstances surrounding each particular case, and where he looks after the car and drives it, and boards and sleeps on the premises, he is excluded as being a domestic servant. A household servant is one who dwells under the same roof with the family under circumstances making him a member thereof.⁴² The status of a household servant is determined rather by his relation to the family than by his relation to the service.⁴³ For example, a workman hired to tend the furnace, mow the lawn, and do odd jobs about the house and premises, who has a room in the house in which to sleep, and who eats at the family table, is

³⁹ In re Keaney, 217 Mass. 5, 104 N. E. 438.

⁴⁰ Id.

⁴¹ Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 16.

Whether a chauffeur is excluded from the provision of the Act depends upon the circumstances surrounding each particular case, and where he looks after the car and drives it, and boards and sleeps on the premises, he is excluded as being a domestic servant. Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 20.

⁴² Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 16.

⁴³ Id.

a household servant.⁴⁴ On the other hand, a chauffeur hired by the month to run the employer's private automobile, but not living under such conditions as to constitute him a member of the family, is not a household servant.⁴⁵ Likewise one who is employed to perform incidental services around the premises and residence of his employer, and not required to do anything inside the house, and who does not live on the premises, is not engaged in "household domestic service," within the meaning of the California Act. While it is doubtful whether the test of living in the employer's house is the sole test of household service, it is essential that he be engaged in rendering service in the house, such as cleaning, cooking, or washing.⁴⁶ Where a porter in a saloon was sent upstairs by the proprietor to wash the windows in the apartment above, where such employer resided with his family, the porter receiving extra pay when he did such upstairs work, and while so engaged fell to the sidewalk and was injured, at the time of his injury he was engaged in household domestic service.⁴⁷ Employés entitled to compensation under the California Act do not include any "employé engaged in farm, dairy,⁴⁸ agricultural, viticultural, or horti-

⁴⁴ (Code Supp. 1913, § 2477m [a]) Id.

⁴⁵ (Code Supp. 1913, § 2477m [a] and section 2477m16[b]) Id.

⁴⁶ *Cleveland v. Hastings*, 2 Cal. I. A. C. Dec. 15.

⁴⁷ *Castellotti v. McDonnell*, 1 Cal. I. A. C. Dec. 351.

⁴⁸ Where a rough carpenter and cement worker is called out of town by the owner of a dairy to put a roof on a reservoir used for storing water for the watering of the stock, and is put to work repairing a leak in the concrete reservoir, the breaking of a ladder causing him to fall and fracture his wrist, he is not an "employé" as defined by section 14 of the Compensation Act, being engaged in dairy labor, an excepted occupation. *Reed v. Winn*, 2 Cal. I. A. C. Dec. 687.

Employés not engaged in farm or dairy labor: An employé engaged in delivering milk for an employer who buys milk at wholesale and retails it to the consumers. *Woodruff v. Peterson*, 1 Cal. I. A. C. Dec. 516. A carpenter employed by persons operating a dairy ranch to go upon the ranch and build a barn, residing on the ranch while at work. *Cowles v. Alexander & Kellogg*, 2 Cal. I. A. C. Dec. 615.

cultural labor,⁴⁹ in stock⁵⁰ or poultry raising, or in household domestic service."⁵¹

§ 61. — Clerks

Within the provision of the Iowa Act that the term "workman" means those engaged in clerical work only, but clerical work shall

⁴⁹ Where a rough garden laborer, whose duties are moving and transplanting trees and constructing boxes and framework, strains himself while moving soil with a wheelbarrow to fill in ground for a lawn, he is engaged in horticultural labor. *Georgandas v. Panama-Pacific International Exposition*, 2 Cal. I. A. C. Dec. 520. Where a laborer is in the employ of a nursery, whose duties are in the handling of trees and plants in transplanting and in loading them on a truck for the market, is injured while being conveyed with fellow workmen on the automobile truck, he is injured while engaged in horticultural labor. *Butti v. MacRorie-McLaren Co.*, 2 Cal. I. A. C. Dec. 535. Where a gardener was employed by an exposition company to take care of the lawns, trees, and shrubbery on their grounds, and was injured by a scratch upon the eyeball while working as such gardener, he was engaged in horticultural labor. *Panama-Pacific International Exposition Co. v. Hooper*, 1 Cal. I. A. C. Dec. 429. Where a gardener was employed to prune, trim, and spray fruit trees growing upon the residence premises of the defendant, who was a city employé, he was engaged in horticultural labor. *Bagley v. James*, 2 Cal. I. A. C. Dec. 842.

⁵⁰ Where it distinctly appeared from the application itself, corroborated by the answer, that the employé was killed while riding a horse, gathering cattle for his employer, who was engaged in the business of raising cattle, the Commission has no jurisdiction; employés engaged in stock-raising being excluded by the Compensation Act from accident disability benefits. *Topping v. Ellis*, 2 Cal. I. A. C. Dec. 382. Where a cook is in charge of a kitchen for the feeding of the hands on a large cattle ranch of 4,500 acres of grazing land, a small extent of which was in grain and alfalfa, he was engaged in stock-raising, and therefore the accident was not compensable. *Acrey v. City of Holtville*, 2 Cal. I. A. C. Dec. 587. Where an employer, engaged in the business of hog raising on a farm in the outskirts of Los Angeles, in order to obtain the vegetable refuse matter of the city market, had to enter into a contract to remove, for a consideration, all garbage from the market, and in the hauling of such garbage, of which but one-third was suitable for hog feed, the teamster sustained an injury, such employé residing on the farm and having no other duty than to do such hauling, such injury was not compensable; such employé being engaged in stock-raising, an excepted employment. *Dana v. De Turk*, 2 Cal. I. A. C. Dec. 954.

⁵¹ Wk. Comp. Act (Cal.) § 14.

not include one standing in a representative capacity to the employer, a partner and a managing corporate officer, being persons standing in a representative capacity, are not entitled to compensation. Partners are employers rather than employés.⁵²

§ 62. — Casual employés

That a workman's employment is casual or intermittent does not deprive him of the status of "employé," in the absence of an express statutory provision to that effect.⁵³ But many of the Acts exclude from their protection casual employés, excepting, in some states, certain municipal and other public employés,⁵⁴ and it becomes material to determine what is a casual employé. Time has confirmed the wisdom of the conclusion, early arrived at by the English authorities, that no hard and fast definition of the term "casual" is advisable.⁵⁵ The word, as commonly used, means some-

⁵² (Code Supp. 1913) Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 3.

⁵³ In re Rheinwald, 168 App. Div. 425, 153 N. Y. Supp. 598. If deemed desirable to withhold compensation from casual or occasional employés, as is done by the Compensation Acts of some states, that is a matter for the Legislature, not for the court or Commission. *Id.*

⁵⁴ The proviso of the Michigan Act, excluding those "whose employment is but casual," does not apply to employés of the state or of municipal corporations within the state. (Wk. Comp. Act, pt. 1, § 7, subd. 2) *Agler v. Mich. Agricultural College*, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 25.

Under the Ohio Act casual employés of a county, city, township, unincorporated village, or school district are entitled to compensation where they are injured in the course of their employment. In re Barbara Michaels, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 156. Other casual employés, though engaged in the usual course of trade, business, profession, or occupation of the employer, are excluded from the protection of this Act. (Wk. Comp. Act, § 14, par. 2) *Clements v. Columbus Saw Mill Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 161.

The defense of casual employment is not available to a municipality, but only to private employers. *Brown v. City of Mauston*, Bul. Wis. Indus. Com. vol. 1, p. 97.

⁵⁵ *Thompson v. Twiss* (1916) 90 Conn. 444, 97 Atl. 328.

thing which comes without regularity and is occasional and incidental. Its meaning may be more clearly understood by referring to its antonyms, which are "regular," "systematic," "periodic," and "certain."⁵⁶ An employment is "of a casual nature"—the words of the English Act—when it is not stable, regular, periodic, or certain in nature.⁵⁷ The difference between those state Acts, which use the modifying word "casual," and the English Act, which uses the words "of a casual nature," must be regarded as designed.⁵⁸ The effect is to narrow the scope of such state Acts, as compared with the English Act. In those states, the contract of service is the thing to be analyzed to determine whether the employment is casual, while in England the nature of the service rendered is the decisive test.⁵⁹ Ordinarily an employment is casual when for a

⁵⁶ *In re Gaynor*, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363.

⁵⁷ The employment was of a casual nature where a jobbing gardener was hired by the day to trim trees, then to level the lawn, and then to trim more trees, being paid by the day—(*Knight v. Bucknill* [1913] 6 B. W. C. C. 160, C. A.) where a carpenter was hired by a householder to cut down some trees on the grounds of a house upon which he had been working as a carpenter; (*McCarthy v. Norcott* [1910] 2 B. W. C. C. 279, C. A.) where a man was hired by a householder for several years to clean windows at irregular periods, whenever they needed cleaning; (*Hill v. Begg* [1909] 1 B. W. C. C. 320, C. A.) where, without making arrangements in advance, a workman cleaned the windows of his employer's residence once each month for four years, and was then killed; (*Ritchings v. Bryant* [1913] 6 B. W. C. C. 183, C. A.) where a window cleaner was in the habit of calling at a doctor's residence, without invitation, about once a month, to clean his windows; (*Rennie v. Reid* [1909] 1 B. W. C. C. 324, Ct. of Sess.); but not where a charwoman went to the same employer regularly on certain fixed days, although without special orders; (*Dewhurst v. Mather* [1909] 1 B. W. C. C. 328, C. A.) nor where an old servant worked for several years in the woods when trimming season arrived, for as long as the work lasted each year, this being regular seasonal employment (*Smith v. Buxton* [1915] 8 B. W. C. C. 106, C. A.).

⁵⁸ *In re Gayner*, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363. (Since the rendition of this decision the Massachusetts Act has been amended by striking out the words "or casual.")

⁵⁹ *Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328; *In re Gayner*, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363; *Knight v. Bucknill*, 6 B. W. C. C. 160.

single day,⁶⁰ or by the hour,⁶¹ but not where one is employed to do a particular part of a service recurring somewhat regularly, with the fair expectation of the continuance for a reasonable time.⁶²

⁶⁰ (St. 1911, c. 751, pt. 5, § 2, as amended by St. 1914, c. 708, § 13) *In re King*, 220 Mass. 290, 107 N. E. 959. A teamster's employment was but casual, where he was occasionally employed by another, as he wanted him, at a certain sum a day for himself and team. (St. 1911, c. 751, as amended by St. 1912, c. 571) *In re Cheever*, 219 Mass. 244, 106 N. E. 861.

⁶¹ "A man was hired to shingle the home of his employer. After he had finished the shingling of this house it was the intention of the employer to have this man do some repairing around other houses that he owned. The man was hired by the hour, at the rate of 20 cents an hour. The Attorney General advised that the employment was a casual employment and the employer would not be liable under the Compensation Act." *Op. Atty. Gen. on Minn. Wk. Comp. Act*, Bul. 11, p. 20. Volunteer firemen, paid \$1 an hour for the first hour of service for every call, and 50 cents an hour for succeeding hours, are casual employes, and are not included in the act. *Id.*

⁶² *Sabella v. Brasileiro*, 86 N. J. Law, 505, 91 Atl. 1032; 87 N. J. Law, 710, 94 Atl. 1103.

A man was employed by the road overseer of the county council to draw stones from the quarry. His wages were fixed by contract. The evidence showed that he was to get work now and again when there would be work to do, there being no objection to his working for some one else when he was not wanted by the overseer. The court held that he was a workman within the meaning of the Workmen's Compensation Act. *O'Donnell v. Clare County Council* (1913) 6 B. W. C. C. 457, C. A.; *Op. Atty. Gen. on Minn. Wk. Comp. Act*, Bul. 11, p. 20.

Where one was employed for an indefinite period at \$5 per day to work on a contract for the erection of a structural steel building, this was not a casual employment. (P. L. 1911, p. 134) *Scott v. Payne Bros., Inc.*, 85 N. J. Law, 446, 89 Atl. 927. Where petitioner testified that the employer told him to "come Monday morning, I will give you some work to shave the skins," that the price was to be so much a dozen, and, if petitioner did better work, 16 cents, the jury could properly find that the intention was to give petitioner piece work in the defendant's regular business. Such employment was not "casual." (P. L. 1911, p. 134) *Schaeffer v. De Grottola*, 85 N. J. Law, 444, 89 Atl. 921.

Where, in the work of superintending and helping in the unloading of glass to be used on a building, there was an element of certainty in the recurrence of the work at times which, though they could not be fixed definitely, were sure to occur and recur in the construction of the building, the work was not casual employment. (Wk. Comp. Act, pt. 1, § 7) *Dyer v. James Black Masonry & Contracting Co.*, Mich. Wk. Comp. Cases (1916) 52, 158 N. W. 959.

Filling a silo and digging potatoes is as much a part of the business of

Thus, one employed as a workman on a sawmill on such days as it operated during a period of four months was not a casual employé.⁶³ It does not render an employment casual that it is not for any specified length of time,⁶⁴ or that the injury occurs shortly after the employé begins work.⁶⁵

The words "or casual" have been stricken from the Massachusetts Act, so that all employés engaged in the usual course of the trade, business, occupation, or profession of their employer, except masters of and seamen on vessels engaged in interstate and foreign commerce, will receive compensation.⁶⁶

farming as any other work about the farm, and the fact that it did not require a long period of time to complete the task, or that it needed to be done only once during the year, did not make it casual employment. *Vojacek v. Schlaefel*, Rep. Wis. Indus. Com. 1914-15, p. 8.

⁶³ *Clements v. Columbus Sawmill Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 161.

⁶⁴ The evidence showed that the employé, a brewery worker and member of the union, was engaged, the employment offered being that of helper in sinking and digging a well, and the employment in which he actually was engaged at the time of the injury being that of a helper in the carrying of pipes from the boiler room of the brewery. No time was fixed as the period of his employment, but the evidence showed that it would be at least two months, and possibly more. After working seven days the employé received a scratch from a pipe which he was carrying, dying two weeks later from septic pneumonia. It was held that the employment was not casual. *Coyle v. Mass. Employés' Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 704 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

⁶⁵ An employé was employed to operate a buffing machine. He was paid by the hour and was not employed for any specified length of time. He was injured within three hours after he entered upon his employment, by being struck on the left side near the region of his heart by a "buffer's chuck," which disabled him so that he had to suspend work for the day, and was unable to again resume work prior to his death, which occurred sixteen days after the injury. The Commission held that the employment was not casual. In *re Bridget McAuliffe*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 144.

⁶⁶ See Introduction to 2 Mass. Wk. Comp. Cases.

The insurer claimed that the employé was not entitled to compensation, because he received his injury while "trimming" a tree on church property, alleging that this work was "casual" and not in the usual course of the busi-

Where the employer desires to raise the question as to whether the employé is a casual employé, and not within the Act, he should submit evidence on that question.⁶⁷

§ 63. — — — Connecticut

"Casual employment," within the Connecticut Act, means occasional or incidental employment; an employment which comes without regularity.⁶⁸ It is in this sense that the word is used, rather than in the sense of an employment arising through accident or chance, which the Supreme Court of New Jersey has held to be the true meaning of "casual" as employed in the Act of that state.⁶⁹ If the employment be upon an employer's business for a definite time, as for a week or a month, it is not a casual employment. Nor is an employment casual if it is for a part of the workman's time at regularly recurring periods of time.⁷⁰ A workman employed in developing land, work in which he would be engaged for several weeks if he satisfied the employer, and which was one of the

ness of the subscriber. The evidence showed that the workman was engaged by a representative of the subscriber and directed to perform such work as the foreman required. The foreman, who also was the tree warden of the town of Stoughton, ordered the employé to "trim" the tree upon which the injury occurred. It was held that the employé was entitled to compensation. *Howard v. Mass. Employés' Ins. Ass'n*, 2 Mass. Wk. Comp. Cases, 1 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct., 218 Mass. 404, 105 N. E. 636).

⁶⁷ *Victor Chemical Works v. Industrial Board of Illinois*, 274 Ill. 11, 113 N. E. 173.

⁶⁸ *Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328.

⁶⁹ *Id.*, supported by *Sabella v. Braziliero*, 86 N. J. Law, 505, 91 Atl. 1032.

In *Coffey v. Borden's Condensed Milk Co.*, 1 Conn. Comp. Dec. 167, it was held that the employment of filling defendant's icehouse with ice from a pond on the premises, such work being done every year and requiring considerable time for its accomplishment, the employé being expected to work until the icehouse was filled, was not casual employment.

In a casual employé's action the common-law defenses are available. *Thompson v. Twiss* (1916) 90 Conn. 444, 97 Atl. 328.

⁷⁰ *Thompson v. Twiss*, *supra*.

businesses, though not the principal business of the employer, was not engaged in an employment of a casual nature.⁷¹ A dual employment does not make one a casual employé.⁷²

§ 64. — — — California

To relieve the employer from liability under the California Act, the employment must be "both casual and not in the usual course of the trade, business, profession or occupation of the employer."⁷³

⁷¹ *Id.*

⁷² In *Penfield v. Town of Glastonbury*, 1 Conn. Comp. Dec. 637, a janitor employed by the city to take care of a school building, and also by a church for similar duties, was held not to have been a casual employé.

⁷³ (Wk. Comp. Act, § 14) *Paul v. Nikkel*, 1 Cal. I. A. C. Dec. 648; *Shouler v. Greenberg*, 1 Cal. I. A. C. Dec. 146.

Compensable injuries.—Where a carpenter is employed by persons operating a dairy ranch to go upon the ranch and build a barn, residing on the ranch while at work, such work is not casual or outside the usual course of the business of his employers. *Cowles v. Alexander & Kellogg*, 2 Cal. I. A. C. Dec. 615. Where a carpenter regularly employed by a laundry corporation in working about the laundry is directed by the president of the corporation to do an odd job on the building belonging to a stockholder, and to have his brother assist him, and it appears that the corporation was in the habit of having this carpenter make such repairs on the private property of individual stockholders, without charge to them, and to pay such carpenter his regular earnings during such service, and that it was the intention and understanding so to do in this instance, the corporation was liable in case of fatal injuries to the brother during such employment. Such employment, though casual as to the deceased, was in the usual course of the employer's business. *English v. Cain*, 2 Cal. I. A. C. Dec. 399. The employment of a person to clean out the cellar of a restaurant, taking out abandoned boxes and goods and pumping out water which had seeped in, the work consuming three days, was in the usual course of the business of the restaurant, although casual, and the person employed was not excluded from compensation. *McDermott v. Fanning*, 3 Cal. I. A. C. Dec. 14. While it was not a part of the laundry business to make repairs to the private property of its members, yet where it had long been the custom of the laundry to make such repairs, such custom brought the making of such repairs within the usual course of the business, actually undertaken by the laundry company as the employer of deceased. *Id.* Where a decorator hired a carpenter less than once a year, but has some woodwork to be done frequently in the course of his employment in putting up scaffolding upon which to fasten

It is the course of the business, not the nature of the employment, which is required to be usual. It follows that the fact that the

decorations, such work being done usually by himself or his own employés, and where he engaged an outside carpenter to erect a booth at a carnival, to be decorated, the employment of such carpenter is in the usual course of the business of the decorator, the erecting of scaffolding upon which to hang decorations being in the usual course of his business, whether it be done by his own employés or infrequently by regular carpenters. *Brain v. Eisfelder*, 2 Cal. I. A. C. Dec. 30. Though a man employed for an emergency job, loading ice upon refrigerator cars, the work to last a few hours, is a casual employé, he is within the protection of the Act, where the work is the regular business of his employer. *Paul v. Nikkel*, 1 Cal. I. A. C. Dec. 648. Where a person who had done occasional errands before for compensation was permitted by the owner to try the automobile delivery wagon, and was given a parcel to deliver, nothing being said about payment therefor, such employment, though casual, was in the usual course of the business of the employer, and compensation should be awarded, for an injury sustained by the overturning of the automobile while on such errand. *Smith v. Hayashi Floral Store*, 2 Cal. I. A. C. Dec. 526. Where a carpenter was employed to repair and rearrange equipment of a creamery, the employment was in the usual course of employer's business. *Hoover v. Engvick*, 2 Cal. I. A. C. Dec. 875.

Employments not in usual course of the employer's business.—Neither the owner of a building, nor the manager, to whom the care of the premises has been intrusted in the owner's absence, has as a usual course of his business the repair of buildings, so that an injury to a workman engaged in making such repair would be received in the usual course of the employer's business. *Peterson v. Pellasco*, 2 Cal. I. A. C. Dec. 199.

Employments both casual and not in usual course.—A house painter employed at a rate per day at work which could be reasonably finished in two weeks, being casual employé not employed in the usual course of the trade, business, profession, or occupation of his employer, where it did not appear that the employer was regularly engaged in any business which called for the employment of house painters, and the contract was for no definite period and obligated the painter to furnish the materials. *Blood v. Industrial Acc. Com'n of State of California* (Cal. App.) 157 Pac. 1140 (annulling award). Where a machinist was hired by a farmer to repair a tractor used in plowing, and, being offered employment at driving the tractor after he had repaired it, refused, and was injured before he had finished the repair work. (*Wk. Comp., etc., Act*, § 14) *Maryland Casualty Co. v. Pillsbury* (Cal. Sup.) 158 Pac. 1031 (annulling award). Where a carpenter was injured while constructing a small barn or chicken house on land being set out to lemon and avocado trees, the business of employer being horticultural, and the job being finished within four days. *Brockman v. Sheridan*, 2 Cal. I. A. C. Dec. 1061. Where a porter

cause requiring the employment is unusual and extraordinary does not prevent the employment from being in the usual course of the employer's business.⁷⁴ Where the length of employment is less than one week, the employment is casual,⁷⁵ though, contrary to agreement, more than a week is taken to do the work,⁷⁶ but not where it is more than one week,⁷⁷ though a more skillful employé

in a saloon was sent upstairs by the proprietor to wash the windows in the apartment above, where such employer resided with his family, the porter receiving extra pay when he did such upstairs work, and while so engaged fell to the sidewalk and was injured. *Castellotti v. McDonnell*, 1 Cal. I. A. C. Dec. 351. Where defendant, a retired merchant and not engaged in the business of repairing roofs, engages the applicant to inspect defendant's roof, find the leaks, and repair them, and applicant is injured by accident while so doing. *Trenholm v. Hough*, 1 Cal. I. A. C. Dec. 260. Where a carpenter was employed by a farmer to assist him in erecting a small building, and the employment lasted and was expected to last not longer than one week. *Aiken v. Anderson*, 2 Cal. I. A. C. Dec. 323. Where a rooming house keeper employed a plasterer for a period of less than one week to lath and plaster certain rooms in his house. *Augustine v. Cotter*, 2 Cal. I. A. C. Dec. 49.

⁷⁴ To combat a fire and prevent impending devastation on a grass range, pasturage on which was essential to the success of the owner's ranching business, a crew of men was employed by the owner. The Commission held that such employment was in the usual course of the owner's business, the work being necessary to preserve the business, though the cause requiring the employment was unusual and extraordinary. *Mazzini v. Pacific Coast Ry.*, 2 Cal. I. A. C. Dec. 962.

⁷⁵ (Wk. Comp. Act, § 14) *Augustine v. Cotter*, 2 Cal. I. A. C. Dec. 49; *Brain v. Eisfelder*, 2 Cal. I. A. C. Dec. 30; *Trenholm v. Hough*, 1 Cal. I. A. C. Dec. 260. Employment for a single task, lasting not more than fifteen or twenty minutes, is casual. *Ginther v. Knickerbocker Co.*, 1 Cal. I. A. C. Dec. 458. Where the regular carpenter was in the usual course of his employment, but the service on the particular job would require only a day, the employment of his brother merely to assist on the one job was casual employment. *English v. Cain*, 2 Cal. I. A. C. Dec. 399.

⁷⁶ Where one hires a workman to build a frame garage, under agreement that the workman will procure a helper and the work will not last more than six days, and where the work actually lasted eight days through failure to procure help, the employment is casual. *Roadhouse v. Wells*, 2 Cal. I. A. C. Dec. 251.

⁷⁷ *Feehan v. Tevis*, 2 Cal. I. A. Dec. 434; *Hoover v. Engvick*, 2 Cal. I. A. C. Dec. 875. *Cowles v. Alexander & Kellogg*, 2 Cal. I. A. C. Dec. 615; *Ra-*

could have completed the work in less than a week.⁷⁸ Employments otherwise casual may cease to be casual by mere lapse of time.⁷⁹ The test of the course of business of a corporation is not the work which the corporation says it is doing, but the work which it actually does as a usual, customary, or repeated matter. Where it undertakes the work of repairing its stockholders' buildings repeatedly, it is doing that work, regardless of whether it be consistent with its name.⁸⁰ Ordinary janitor work is in the usual course of business of any employer who conducts his business in any building which needs to be cleaned or with machinery which needs occasionally to be shifted.⁸¹

§ 65. — — — Iowa and Minnesota

The Iowa Act, resembling that of California, is peculiar, in that it defines "casual employment" to refer to a person whose employment is purely casual and not for the purpose of the employer's trade or business. The statutes of most of the states use the word "or" in place of the word "and." No employers are excluded from

vencroft v. Packard, 3 Cal. I. A. C. Dec. 24. Where a machinist is employed to go out to the ranch of his employer with his tools and put the caterpillar traction engine in repair for operation during the season, and is so engaged for a period of ten days, such employment is not casual. *Snow v. Harris*, 2 Cal. I. A. C. Dec. 393.

⁷⁸ Where at the time of entering upon a job it appears that the work will probably last more than one week, and the work does so last, the employment is not casual, even though a more skilled employé would have completed it within the week. *Peterson v. Pellasco*, 2 Cal. I. A. C. Dec. 199.

⁷⁹ *Blaine v. McKinsey*, 1 Cal. I. A. C. Dec. 641. The employment of a carpenter hired by the job to build a cottage was not casual, where he had worked longer than one week. *Id.* Casual labor ceases to be casual if it lasts more than one week. *Crosby v. Strong*, 2 Cal. I. A. C. Dec. 408.

⁸⁰ *English v. Cain*, 2 Cal. I. A. C. Dec. 399.

⁸¹ Where the manager of a creamery, needing help in putting away heavy machinery, calls in a passer-by to help him for fifteen or twenty minutes at a small remuneration, and the passer-by is injured while so doing, he is entitled to compensation. *Ginther v. Knickerbocker Co.*, 1 Cal. I. A. C. Dec. 458.

the provisions of the Iowa Act unless the employment is not only purely casual, but also not for the purpose of the employer's trade or business.⁸² A laborer picked up on the street to repair the porch of a doctor's residence is not within this Act, where the repair work is unimportant and requires but a few hours' labor.⁸³ The employment of a man to collect cream from farmers and bring it to the creamery, though being for one day only, and hence casual, was in the regular course of the employer's business, and therefore within the scope of the Minnesota Act.⁸⁴

§ 66. Independent contractor

The Compensation Law does not apply where the injured person is an independent contractor, and the relation of employer and employé does not exist.⁸⁵ It is not possible to lay down a hard and fast general rule or state definite facts by which the status of men working and contracting together can be definitely defined in all cases as employé or independent contractor.⁸⁶ Each case must depend on its own facts. Ordinarily, no one feature of the relation is determinative, but all must be considered together.⁸⁷ A contractor is ordinarily one who carries on an independent employment and is responsible for the results of his work, one whose contract relates to a given piece of work for a given price. These characteristics, however, though very suggestive, are not necessarily controlling.⁸⁸ Generally speaking, an "independent contractor" is one

⁸² Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 6.

⁸³ Id.

⁸⁴ Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 13, p. 31.

⁸⁵ In re Sarah Johns et al., vol. 1, No. 7, Bul. Ohio Indus. Com. p. 172; Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 7.

The law of independent contractor was in no wise changed by the enactment of the Workmen's Compensation Act of 1913. *Biddinger v. Champion Iron Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 70.

⁸⁶ *McCoy v. Kirkpatrick*, 1 Cal. I. A. C. Dec. 599.

⁸⁷ Id.; *Wowinski v. Vito*, 1 Conn. Comp. Dec. 629.

⁸⁸ *Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328.

who exercises an independent employment and contracts to do a piece of work according to his own method, without being subject to the control of the employer, save as to the results of his work.⁸⁹

⁸⁹ An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom the work is done, and is entitled to use his own discretion in things not mentioned in the plans and specifications. Rep. Nev. Indus. Com. 1913-14, p. 25.

The test of the relationship of employer and employé is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent. *Tuttle v. Embury-Martin Lumber Co.* (Mich.) 158 N. W. 875.

The services required all the applicant's time, and he was not at liberty to do teaming for any other employer. The respondent, through its superintendent and foremen, directed the loading and place of hauling and unloading, and in one instance directed the discharge of a teamster employed by the applicant, and the instruction was complied with. Otherwise, the applicant employed the teamster, and paid him himself, and took care of the teams, and furnished his own barn and outfit for the teaming. He and his teamster reported for work at 7 o'clock in the morning, and used the team the full day, and sometimes worked overtime. He had no definite term of service; no definite agreement as to any particular amount of hauling to be done. He was subject to discharge at any time. Whatever the contract of service might have been is left very largely to inference. Upon these facts, the question as to whether the applicant was an employé for hire, or a contractor, was a question of law, and it was decided that he was an employé, and entitled to compensation. *Mantz v. Falk Co.*, Rep. Wis. Indus. Com. 1914-15, p. 15.

While members of an orchestra would usually be employés, their contract may make them independent contractors. (Code Supp. 1913, § 2477m16 [b]) Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 18. Where it appeared that B. and A. were copartners in the teaming business, and A. rented a team, with B. as driver, to C., and C. supposed that B. was an employé of A. sent with the team, and C. made all of the financial arrangements with A., and paid A. for the use of both team and driver, A. later dividing the earnings with B., the Commission held that B. was not an employé of C., but an independent contractor, either singly or jointly with A. and that C. was not liable for compensation for injuries received by B. while so working for C. *Sayers v. Girard*, 1 Cal. I. A. C. Dec. 352.

In *Penfield v. Town of Glastonbury*, 1 Conn. Comp. Dec. 637, where a janitor was employed by three establishments, including a church, concurrently, and also dug and tended graves in the cemetery for small sums, he was an

One test, sometimes said to be decisive, is as to who has the right to direct what shall be done, and when and how it shall be done,

employé in regard to the janitor work, and a contractor in respect to the digging and care of graves.

Persons held to be contractors and not workmen: A physician, since he is free from the control or direction of the person employing him. Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 15. *Ohio*. One who contracts with another to tear down and remove a stack, the contract providing that he shall furnish his own tools and appliances, hire his own help, and deliver the materials at a specified place for a stipulated sum of money; the person for whom the work was done retaining no power of supervision over the manner of doing the work. In re Sarah Johns, vol. 1, No. 7, Bul. Ohio Indus. Com., p. 172. *California*. One engaged to cut ties at a certain price per tie on land of defendant, where he was at liberty to employ and did employ labor on his own account, without the consent of the owner of the land, and without such owner having any control over the men so employed, or of the hours of labor of the applicant himself. Rose v. Pickrell, 1 Cal. I. A. C. Dec. 85. A plasterer theretofore doing journeyman work, who makes an oral contract to do a plastering job for a lump sum, and is given free hand to employ assistants, and takes risks of profit and loss, and is not to be controlled or supervised. Baker v. Armstrong, 2 Cal. I. A. C. Dec. 1057. An applicant engaged to cut and saw wood for the defendant, and having the power to employ other men to help him, the defendant having no control over the applicant or those employed by him, as to who should be employed, or their hours of labor, but only as to the length of the wood sawed, and the applicant also having similar arrangements with other parties to saw wood for them on the same terms. Gilmore v. Sexton, 1 Cal. I. A. C. Dec. 257. A teamster paid per load for one definite service, producing one agreed result, having full control of his team, his time, his methods of work, as to whether or not he hire all help, and of all details, except as to what is to be hauled, teaming as such, being his regular business, independent and distinctive from the regular business of his principals, he supplying and controlling the entire means of producing the result for which he is to be paid. (Comp. Act, §§ 13, 14) McCoy v. Kirkpatrick, 1 Cal. I. A. C. Dec. 599. The husband of applicant, where he had purchased a laundry route from the former owner and with a motor wagon of his own was carrying on the business of collecting laundry for the defendant, and being paid 30 per cent. of the receipts by the laundry, and it appeared that he was under no direction or control of the laundry as to hours of work and field for soliciting, and could even sell his route to another driver, or transfer the business to another laundry, and that he bore the losses due to bad accounts. Monroe v. Yosemite Laundry Co., 2 Cal. I. A. C. Dec. 718. A member of a copartnership working under a subcontractor. Kasovitch v. Wattis Co., 2 Cal. I. A. C. Dec. 319. *Connecticut*. One who agreed to blast and break up

who has the right to the general control.⁹⁰ When the doing of specific work is intrusted to one who exercises an independent em-

stone to be used by the respondents for building purposes, receiving wages per day, but using his own tools and providing the dynamite and assistants used, and being under no direction or duty to receive directions from the respondent. *Wowinski v. Vito*, 1 Conn. Comp. Dec. 629. A carpenter who agreed to build a barn for the respondent, being paid by the hour, but hiring other men, and making some profit on their wages, as well as on some materials furnished by him, and doing the work from general plans, without any supervision as to methods. *Crittenden v. Robbins*, 1 Conn. Comp. Dec. 523. One who agreed to cut wood on the defendant's land, at a fixed rate per cord, using his own discretion as to the work; the defendants having no authority or supervision as to hours, methods, tools, or persons employed. *Snow v. Winkler*, 1 Conn. Comp. Dec. 76. A workman who agreed to cut and pile wood on the defendant's land for a fixed rate per cord, cutting as much as he pleased and when he pleased, and working part of the time for other people. *Benoit v. Bushnell*, 1 Conn. Comp. Dec. 172 (superior court reversing the commissioner). A painter who agreed to paint the house of the respondent, furnishing the ladders and an assistant part of the time, making a small profit on the wages of such assistant, the respondent paying for the materials, and for the work by the day or hour, but having no power of direction or supervision beyond requiring a finished job within a reasonable time. *Wright v. Barnes*, 1 Conn. Comp. Dec. 248. One who had agreed with the respondent to build a silo for \$20, respondent to furnish the foundation, the materials, and a helper, but having no directive rights over the work. *Boyington v. Stoddard*, 1 Conn. Comp. Dec. 103. *New York*. One whose business was mov-

⁹⁰ A workman was employed to do certain work in the development of land, the employer furnishing the explosives and most of the tools used. The workman kept a team of horses and worked sometimes with his team. For five or six years prior to the injury he had done odd jobs for the same employer, at times as often as two or three times a week. He had the privilege of engaging help, and in fact employed men to assist him, and at the end of the week gave the employer the pay roll and received wages for these men, which he turned over to them. He was paid for his own work by the day at irregular times, receiving pay for his team when it was used, but no profit on the wages of men employed by him. It did not appear that he was responsible for the manner in which the work was done, or that the employer did not retain control over the extra men hired, as well as over the workman. Either party was at liberty to withdraw from the arrangement without loss from breach of contract. The court held that the relation was that of employer and employé, and not that of independent contractor. *Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328.

ployment, and selects his own help, and has the immediate control of them, and the right to control the method of conducting the

ing and handling heavy machinery, being engaged for that purpose by the defendants, and who employed helpers, and not only made a profit on their wages as charged against the defendant, but also carried insurance on them, and furnished certain appliances for the use of which he charged the defendant. *McNally v. Diamond Mills Paper Co.*, *The Bulletin*, N. Y., vol. 1, No. 7, p. 8. *Wisconsin*. One who was under contract with a lumber company to cut, log, haul, and deliver all the saw logs and pulp wood on certain lands, and was paid according to the amount of timber cut, and hired his own help to do the work. *Zobel v. Godlevski*, *Rep. Wis. Indus. Com.* 1914-15, p. 12. *England*. A man paid 5s. a day by a county council to haul stone, and permitted to work whenever and in any manner he liked. *Ryan v. Tipperary County Council* (1912) 5 B. W. C. C. 578, C. A. A foreman bricklayer who accepted a contract to do a piece of work, having the material furnished him, but himself obtaining the labor and tools, and was paid in a lump sum. *Simmons v. Faulds* (1910) 3 W. C. C. 169, C. A. (Act of 1897). Two laborers, who agreed to remove surface earth, hired help, and were paid by the cubic yard, and who were supplied with plant and tools by the quarry master, with whom they made the arrangements. *Hayden v. Dick* (1903) 5 F. 150, Ct. of Sess. The head of a gang of workmen engaged in felling trees. *Curtis v. Plumbtre* (1913) 6 B. W. C. C. 87, C. A. A journeyman slater, who had undertaken as an independent contractor, hiring his own laborer, to do a job of slating for some builders, and did not progress as rapidly as they wished, whereupon they hired another slater and two more laborers to "push the work." *Barnes v. Evans & Co.* (1914) 7 B. W. C. C. 24, C. A. A man who agreed to drag some logs with his horse, being paid a certain sum per day, and was not obliged to do the work himself, but might have sent a servant. *Chisholm v. Walker & Co.* (1910) 2 B. W. C. C. 261, Ct. of Sess. A man who had contracted with the harbor commissioners that he would furnish a yawl and four men to work at a pilot station, and was drowned while taking a pilot out to his ship in the harbor, he being under no obligation to do the work personally. *Walsh v. Waterford Harbor Commissioners* (1914) 7 B. W. C. C. 960, C. A. A rabbit trapper, who was paid so much a couple and was his own master in respect to his work, although the employer paid him by the couple and supplied him with a cottage for his use. *McConnel v. Galbraith* (1914) 7 B. W. C. C. 968, C. A. A mason who agreed with a contractor to build cottages for him within a certain time, being paid by the day and using material furnished by the contractor, who also provided a surveyor to pass upon the work as to whether it was satisfactory, the mason not being compelled to work all the time, but working part of his time for other persons. *Byrne v. Baltinglass Rural District Council & Kelly* (1912) 5 B. W. C. C. 566, C. A. A letter fixer, who was hired quite often intermittently, and was paid by the piece, and who

work, the contractor is an independent contractor.⁹¹ It does not make one an independent contractor that he is to be paid for his

worked for others when not employed by defendants. *Burnham & Co. v. Taylor* (1910) 3 B. W. C. C. 569, Ct. of Sess.

Persons held to be workmen and not independent contractors: A person engaged by creamery at \$10 per day to collect cream and deliver butter, said sum to be computed upon the basis of \$75 per month wages and a further allowance to be made for the rental of an automobile and team and the wages of a boy to assist in the work, and it appearing that the creamery exercised full direction and control and supervision over him as to the mode of doing his work, that he gave his time exclusively to the employment and was subject to discharge at any time. *Golden v. Delta Creamery Co.*, 2 Cal. I. A. C. Dec. 744. A carpenter working for a lump sum for his labor, the amount thereof being based upon the estimated number of days required at a given wage, and he not supplying the materials or paying his assistants, and being subject to the direction of the owner. *Holmes v. Japan Beautiful Nippon Kyosin Kaisha, Inc.*, 2 Cal. I. A. C. Dec. 894. A cook put in charge of a boarding house by a manufacturing company on a monthly salary, and to have in addition all profits in boarding the employes, but the work done under the direction, control and management of the company. *Michael v. Western Salt Co.*, 2 Cal. I. A. C. Dec. 501. A shingle bolt maker, engaged on the timber land of the defendant in the cutting of shingle bolts and paid at the rate of \$1.75 a cord for all work done, the pay day being at the same time as that of the men working on a wage basis, notwithstanding the fact that he had no regular hours, was master of his own time, and was subject to no supervision other than that the shingle bolts conform to standard. *Travis v. Hobbs, Wall & Co.*, 2 Cal. I. A. C. Dec. 506. A vaudeville actress employed at a salary on a vaudeville circuit, though she furnished her own costumes and skates. *Howard v. Republic Theater*, 2 Cal. I. A. C. Dec. 514. A carpenter frequently employed at a daily wage by the shop owner, where he is put to work to fill an order for window frames, on the basis of 25 cents per frame, and is injured while so doing. *Hale v. Johnson*, 2 Cal. I. A. C. Dec. 339. One who is engaged by a merchant to collect bills, and spends about two hours a day in so doing, no fixed compensation being agreed upon, and who is paid by being given such sum from time to time as both parties agree upon, and who while so engaged is not, with one unimportant exception, employed by others to collect bills at the same time. *Shoulder v. Greenberg*, 1 Cal. I. A. C. Dec. 146. A superintendent of construction of an oil pumping apparatus, of which he was the inventor, who receives the sum of \$3.50 per day from the oil company for each day of work, which the oil company designates as an "advance," but does not claim was loaned or to be repaid, and the books show a balance

⁹¹ *Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328.

services on a commission basis,⁹² by piecework,⁹³ or by any particular mode of payment.⁹⁴

of \$301 of unpaid advances at the death of the superintendent, a portion of which is thereafter paid to the widow. *Turner v. Oil Pumping & Gasoline Co.*, 2 Cal. I. A. C. Dec. 496. A salesman, who with his own motorcycle was engaged by defendant to solicit business in a certain district assigned to him, to be paid a commission on contracts and sales for his services, and at all times to be subject to the defendant's orders as to collections to be made and business to be sought, the sole work of such salesman being for said defendant. *Lewis v. Garratt-Callahan Co.*, 2 Cal. I. A. C. Dec. 952. *Michigan*. A driver employed for no definite time to haul logs for a lumber company and subject to the company's right to discharge him at any time, the work being done under the control of the company, both as to time and place. *Tuttle v. Embury-Martin Lumber Co.* (Mich.) 158 N. W. 875. *Wisconsin*. A railroad laborer, who was paid according to the amount of work done, but whose tools were furnished by the employer, and who had no capital, no special skill, and nothing to contract for except the sale of his labor. *Erickson v. Peppard & Burrill*, Rep. Wis. Indus. Com. 1914-15, p. 27. *England*. A quarryman whose tools were supplied him, and who was paid by the amount of material he worked, although he had power to hire and discharge men under him. *Evans v. Penwyllt Dinas Silica Brick Co.* (1902) 4 W. C. C. 101. A quarryman who was paid by the ton for the stone he quarried, and, although he had a partner and six workmen under him, was himself under the quarry manager, who told him what kind of stone to get, where to put the refuse, and who could have discharged him for disobedience. *Jones v. Penwyllt Dinas Silica Brick Co.* (1913) 6 B. W. C. C. 491, C. A. A worker in a quarry, paid for exactly the number of days he worked, at a rate per day, although he was allowed to use his own judgment as to where to work and could choose his own helpers. *Paterson v. Lockhart* (1905) 7 F. 954, Ct. of Sess. A man employed to break steel and cinders at a rate per ton, employing his own assistants. *Vamplew v. Parkgate Iron & Steel Co., Ltd.* (1903) 5 W. C. C. 114, C. A. (Act of 1897). A plumber, hired to fix some pipes and supplied with materials by the owner, who superintended the work and paid him for the work by the hour. *McNally v. Fitzgerald* (1914) 7 B. W. C. C. 24, C. A. A man hired by the contractor for the supply of road metal to break stones, the contractor paying him a piece rate, directing the locations of his work, and having authority to discharge him. *Boyd v. Doharty* (1910) 2 B. W. C. C. 257, Ct. of Sess. A worker who hauled stones for the pay of 5s. a day and was allowed to work for other people when not badly needed by his first employer. *O'Donnell v. Clare County Council* (1913) 6 B. W. C. C. 457, C. A. A man hired to cart milk at a certain reward per gallon, who furnished his own horse and wagon. *Clarke v. Bailieborough Co-operative Agricultural &*

⁹² See note 92 on page 217.

⁹³ See note 93 on page 218.

⁹⁴ See note 94 on page 219.

One who has an independent business, and generally serves only as a contractor, may abandon that character for a time and become

Dairy Society, Ltd. (1913) 47 Ir. L. T. R. 113, C. A. A decorator hired to paper the walls, who came and went when he pleased, and made out and receipted his bill when through. *Lewis v. Stranbridge* (1912) 6 B. W. C. C. 568, C. A. A man hired to haul stone from a quarry, and paid a certain fixed sum per load. *Howells v. Thomas* (1905) 120 L. T. Jo. 79, C. A.

Where one of the members of a partnership in the glazing business was employed by the principal contractor on the building to superintend the unloading of the glass, which was not included in the partner's contract but was outside that contract, the partner, injured while assisting with the unloading, was an employé of the principal contractor, and not an independent contractor with respect to the work at which he was injured. *Dyer v. James Black Masonry & Contracting Co.* (Mich.) 158 N. W. 959.

One who is employed by a manufacturing company to do the painting of its products, the manufacturing company furnishing a place to do the work by the piece or job, the person employed being left free to employ, direct, and discharge his helpers, the manufacturing company retaining no control over the mode or manner of doing the work, except that the person employed to do the painting and his helpers are required to observe shop regulations applying to all employés of the manufacturing company, is not an independent contractor, but an employé. It follows that, being an employé of the manufacturing company, he acted as their agent in employing his helpers, and they, too, are employés of the manufacturing company. In *re Chester McDonough*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 152. A helper of B., being employed to take charge of a certain department of the work, injured on one of A.'s machines while in the course of employment in working on outside work, is to be regarded as A.'s employé, and A., having elected under the provisions of the Compensation Act to pay compensation direct to his injured employés, is required to compensate such injured employé; the principle of independent contractor not applying. *Robinson v. Newark Reflector Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 167. Where A., the owner of a factory, employed B. to take charge of a part of the work done in the factory, paying B. partly by the piece and partly by the hour for the time devoted by him to the work, and where B., on account of A. not having sufficient work to keep him busy all the time, was permitted to take in outside work, A. furnishing the place, the tools, and machinery with which to do such outside work, B. employing his own help for the work he did for A., as well as for the outside work, the relation of independent contractor does not obtain as between A. and B., either as to work done for A. or as to the outside work. *Id.*

Where the issue arose, and the testimony was in direct conflict, as to whether a carpenter was employed by the defendant, or took the job at a contract price, and the evidence showed that the carpenter had, prior to his injury and

an employé, even without doing work of a different nature from that to which he is accustomed. He may be a contractor as to part

death, been paid a sum in excess of the amount claimed by the defendant to be the contract price, although the job was only half finished, that such sum paid was exactly equal to the amount due for the labor furnished at the estimated wage, that the specifications of the work were very indefinite, that defendant gave instructions as to the work during its performance inconsistent with what would be the case if the carpenter were an independent contractor, and that the alleged contract was merely for the labor and not for materials, such sum was at the most an estimate of the probable cost, and the carpenter was an employé, and not an independent contractor. *Connolly v. Connolly*, 2 Cal. I. A. C. Dec. 790. Passing up lumber to a carpenter and otherwise aiding him in the work is not usual for a contracting builder, where a contract has been let for a lump sum. Doing such work indicates that the carpenter is an employé within the meaning of the Compensation Act. *Crosby v. Strong*, 2 Cal. I. A. C. Dec. 408. A night watchman was employed by the defendant at a salary of \$30 per month to watch its premises, and was at the same time employed by others to act as night watchman for their establishments at different salaries. Each night he made his rounds, covering the premises of all the persons so employing him. The fact of his employment by the others was known to and approved by the defendant, but the defendant did not know how many others were so employing him, or who all of them were. The contract of hire with defendant was personal in nature, without any right in the employé to employ a substitute when he wished to take a vacation, and he was given specific instructions what to do and when to do it, and required to show by his night watchman's clock that he had made good for the month before his monthly salary was paid, and if found delinquent could have been reprimanded, disciplined, or discharged. The Commission held that the relation between the night watchman and the employer is that of employer and employé, and not of independent contractor. *Mason v. Western Metal Supply Co.*, 1 Cal. I. A. C. Dec. 284. A teamster, owning his own team and wagon, contracted to do hauling for an employer, and agreed to provide a team and driver for \$6 per day, and later appeared for work himself, driving the team. He was required to work eight hours per day, and was under the immediate control and supervision of the employer as to the mode of doing the work, and the employer retained the power and right to discharge him and rule his team off the work if the services rendered were not satisfactory. No contract was made for a specified amount of hauling, or specified quantity of work to be done, or specified length of time during which the services should be rendered. The Commission held that the agreement amounted to a contract of hire, and was not an independent contract for the furnishing of services, though it further appeared that one week after the beginning of the employment the teamster was requested to and did

of his service and a servant as to part.⁹⁵ Thus, one who is injured while operating a launch to bring supplies to a dredge for his em-

furnish another team belonging to himself, with a driver hired and paid for by himself, to work for the employer at \$6 per day for the use of the team and driver; the view of the Commission being that, while it is true that the injured employé may have been an independent contractor as to the second team provided by him for defendants' work, he is at the same time an employé under the terms of the first contract made between himself and his employer. *Stevens v. Tittle*, 2 Cal. I. A. C. Dec. 146.

⁹² Where a soliciting agent, provided with a horse and wagon by a dealer in furnishing goods, took goods for distribution and sale within territory assigned to him and was paid for his services on a commission basis, it appearing that he and other such agents returned all unsold goods and were credited with the same list price which they had been charged up with when they took the goods out, and that each sale, after being verified by a collector of the firm, was taken over, and any possible loss assumed by the firm, and all sales were made in the name of the firm, such agent was an employé, and not an independent contractor. *Rosenberg v. Western Mercantile Co.*, 2 Cal. I. A. C. Dec. 673. Payment by commission is equivalent to payment of wages, provided there is a contract of hire. There is no distinction between the relations existing between applicant and defendant under their contract and that ordinarily existing between a commercial traveler, who is paid a commission on his sales in lieu of wages, and his employer. In both instances the salesmen are expected to devote their whole time to the service of the employer. Book agents or canvassers, on the other hand, are not as a rule called upon to give their whole time to the service, but may devote as much or as little to it as they please. It follows that where the applicant entered contracted to "devote his whole time and energy to selling the lots" of defendant, and not to sell for any other individual, firm, or corporation, and did so devote his time for two years preceding the accident arising during such service, the basis of his pay being entirely commissions, which were certain percentages of the payments made by the purchasers, out of which the agent must pay his own traveling and living expenses, an injury sustained by the overturning of the automobile of applicant, while he was proceeding as directed by the defendant to a new field of operations, was compensable, the applicant being an employé and not an independent contractor. *Skidmore v. Brown*, 2 Cal. I. A. C. Dec. 556. Where a canvasser was given by a written contract exclusive selling territory and commissions for the sale of heaters for installation, and was expected to and did give the whole of his time to the business, and was under considerable control as to reporting progress and sales, and the heaters were installed by the selling firm, and,

⁹⁵ *In re Powley*, 169 App. Div. 170, 154 N. Y. Supp. 426.

ployer was an employé and not an independent contractor, though he was an independent contractor for dredging operations.⁹⁶ But

unlike another canvasser under contract with the firm, he was not required to guarantee the purchase price of heaters sold, he was an employé, and not an independent contractor. *Horgan v. Kinney*, 2 Cal. I. A. C. Dec. 1006. Where a bowling alley has the pins set up in its various alleys by boys, working irregularly as they may happen to be present and needed, and receiving as pay 25 per cent. of the sum collected from the games which they respectively serve, the boys, while setting pins, are employés, and not contractors. *Weaver v. Eyster & Stone*, 1 Cal. I. A. C. Dec. 563.

⁹³ The fact that one is a piece worker does not necessarily determine his status. *Travis v. Hobbs, Wall & Co.*, 2 Cal. I. A. C. Dec. 506. Where a farm hand, though called on occasionally to do various jobs, for which he is paid, is occupied mainly with cutting wood on the farm, and is paid therefor by the cord, this mode of payment being agreed upon because the owner cannot be present to supervise, and the farm hand works steadily ten hours a day, and also performs other volunteer services and lives on the farm, the fact that he is paid by piece work will not make him an independent contractor. *Fisher v. Dunshee*, 2 Cal. I. A. C. Dec. 849. Where a lather, under contract of hire to lath a house at a certain price per thousand, subject, however, to the direction and control of the subcontractor, and liable to discharge at any time by him, he was an employé, and not an independent contractor. *Stonaker v. Jones & Delaney*, 2 Cal. I. A. C. Dec. 834. A woodworker was engaged to cut out pieces of wood and put them together into lamps for 35 cents per lamp, and in order to expedite work was allowed to hire two helpers at a weekly rate of pay fixed by the defendant, but paid out of the 35 cents, money therefor being advanced by defendant. All machines and material were furnished by defendant. The woodworker chose his own hours, but was forbidden using machines outside working hours. He did not account for money received for payment of helpers. The Commission held that he was an employé, and not an independent contractor. *Shaffer v. Southern California Hardwood Mfg. Co.*, 2 Cal. I. A. C. Dec. 891. Where a woodcutter is engaged by the agent of a subcontractor to fell trees and cut cordwood on the premises of the principal, to be paid by the cord, to furnish his own tools, and within reasonable limits to be master of his own hours and time, and is paid by check from the subcontractor, and sustains an injury resulting in his death, the woodcutter is an employé of the subcontractor, not an independent contractor. *Lachuga v. Kataoka*, 2 Cal. I. A. C. Dec. 766. The fact that applicant was paid for his work at the rate of 18 cents for every tie cut by him was not by itself conclusive that he was an independent contractor; such mode of payment being entirely consistent

⁹⁶ In *re Powley*, 169 App. Div. 170, 154 N. Y. Supp. 426.

where the owner of a dredge, after leasing same to an independent contractor, was running it, he was not an employé of such contractor within the Workmen's Compensation Law.⁹⁷

A physician employed on salary by another physician, who is under contract to supply medical services to incapacitated employés of a manufacturing concern, is an employé of the latter and not an independent contractor, although allowed to follow private practice when his services are not required on contract cases.⁹⁸

Where a painter, who is killed, while working without helpers, by falling from a scaffold, has previously done work for the employer and been paid a lump sum for doing painting on the employer's plant, under a contract specifying the kind of work and the

with his being an employé on a piece work basis, as well as with his being an independent contractor. *Rose v. Pickrell*, 1 Cal. I. A. C. Dec. 85. An employé who claimed that he was paid \$3 per day, while his employer claimed that he had contracted to dig a sewer at 10 cents per foot, was held to be an employé, and not an independent contractor. *Farley v. Koch*, 2 Cal. I. A. C. Dec. 986.

⁹⁴ Where an aviator contracted with a moving picture concern to assist in the making of films with his aeroplane at \$5 per day and \$75 for the first flight, and \$50 each subsequent flight, he was an employé, and not an independent contractor. *Stites v. Universal Film Mfg. Co.*, 2 Cal. I. A. C. Dec. 670. Where an automobile mechanic was engaged to overhaul and repair an automobile on the premises of the employer, and to be paid 40 cents an hour for all time put in, though he supplied at retail prices parts which he had purchased at dealers' prices, he was an employé, and not an independent contractor. *Detwiler v. Kettering*, 2 Cal. I. A. C. Dec. 810. A chair man in an exposition relied for his earnings on casual patrons, and was furnished his equipment by the chair concessionaire, and required to conform to regulations as to the time of taking out and returning chairs and as to the order in which patrons should employ chair men. He was not allowed to sublet his chair, and was required to charge only a definite price and to pay in advance daily a specific rental for his chair, with permission to retain all earnings without an accounting, this method of remuneration being adopted as the most practical for the concessionaire. The Commission held that he was an employé, and not an independent contractor. *Leon v. Exposition Wheel Chair Co.*, 2 Cal. I. A. C. Dec. 845.

⁹⁷ *In re Powley*, 169 App. Div. 170, 154 N. Y. Supp. 426.

⁹⁸ *Getzlaff v. Enloe*, 3 Cal. I. A. C. Dec. 18.

material to be used, he is an employé, rather than an independent contractor,⁹⁹ though his contract is in writing, and he agreed to do the work satisfactorily, and to do it over if it did not endure a specified length of time.¹

§ 67. — Federal Act

In order that one may come within the federal Act, he must be a "person employed by the United States," and not a mere contractor. A plate printer in the Bureau of Engraving and Printing paid by the piece,² a contract tie maker, paid by the piece, who boards himself and hires and pays his own help,³ and the owner of a power boat chartered to the government and operated by the owner in its service, are contractors, and not employés of the United States.⁴ A workman employed by a government contractor is not employed by the government.⁵ On the other hand, one employed and carried on the pay rolls of the reclamation service is employed by the government when performing work being done by a contractor for the government, if directed to do so by his superior.⁶ It has been determined that a workman employed in the Forest Service, designated with others to perform certain work which the government was performing under agreement with county supervisors, the latter bearing the expense, was employed by the United States and entitled to compensation for injuries sustained while so employed.⁷

⁹⁹ (Wk. Comp. Law as amended in 1914 [Laws 1914, c. 41] § 2, group 42) In re Rheinwald, 168 App. Div. 425, 153 N. Y. Supp. 598.

¹ Id.

² In re Clark, Op. Sol. Dept. of L. 49.

³ In re Contractors or Jobbers at Neopit Indian Sawmill, April 8, 1915. Op. Sol. Dept. of L. p. 58.

⁴ In re Hanson, Op. Sol. Dept. of L. 51.

⁵ In re Lipscomb, Op. Sol. Dept. of L. 50.

⁶ In re Crawford, Op. Sol. Dept. of L. 56.

⁷ In re Kenny, Op. Sol. Dept. of L. 57.

§ 68. Employé of independent contractor

Under the New Jersey Act, the employer is liable, for injury to an employé of an independent contractor from defects in ways, works, machinery, or plant, only when he furnishes same, and not when they are furnished by the independent contractor, over whose negligent conduct in not remedying defects the employer has no control.⁸ The employé of an independent contractor, who is a subscriber, under the Massachusetts Act, has the same rights against the owner's insurer, as though it had directly insured the employer.⁹ Where a teamster was sent by his employers to get a load of concrete sills from an inclosure belonging to certain building contractors, at their request, and on arriving was assisted by a son of one of the contractors, who selected the sills to be taken, and was injured by the falling of one of the sills while it was being carried to the wagon, he was not an employé of the contractors, nor was he engaged in the usual course of their business as contractors.¹⁰ Where the inventor of a plant for pumping oil was employed by a company selling the machine to superintend and control the installation of a plant upon the premises of the subscriber, his employers being independent contractors with respect to the subscriber, the subscriber's insurer could not be held liable for the death by accident of the inventor while so employed; he being in no sense an employé of the subscriber.¹¹

§ 69. Officers

Since public officers are not entitled to compensation as employés, it becomes important to distinguish between officers and

⁸ *Kennedy v. David Kaufman & Sons Co.* (N. J. Sup.) 91 Atl. 99. As to who are independent contractors, see § 66, ante.

⁹ Wk. Comp. Act, pt. 3, § 17.

¹⁰ *In re Comerford*, *In re Contractors' Mut. Liab. Ins. Co.* (Mass.) 113 N. E. 460.

¹¹ *Western Indemnity Co. v. State Indus. Acc. Com.* (Cal.) 158 Pac. 1033 (annulling award of commission).

employés.¹² As said by Judge Cooley: "The officer is distinguished from the employé in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office; and usually, though not necessarily, in the tenure of his position."¹³ Except where the statute otherwise provides, as is done by the Ohio Act,¹⁴ a policeman is not an "employé" of the city, but is an "officer" holding an office of public trust.¹⁵ But a village night marshal, performing the duties of a policeman at night, was

¹² (Code Supp. 1913, tit. 12, c. 8a, § 2477m16 [b]) Op. Sp. Counsel to Iowa Indus. Com. (1915) pp. 3, 7.

¹³ *Blynn v. City of Pontiac*, 185 Mich. 35, 151 N. W. 681; *Mr. Justice Cooley in Throop v. Tangdon*, 40 Mich. 673. A deputy surveyor, appointed by the surveyor general, received a personal injury while surveying lumber for the subscriber and claimed compensation as an "employé." The evidence showed that he was a public official; that he could not survey lumber under the law "for any person by whom he is employed"; that his duties were fixed by statute; that he was under the control and direction of the surveyor general; and that his salary was fixed by law and was in the form of fees covering the service rendered. The Commission held that he was not an "employé." *Emerson v. Mass. Employés' Ins. Ass'n*, 2 Mass. Wk. Comp. Cases, 181 (decision of Com. of Arb.).

¹⁴ A lieutenant of police of a city not maintaining a policemen's pension fund is an "employé" within the meaning of paragraph 1 of section 14 of the Ohio Act. *In re Frances E. Lyman*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 182.

¹⁵ *Blynn v. City of Pontiac*, 185 Mich. 35, 151 N. W. 681. Policemen in the city of Minneapolis are officers of the city, and hence are excluded from the provisions of the act. Gen. Laws 1913, c. 467, § 34, subd. 1 [Gen. St. 1913, § 8230j] Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 26. The Court of Criminal Appeals of Texas has decided that "a policeman of a city is a public officer holding his office as a trust from the state, and not as a matter of contract between himself and the city, the word applying equally to every member of the police force," and that "a policeman is a public officer of the state expressly charged by the statutes with enforcing a large body of the criminal law." *Ex parte Preston*, 72 Tex. Cr. R. 77, 161 S. W. 115. See, also, *McQuillin on Municipal Corporations*, II, 940, and V, 5049; 28 Cyc. 497.

an employé subject to the Wisconsin Act.¹⁶ Firemen¹⁷ and deputy sheriffs on a fee basis are officers rather than employés.¹⁸

¹⁶ (Wk. Comp. Law, St. 1915, §§ 2394—3 to 2394—7) *Village of Kiel v. Industrial Commission of Wisconsin* (Wis.) 158 N. W. 68.

¹⁷ Firemen of the city of Minneapolis, appointed annually and required to take an oath of office, are officers of the city, and hence excluded from the provision of the act. (Gen. Laws 1913, c. 467, § 34, subd. 1 [Gen. St. 1913, § 8230]) Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 24. Where part of the duty of a police constable was to act as fireman, and he was injured while so doing, he was not a workman. *Sudell v. Blackburn Corporation* (1910) 3 B. W. C. C. 227, C. A.

¹⁸ Where a deputy sheriff, injured while making an arrest, was appointed for his own convenience, received no compensation from the sheriff of the county, and was to receive no compensation other than fixed fees for serving of legal process, he was not an employé as defined by the Compensation Act, and his injury is not compensable. *Yancey v. County of Los Angeles*, 2 Cal. I. A. C. Dec. 601.

ARTICLE II

DEPENDENTS

Section

70. Who are dependents and what constitutes dependency.
71. Partial dependency.
72. Total dependency.
73. Alien dependents.
74. What children may be dependents.
75. Illegal and divorced wives—Marriage.
76. Nonsupport and desertion.
77. Dependents under federal Act.
78. Claim of dependent.
79. Payment to representatives—Survival of claim.
80. Determination of question of dependency.
81. Presumption of dependency—Husband and wife.
82. Parent and child.
83. California.
84. Proof of dependency.

§ 70. Who are dependents and what constitutes dependency

Compensation Acts are founded on the theory of compensation, not only to the injured workman, but to his dependents in case of his death.¹⁹ While ordinarily no exact standard for the determination of dependency is prescribed by statute, and it is difficult, if not impossible, to formulate such a standard,²⁰ it may be said in general terms that a "dependent" is one who looks to another for support, one dependent on another for the ordinary necessities of life, for a person of his class and position,²¹ and that, to be entitled to compensation as a dependent, one need not deprive himself of the

¹⁹ In re Nelson, 217 Mass. 467, 105 N. E. 357.

A provision in the Constitution authorizing the Legislature to enact laws providing "compensation to employes," in view of the trend of like legislation, must be construed to authorize laws not only giving compensation to the employes themselves, but also to those dependent upon them for support. *Western Metal Supply Co. v. Pillsbury* (Cal.) 156 Pac. 491.

²⁰ *Miller v. Riverside Storage Co.* (Mich.) 155 N. W. 462.

²¹ *Jackson v. Erie R. Co.*, 86 N. J. Law, 550, 91 Atl. 1035; *Tirre v. Bush Terminal Co.*, 172 App. Div. 386, 158 N. Y. Supp. 883; *Dazy v. Apponaug Co.*,

ordinary necessities of life to which he has been accustomed, but he cannot demand compensation merely to add to his savings or investments.²² It follows that dependency does not depend on whether the alleged dependents could support themselves without decedent's earnings,²³ or so reduce their expenses that they would be supported independent of his earnings,²⁴ but on whether they were in fact supported in whole or in part by such earnings,²⁵ un-

36 R. I. 81, 89 Atl. 160; *Simmons v. White Bros.*, 80 L. T. 344, 1 W. C. C. 89; *Main Colliery Co., Ltd., v. Davies*, 2 W. C. C. 108.

²² *Dazy v. Apponaug Co.*, 36 R. I. 81, 89 Atl. 160.

²³ *Miller v. Riverside Storage & Cartage Co. (Mich.)* 155 N. W. 462.

In *Howells v. Vivian & Sons*, 85 L. T. 529, 4 W. C. C. 106, it was said: "The test of dependency is not whether the family could support life without the contributions of the deceased, but whether they depended upon them as part of that income or means of living." The court held that, where the support of a deceased son cost the family 14s. a week, and he added 25s. a week to the family income, his father earning 33s. 9d. a week, the question of whether or not the family could support itself without his earnings is not a proper criterion of their dependency.

²⁴ A dependent under the Act is not necessarily one to whom the contributions of the injured or deceased workman are necessary to his or her support of life; the test is whether the contributions were relied upon by the dependent for his or her means of living, judging this by the class and position in life of the dependent. *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245; *Howells v. Vivian & Sons*, 85 L. T. 529, 4 W. C. C. 106; *French v. Underwood* (1903) 5 W. C. C. 119 (Act of 1897).

²⁵ *Buchanan v. White Lumber Co.*, 2 Cal. I. A. C. Dec. 796; *Pryce v. Penrickber Nav. Colliery Co.*, [1902] 1 K. B. 221.

The mother and sister of a deceased employé who were residents of Italy and unable to work, were found to be wholly dependent upon him, though they occasionally received small remittances from another sister, who was a member of the family, earning six or seven cents a day, and from an aunt, there being evidence that such remittances were wholly gratuitous, and that the pittance earned by the sister was hardly sufficient for her own support. *Petrozino v. American Mut. Liability Co. (Caliendo's Case)*, 219 Mass. 498, 107 N. E. 370.

A workman's daughter was not dependent upon him for support where, for several years, she had resided with and been cared for by another; nor where the workman's wife had been supported by the state in an insane asylum for more than nine years, without any contribution to her support

der circumstances indicating an intent on the part of deceased to furnish such support.²⁶ Occasional gifts, not being contributions

being made by deceased, was she dependent upon him for support. *Roberts v. Whaley* (1916, Mich.) 158 N. W. 209.

Where deceased and his brother made their homes at their sister's house, though away from Monday until Saturday, but spending their entire spare time at her house from Saturday until Monday, and each paying her \$5 a week, which payments were materially greater than what was received from her, the sister was found to be a dependent. *Hammill v. Pennsylvania R. Co.*, 87 N. J. Law, 388, 94 Atl. 313. That the workman's father worked and earned \$26.40 a week, and that the mother and sisters also worked, did not alter the fact that decedent's earnings went to the general support of the family, and that the amount contributed by him amounted to more than his board, lodging, and other expenses, and that the family were dependents, in that they derived substantial benefit from the fact that he lived with them and voluntarily gave all his wages into the common fund. *Connors v. Public Service Electric Co.* (1916, N. J.) 97 Atl. 792. Evidence that an adult workman turned over his wages to his father, and that his sister received substantial benefit therefrom, authorized an award of compensation to her, whether she was an adult or a minor. *Id.* Decedent's mother was actually dependent upon him where decedent, who was 18 years old, his stepfather, and seven other children constituted the family, and it appeared that the husband earned \$11 a week and decedent \$6, of which he contributed \$5 to the support of the family, and that the family had no other property or income. *Krauss v. Fritz & Son, Inc.*, 87 N. J. Law, 321, 93 Atl. 578. Proof that, prior to and up to the time of his death, decedent gave his earnings to his father, and that the father had no other income or means of support, justifies a finding that the father was an actual dependent of decedent. (P. L. 1911, p. 139, § 2, par. 12) *Reardon v. Philadelphia & R. Ry. Co.*, 85 N. J. Law, 90, 88 Atl. 970.

Where the deceased workman's sister was an unemployed schoolgirl, largely supported by his earnings, she was a "dependent." (Consol. Laws, c. 67) *Walz v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6, 155 N. Y. Supp. 703.

In *Kane v. New Haven Union Co.*, 1 Conn. Comp. Dec. 492, it was held that where a minor son contributed all of his earnings, \$11 per week, to a family fund, receiving therefrom his clothes and personal expenses, his father was a dependent.

Where the mother of a deceased employé, living with her husband and

²⁶ Dependency in fact within section 19 (b) of the California Act refers to the receipt of support under circumstances indicating an intent of deceased to furnish support to the dependent. *Prichard v. American Beet Sugar Co.*, 2 Cal. I. A. C. Dec. 341. The intent of a son to contribute to his parents' support must be clearly shown to establish dependency. *Da Luz v. Rideout*, 2 Cal. I. A. C. Dec. 359.

for support, do not prove dependency;²⁷ nor does a moral obligation of support to be effectuated in the future constitute depend-

sions, received regular contributions toward the support of herself and family, and it appears that the husband and sons were all employed in gainful occupations under the same employer, the Commission held that, while it did not appear that the contributions were necessary to her support, it did appear that they were made, and this made her a dependent. *Buchanan v. White Lumber Co.*, *supra*. But where the father of a deceased employé, claiming dependency because of his being a paralytic, is found to be receiving a total disability allowance from the Foresters lodge, and to have received no contributions from the deceased son for a year past, he is not dependent. *Murphy v. Standard Oil Co.*, 2 Cal. I. A. C. Dec. 304. Where it appeared that, after contributing for several years to his mother's support, an employé had for several years prior to his death discontinued such contributions and made payments on a small ranch, to which he intended bringing her to live with him on completion of the purchase and the building of a

²⁷ *Da Luz v. Rideout*, *supra*.

Evidence of occasional gifts by the workman to his brother does not establish dependency of such brother. *Holleron v. Hill*, 2 Cal. I. A. C. Dec. 289. Evidence of contributions made to a mother in the nature of occasional gifts, and not as contributions to her support, does not establish dependency. *Avery v. Pacific Gas & Electric Co.*, 2 Cal. I. A. C. Dec. 311. Where a mother received occasional sums sent to her by her son, only at irregular intervals and on request, such sums were merely occasional gifts, not regular contributions for support, and the mother was not a dependent of the son. *Turley v. Bible Institute Building Co.*, 1 Cal. I. A. C. Dec. 472. Where deceased has not for three years before his death contributed regularly to the support of his parents, but has at irregular intervals sent money to them as remembrances, the parents are not dependent on him. *Cal. State Board of Prison Directors v. Dickerson*, 1 Cal. I. A. C. Dec. 262.

In *Blackall v. Winchester Repeating Arms Co.*, 1 Conn. Comp. Dec. 183, where the father of the deceased testified that she had never had steady employment, and it appeared that she was barely self-supporting, if that, small sums given at various times to her grandmother, who at other times helped her to buy clothes, do not make the grandmother dependent upon her. In *Blanton v. Wheeler & Howes Co.*, 1 Conn. Comp. Dec. 415, where it appeared that the claimant daughter of the deceased workman was married and living apart from him, was earning a little herself, and apparently as well situated as her father, though she received small irregular gifts of money from him, which she used for living expenses, the commissioner decided as a question of fact that she was not a dependent within the meaning of the Act.

ency in fact.²⁸ The existence or nonexistence of a legal obligation to support, though persuasive and a factor to be considered in de-

house, her dependency on him was not shown. *Prichard v. American Beet Sugar Co.*, 2 Cal. I. A. C. Dec. 341.

Where the deceased workman lived at home with his widowed mother and a sister who did the housework, his only brother living in another city and earning sufficient to support himself, and turned over all of his wages to his mother, she was the only dependent. *Maire v. Wm. Landauer & Co.*, Rep. Wis. Indus. Com. 1914-15, p. 20.

Where a deceased employé was survived, besides a wife and child, by his mother and two sisters, aged 23 and 9 years, but had never contributed anything toward the support of any of the three latter, they were not dependent upon him to any extent. In *re Laura Shaffer*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 7. A sister of full age was neither wholly nor partially dependent on an unmarried brother with whom she did not reside, though he occasionally gave her small sums of money, where she had been regularly employed for some years at from \$9 to \$10 a week. In *re Bertha R. Cavett*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 150. An employé was killed in the course of his employment leaving surviving him a widow and a son 35 years of age, mentally and physically deficient, but who, for a number of years prior to and at the time of the death of the workman, was employed at a weekly wage of \$7.50. The Commission held that the son was not wholly or partially dependent upon deceased. In *re Frances Williams*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 31.

Where the earnings of a workman and his two sons combined to support the whole family, and all three were killed in the same accident, the widow was a dependent of all three. *Hodgson v. Owners of West Stanley Colliery* (1910) 3 B. W. C. C. 260, H. L., and 2 B. W. C. C. 275, C. A. Where a father who received 10s. a week from his son and was earning 26s. a week by his own efforts, he was not dependent. *Arrol & Co., Ltd., v. Kelly* (1905) 7 F. 906, Ct. of Sess. (Act of 1897).

²⁸ *Prichard v. American Beet Sugar Co.*, 2 Cal. I. A. C. Dec. 341.

Where a son of the deceased employé is nineteen years old, and in his divorced mother's custody, with no provision for his support by his father, and no contributions to such support in fact made by the father, the son is not a dependent. *Dolbeer & Carson Lumber Co. v. Watson*, 1 Cal. I. A. C. Dec. 654.

In *Pinel v. Rapid Ry. System*, 184 Mich. 169, 150 N. W. 897 (Comp. Laws 1897, § 4487 et seq.), it was held that where the mother of a workman was living apart from him at the time of his death and was not dependent upon him, and he, though under a moral obligation, was under no legal obligation to support her, she was not a "dependent." The court said: "The claimant did not belong to the class conclusively presumed by the compensation law to be a dependent. On the date of the accident it is conceded claimant was

termining dependency,²⁹ is not conclusive unless made so by statute. Purely voluntary contributions may establish dependency.³⁰ Thus, voluntary contribution to the support of a workman's minor child fixes dependency as a matter of fact, though the child has been awarded to its mother by a divorce decree which makes no provision for support by the father, and entitled the child to an award

not dependent by reason of any support furnished her by the deceased. On the date of the accident she was not dependent on the deceased by force of any order of court based upon section 4487 et seq. A son is always under moral obligation to assist his indigent mother, but he is under no legal obligation to do so until proceedings under the statute have resulted in an order compelling him to do so. No such order was in force at the time of the accident; therefore * * * he was under no legal obligation at that time to support his mother." This case is supported by *Rees v. Penrikher Nav. Co.*, 87 L. T. 661, 5 W. C. C. 117; *Schwanz v. Wujek*, 163 Mich. 492, 128 N. W. 731.

In *Merriman v. Scovill Mfg. Co.*, 1 Conn. Comp. Dec. 596, where the deceased son had agreed with his father that he was to be allowed to keep and use his own wages, and was to board at home without any present payments, but was to pay \$3 per week for such board after he had obtained an education and was able to reimburse his father, it was held that the father could not be held to be a dependent upon the strength of such expected payments.

²⁹ A ten year old child of a workman by his first wife, who, though she had not lived with her father and stepmother for five years previous to his death, had not been adopted by the people with whom she was living, and expected to return to live with her father at any time, was a dependent. (Gen. Laws 1913, c. 467, § 14 [Gen. St. 1913, § 8208]) Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 11. p. 31.

Where all five sons of a widow were liable for her support, but one really provided her support, and he was killed, she was totally dependent upon him. *Rintoul v. Dalmeny Oil Co., Ltd.* (1909) 1 B. W. C. C. 340, Ct. of Sess. Where a workman gave the wife and two children he had deserted only trifling amounts for two years, and then when a decree of alimant was rendered against him, disappeared entirely, and was not heard of until he died a year and a half later, the children were held to be dependent. *Young v. Niddrie & Benhar Coal Co., Ltd.* (1913) 6 B. W. C. C. 774, H. L., and (1912) 5 B. W. C. C. 552, Ct. of Sess.

³⁰ Death benefits under the Act are not limited to those for whose support the deceased workman was legally chargeable. "Dependents" include those supported by the workman's voluntary contributions. *Walz v. Holbrock, Cabot & Rollins Corp.*, 170 App. Div. 6, 155 N. Y. Supp. 703.

of death benefits based on the amount of such contributions;³¹ but voluntary contributions of money, support, or service by a brother to a sister, or by a sister to a brother, are not necessarily evidence of the dependency of either, or of the extent of the dependency.³² Minority of a deceased workman does not prevent his parents from being dependent on him.³³ The husband of the mother of an illegitimate son, when not the putative father, is not a dependent of the son, so as to be entitled to compensation for his death.³⁴

Compensation cannot be awarded to alleged dependents not belonging to the classes of relatives enumerated by statute.³⁵ The enumeration of certain persons after the heading "dependents" should not be held to place them in the relationship of actual dependents; such enumeration merely indicating that they must prove themselves dependents in fact, as distinguished from theoretical dependents.³⁶ A statute authorizing compensation to actual dependents will be liberally construed to allow compensation to the dependent parent of a deceased workman, though he has left no surviving wife or child, and no specific amount of compensation is fixed for such a case.³⁷

³¹ *Morse v. Royal Indemnity Co.*, 1 Cal. I. A. C. Dec. 53.

³² *Miller v. Riverside Storage & Cartage Co.* (Mich.) 155 N. W. 462.

³³ (Consol. Laws, c. 67, § 16, subd. 4) *Friscia v. Drake Bros. Co.*, 167 App. Div. 496, 153 N. Y. Supp. 392.

³⁴ *McLean v. Moss Bay Iron & Steel Co., Ltd.* (1910) 2 B. W. C. C. 282, C. A.

³⁵ *Hammill v. Pennsylvania R. Co.*, 87 N. J. Law, 388, 94 Atl. 313.

A sister-in-law, with whom the deceased employé resided and for whom he made contributions, is not dependent upon him, she not being included in the classes of relatives enumerated. *Western Indemnity Co. v. O'Brien*, 2 Cal. I. A. C. Dec. 368.

³⁶ *Miller v. Public Service Ry. Co.*, 84 N. J. Law, 174, 85 Atl. 1030.

³⁷ Compensation may be awarded under P. L. 1911, p. 139, § 2, par. 12, subd. 1, to a mother who is "actually dependent" on a deceased son, although the son leaves no widow; the object of this section being to award compensation to actual dependents. The right to compensation of actual dependents was fixed by the earlier words of the statute, and it is immaterial that no specific amount is fixed by way of compensation to the mother, where decedent leaves no widow. A basis for compensation in the case of the mother

An Act providing that, in case the employé dies of his injury, compensation shall be awarded to those persons who were in fact his next of kin or members of his family at the time of the injury, and who in fact were dependent upon him for support at that time, does not authorize an award of compensation to be made, for example, to persons who would have been his next of kin if his sole next of kin had been dead, and who were not in fact dependent upon him, but might have been dependent upon him, had it been that the next of kin who was dependent upon him had died. The widow of a subcontractor's employé, killed in the course of his employment, is entitled to compensation under the Massachusetts Act.³⁸

alone is found in the schedule in the fact that 25 per cent. of the wages is to be awarded where there is a widow alone, and 50 per cent. where there is a widow and father or mother. While the courts cannot read into the statute words which are not there, they may, on legal principles, read into the basis of compensation words essential to the main intent, as indicated by the words "actual dependents." *Blanz v. Erie R. Co.*, 84 N. J. Law, 35, 85 Atl. 1030. This case cites *Eyston v. Studd*, cited in *Bacon's Abridgment*, "Statutes," 1, 6, holding that a statute giving a remedy against executors might be extended by equitable construction to administrators, because they are within the equity of the statute, which case was followed and applied in *Hoguet v. Wallace*, 28 N. J. Law, 523, and recently was applied in *State v. Alderman*, 81 N. J. Law, 549, 79 Atl. 283, holding that a statute forbidding objections to an indictment for defects apparent on its face, unless taken before the jury was sworn, applied to a case where the defendant plead *nolo contendere*, in which, therefore, no jury could be sworn.

The parents are entitled to compensation for death of the employé, if dependent upon him, though he left no surviving wife or child. (*Consol. Laws*, c. 67, § 16, subd. 4) *Frischia v. Drake Bros. Co.*, 167 App. Div. 496, 153 N. Y. Supp. 392; *In re Murphy* (Mass.) 113 N. E. 283. Where the mother with whom the employé lived and to whose support he contributed was his only next of kin, the rest of the family being her sons and daughters, she was the only dependent entitled to compensation for the death of the employé. *Id.*

Where the workman left surviving him a dependent mother, and brothers and sisters not dependent, the mother was entitled to the entire compensation. (*Wk. Comp. Act 1912*, § 4; *Jones & A. Ann. St. 1913*, par. 5452) *Matecny v. Vierling Steel Works*, 187 Ill. App. 448.

³⁸ (St. 1911, c. 751, pt. 2, §§ 6, 7, and pt. 3, § 17) *In re King*, 220 Mass. 290, 107 N. E. 959.

It is not the policy of the Kansas Act to continue compensation to a dependent minor after he reaches the age of 18 years, unless he be physically and mentally incapable of earning wages, or to award compensation to an adult married son, who is the head of a family living separate from the family of his mother, who from her wages as an employé has made small contributions toward his support, where he is physically and mentally capable of earning, and is actually earning, fair wages.³⁹

The British Act recognizes "the members of the workman's family as were wholly or in part dependent," and the British cases illustrate this feature of the statute, recognizing the family as such, while the New Jersey Act does not recognize the family as a unit, but individuals or groups of individuals, when actually dependent in fact. To come within the latter Act, the individuals named therein must be actually dependent upon the deceased, rather than upon a common family fund.⁴⁰ In a Connecticut case, where the deceased minor employé had been obtained by the claimant from a home for destitute children, under an agreement which provided that the home might demand his surrender at any time, and had never legally adopted the deceased, he was held by the Commissioner not to have been such a member of claimant's family as to entitle claimant to an award as a dependent on account of contributions of wages made by the deceased.⁴¹

§ 71. Partial dependency

The phrase "actual dependents" means dependents in fact whether wholly or partially dependent. Hence it was no defense, in proceedings under an Act using this term, that petitioner and his family were not entirely dependent on deceased.⁴² Partial depend-

³⁹ (Wk. Comp. Act, § 4) *Taylor v. Sulzberger & Sons Co.*, 98 Kan. 169, 157 Pac. 435.

⁴⁰ *Havey v. Erie R. Co.*, 88 N. J. Law, 684, 96 Atl. 995.

⁴¹ *Weaver v. Assawaga Co.*, 1 Conn. Comp. Dec. 331.

⁴² See note 42 on following page.

ency, giving a right to compensation,⁴³ may exist, though the contributions be at irregular intervals and of irregular amounts, and though the dependent have other means of support,⁴⁴ and be not

⁴² *Muzik v. Erie R. Co.*, 85 N. J. Law, 129, 89 Atl. 248, Ann. Cas. 1916A, 140, affirmed in 86 N. J. Law, 695, 92 Atl. 1087; *Jackson v. Erie R. Co.*, 86 N. J. Law, 550, 91 Atl. 1035.

The phrases "actual dependent" and "who are dependent upon the deceased," as used in the New Jersey Act, mean relatives in some degree mentioned in the Act, who were dependents in fact and being wholly or to a substantial degree supported by the deceased at the time of his death. (P. L. 1913, p. 305, par. 12) *Hammill v. Pennsylvania R. Co.*, 87 N. J. Law, 388, 94 Atl. 313; *Havey v. Erie R. Co.*, 87 N. J. Law, 444, 95 Atl. 124. The words "actual dependents" mean dependents in fact. The contrast in the statute is between those who are actually dependent and those who are not dependent. (P. L. 1911, p. 139, § 2, par. 12) *Miller v. Public Service Ry. Co.*, 84 N. J. Law, 174, 85 Atl. 1030.

In *Belcher v. Campo*, 1 Conn. Comp. Dec. 612, where though the deceased workman's father owned considerable real estate and chattels incidental to the running of his farm, both he and the mother were unable to do any work, the farm being run by the deceased son, and groceries and feed for the stock being bought by him, and the father testified that he depended upon the son for these necessary supplies, which were bought from the wages earned by the deceased in respondent's employ, both mother and father were held to be partial dependents.

In a case in which a father sought compensation on account of the death of a son who had contributed to his father a certain average sum weekly, it was said that the question was whether the father "made a loss by the death of his son, in consequence of there no longer being a source of assistance to him from his son's earnings in the work at which he was killed, and on which source, from his own inability to earn wages himself, he was wholly or partially dependent." *Arrol & Co., Ltd., v. Kelly*, 7 F. 906, 42 S. C. L. 695.

⁴³ It is not necessary that the dependency be total in order to entitle the dependent to the benefit of the statute. *Walz v. Holbrook*, 170 App. Div. 6, 155 N. Y. Supp. 703; *Tirre v. Bush Terminal Co.*, 172 App. Div. 386, 158 N. Y. Supp. 883. Partial dependency is sufficient to entitle a claimant to compensation. *Rhyner v. Hueber Bldg. Co.*, 171 App. Div. 56, 156 N. Y. Supp. 903. That the workman's sister was only partially dependent upon him did not prevent her from recovering compensation for his death. *Walz v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6, 155 N. Y. Supp. 703.

⁴⁴ (Wk. Comp. Act, § 43) *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245.

Where a workman, who left surviving him two sisters under eighteen years of age, a married sister, and a mother, had given his mother one-half of his

reduced to absolute want.⁴⁵ But it exists only to the extent that the deceased workman contributed to the support of the dependent.

earnings for more than ten years, which earnings she used for support of herself and minor children, she was partially dependent on him, though she also received some support from her husband. *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436. In *Jakubowski v. Brooks*, 1 Conn. Comp. Dec. 281 (affirmed by superior court on appeal), where the deceased, a sister of the claimant, made irregular contributions to the claimant whenever any emergency or particular need arose, though she lived with her sister's family and paid no board, contributing in all over \$200, claimant was held to be a partial dependent, even though her husband, when working, was able to support her, and it did not appear that she would have suffered want if the contributions had not been made. In *Kennedy v. American Brass Co.*, 1 Conn. Comp. Dec. 406, where it appeared that deceased practically furnished the house rent for his sister, gave her sums of money, and purchased coal for her, though her husband was earning \$15 per week, it was held that she actually relied upon these contributions as a means of maintaining the family standard of living, and was a partial dependent. In *McNamara v. Ives*, 1 Conn. Comp. Dec. 41, it was held, where the deceased employé lived with his sister and contributed about \$50 a year, besides paying his board, and also did work around the home, that she was a dependent, entitled to the minimum of \$5 per week for 312 weeks. Where a minor employé contributed approximately \$12 to \$14 per month to a family consisting of his father, mother, and sister, they were partially dependent upon him, and entitled to the minimum benefit of \$5 per week for 312 weeks, and \$100 burial expenses. *Anderson v. American Straw Board Co.*, 1 Conn. Comp. Dec. 11 (affirmed by superior court on appeal).

The plaintiff's son, 18 years old, living with her and and her husband, turned over to her his wages, paying nothing for his board, room, or laundry, but obtaining from her money for his expenditures. Although she was supported by her husband, she has required certain medical and surgical attention, the expenses of which were paid in part by the deceased, and his wages were always available by her for such attention, all of which extra expense could be met only by using a portion of his earnings. The court held that she was partly dependent upon the son, and could recover under the Workmen's Compensation Act on account of his death. *Smith v. National Sash & Door Co.*, 96 Kan. 816, 153 Pac. 533.

Where the deceased workman was a minor 16 years old, living at the home of the claimant, his half-brother, of whose family he was a member, the household affairs being managed by the claimant's wife, to whom her husband and decedent gave their entire weekly wages, from which the family, consisting

⁴⁵ *Rhyner v. Hueber Bldg. Co.*, 171 App. Div. 56, 156 N. Y. Supp. 903.

Payments made for other purposes than for support, such as payments to the dependent to be invested for the joint benefit of both, constitute no part of such dependency.⁴⁶ Although a wife in Italy

of decedent, the husband and wife, and their two minor children, were supported, claimant was partially dependent upon decedent's wages for support. (St. 1911, c. 751, pt. 2, § 6) In re Kelley's Case, 222 Mass. 538, 111 N. E. 395; Dodge v. Boston & Providence R. R., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318; Murphy's Case, 218 Mass. 278, 105 N. E. 635. Where an employé contributed \$2 per week to the support of a child, who had left his home with his wife when she left him, the child was a partial dependent. Bentley v. Mass. Employés Ins. Assn. (1914) 2 Mass. Wk. Comp. Cases, 42 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct., 217 Mass. 79, 104 N. E. 432).

Where it appeared that the widow resided in China, and had at all times resided there, and had not been living with her husband for 11 years, but had been partially dependent on him, and in receipt of contributions toward her support, she was entitled to a death benefit of three times the average annual contribution. Ching Shee v. Madera Sugar Pine Co., 2 Cal. I. A. C. Dec. 1014. Where a father provides a home, food, and clothing for his daughter, who is regularly employed and earning \$35 a month, and devoted her earnings entirely to such personal expenditures as she pleased, she was a partial dependent to extent of 50 per cent. Smith v. Christopher's Market, 2 Cal. I. A. C. Dec. 536.

Where a Pole working in Scotland was killed after he had worked for eight months, in that time having sent \$1 to his wife, who was supported by her own work and help from her parents, the wife was partially dependent. Baird & Co., Ltd., v. Podolska (1906) 8 F. 438, Ct. of Sess. Where a boy's earnings of 8s. per week were put in the common family fund, and his support was estimated to cost only 5s. per week, there was evidence that his parents were partly dependent upon him. Main Colliery Co., Ltd., v. Davies (1900) A. C. 358, H. L., and 2 W. C. C. 108.

⁴⁶ Mahoney v. Yosemite Valley R. R. Co., 2 Cal. I. A. C. Dec. 150. Where a son, contributing one-half of his earnings to his family, consisting of a sister, mother, and father, is killed, the dependency of the sister is partial. Irwin v. Globe Indemnity Co. of N. Y., 1 Cal. I. A. C. Dec. 547.

The employé contributed all of his earnings to his mother, who was partially dependent upon him for support. Five other children contributed to the family fund. The father earned an average weekly wage of \$14.50. It was held that the mother was entitled to a weekly compensation equal to one-half of decedent's weekly contribution. Devaney v. American Mutual Liability Insur. Co., 2 Mass. Wk. Comp. Cases, 233 (decision of Com. of Arb.). The employé had been separated from his wife for a period of 18 months prior to the occurrence of the injury which caused his death, and had not during

has for seven years been supported by contributions from her husband in this country, she will be presumed to be only partially dependent upon him at the time of his death, one and a half years after the seven-year period, if during the one and a half years he has made no remittance and she is living with three adult children, at least two of whom are presumably able to support her.⁴⁷

§ 72. Total dependency

Compensation is awarded on the basis of total dependency, where the dependents subsist entirely on the earnings of the workman,⁴⁸

that period contributed to her support. He lived with his mother and contributed \$5 weekly to her. She was partially dependent on him; another son assisting to support her. It was held that the mother was partially dependent. *Stone v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 715 (decision of Com. of Arb.).

Where a father, mother, and grown son constitute a family, both father and son are wage-earners, and both contribute to the family fund, the son being considered as one of the family, and not as a boarder, the mother may be partially dependent upon her son for support. In *re Emma Hoffman*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 41. An unmarried employé maintained a home for himself, his mother, who was 63 years of age, and an unmarried sister, 24 years of age. The entire living expenses of the family were met by the earnings of the employé and a pension of \$12 per month paid to the mother by the United States government. The Commission held that the mother and sister were both partially dependent upon him for support. *Ress v. Youngstown Sheet & Tube Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 194. But where a son who was of full age made his home with his father and mother, and turned over a large portion of his earnings to his father, who made no charge against him for board, clothing, and lodging, and the father owned real estate which was listed for taxation at \$12,440, and the mother owned real estate listed for taxation at \$4,730, the tax value in each instance being not more than 60 per cent. of the actual value of the real estate, the same being incumbered to the extent of \$6,000, the father being 66 years of age and not a wage-earner, and the mother being 59 years of age and not a wage-earner, the Commission held that neither the father nor the mother were either wholly or partially dependent on the grown son. In *re Joseph Hora*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 173.

⁴⁷ *Claudio v. California Street Cable Ry. Co.*, 3 Cal. I. A. C. Dec. 7.

⁴⁸ Where an invalid for 25 years had lived with and was supported by her sister, "everything * * * received in the way of food, lodging, clothing,

even though, but for services performed for him, they would be able to support themselves.⁴⁹ Persons are not precluded from be-

medicines, payment of doctor's bills, and contributions of cash coming from her sister," she was wholly dependent on her sister for support. *Buckley v. American Mutual Liability Ins. Co.*, 2 Mass. Wk. Comp. Cases, 186 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct., 218 Mass. 354, 105 N. E. 979, Ann. Cas. 1916B, 474). The workman contributed all of his earnings to his mother, who was custodian for the benefit of his invalid father, mother, and two minor brothers. An unprofitable store had been started, in connection with the tenement in which the family lived, about six weeks before the workman's death. It was held that the father, mother, and two minor brothers were wholly dependent for support. *De Pasquale v. Employers' Liability Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 497 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

The widow and minor children of a deceased workman, with whom he lived, and whom he supported at the time of his death, and who had at the time no property or income of their own, were wholly dependent on him. In *re Elida Baird*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 28. A coal miner 19 years of age lived with his invalid father and stepmother, and with five half brothers and sisters, from 2 to 13 years old. The stepmother was not a wage-earner and the whole family subsisted on his earnings. The Commission held that the entire family was wholly dependent on him. In *re Lewis Spencer*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 179. Where the deceased employé was unmarried, and lived with his mother, and supported her, she was wholly dependent upon him. In *re Bridget McAuliffe*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 144. A workman's widow, with whom he lived prior to his decease, who had no separate estate and no income of her own, but subsisted entirely upon the earnings of her husband, was wholly dependent. In *re Anna King*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 37. Where a daughter 16 years of age lived separate from her father, her mother being dead,

⁴⁹ A strong, healthy woman, earning, prior to her mother's death, \$9 a week in a factory, relinquished her position and remained at home to take care of her father without any agreement as to remuneration. At the time of the hearing she was able to earn good wages as a housekeeper and considered herself wholly dependent upon her father for support. It was held that she was wholly dependent on her father. *Herrick v. Employers' Liability Assurance Co., Ltd.*, 2 Mass. Wk. Comp. Cases, 122 (decision of Com. of Arb., affirmed 217 Mass. 111, 104 N. E. 432, 4 N. C. A. 564).

Where a girl able to earn wages, and having previously done so, was keeping house for her father, receiving therefor her board, lodging, and clothes, but no money compensation, she was dependent upon her father. *Moyes v. Dixon, Ltd.* (1905) 7 F. 386, Ct. of Sess. (Act of 1897).

ing totally dependent by the fact that temporary gratuitous services have been rendered for or occasional money sent to them by persons other than the workman,⁵⁰ that they hold small savings accounts,⁵¹ that they have been supported in part by the workman's

and her father paid her board and furnished her money to buy necessary clothing, she was wholly dependent upon her father for support. In *re Maude M. Hughes*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 148. Where the employé was survived by a widow and son 35 years old, the widow was held to be wholly dependent. In *re Frances Williams*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 31.

Where it is shown that all the support of two minor children came from their father, and that remittances therefor from him were regular, and were relied upon, such evidence establishes the fact of total dependency. *Holleron v. Hill*, 2 Cal. I. A. C. Dec. 289.

Where a father, who was tenant of and owned the furniture of the house in which he lived, gave his weekly earnings of 18s. a week to his daughter, with which, added to the income from a lodger whom the daughter took care of, she managed the house, the daughter was wholly dependent upon her father. *Marsh v. Boden* (1905) 7 W. C. C. 110, C. A. (Act of 1897).

⁵⁰ (Gen. St. 1913, § 8208) *State ex rel. Splady v. District Court*, 128 Minn. 338, 151 N. W. 123.

Where a deceased workman's mother, according to an arrangement made, was to live with him and be supported by him, a conclusion of the Commissioner that she was totally dependent upon him was authorized, though she was temporarily living with another son. *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436.

That the deceased employé's aunt occasionally sent various sums to his mother, which remittances were mere gratuities, and that one of his sisters, a member of the family, earned six or seven cents a day, no part of which was paid to the mother and another sister, the alleged dependents, did not preclude them from being wholly dependent on his earnings. *Petrozino v. American Mutual Liability Co.*, 219 Mass. 498, 107 N. E. 370.

⁵¹ Where a daughter, for three years before her father's death, has had no income, except money allowed her by her father and the compensation for two weeks, which is so small that it may be disregarded, and is too ill to work, the fact that she had \$100 saved from the money given her by her father will not prevent a finding that she was wholly dependent on her father at the time of his decease. (St. 1911, c. 751) In *re Carter*, 221 Mass. 105, 108 N. E. 911.

Where a mother is living with her son, and without resources except a few hundred dollars kept for an emergency, a portion of which she advances for household expenses in a financial exigency expecting to have the amount

income other than his wages,⁵² or that money furnished for their support by the workman was not paid directly to them.⁵³

§ 73. Alien dependents

As a rule, the fact that a dependent is an alien living in a foreign country does not, of itself, bar compensation.⁵⁴ But "dependents," as used in the Washington Act, does not apply to any nonresident dependents, other than a father or mother.⁵⁵ The right of an alien nonresident next of kin to damages is limited by the New Jersey

repaid later, she is wholly dependent on the son for support. *Bennett v. San Buenaventura Wharf Co.*, 1 Cal. I. A. C. Dec. 200.

⁵² A widowed mother, without means, who is supported by her son, partly by the wages of his employment and partly by the yield of his land, is wholly dependent upon her son for support, within the meaning of the Minnesota Compensation Act (Gen. St. 1913, § 8208, subd. 2) *State ex rel. Crookston Lumber Co. v. District Court*, 131 Minn. 27, 154 N. W. 509.

⁵³ That the deceased workman's sister did not receive support directly from deceased, but indirectly through money contributed by him to the support of the family, did not preclude her from recovering compensation for his death. *Walz v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6, 155 N. Y. Supp. 703.

⁵⁴ Compensation was allowed the mother and sister of a deceased workman, who were residents of Italy. *Petrozino v. American Mut. Liability Co.* (Caliendo's Case), 219 Mass. 498, 107 N. E. 370.

The wife and infant son of a deceased workman, residing in Austria-Hungary, were entitled to receive compensation under the Ohio Act for his death. *Vujic v. Youngstown Sheet & Tube Co.* (D. C.) 220 Fed. 390.

If otherwise entitled, the fact that the widow of an alien workman lived in a foreign country at the time of both accident and death does not bar compensation. *Krzus v. Crow's Nest Pass Coal Co., Ltd.* (1913) 6 B. W. C. C. 271.

Aliens are included within the meaning and scope of the Compensation Act, and, if actually dependent upon one receiving his death by reason of an accidental injury arising out of and in the course of the employment, they are entitled to compensation for same. *Bishop v. United States Crushed Stone Co.*, Bulletin No. 1, Ill., p. 201. An alien nonresident, beneficiary of a person who met death because of an injury that arose out of and from the course of his employment, under the Workmen's Compensation Act, is entitled to compensation the same as if she were an actual citizen and resided in the state of Illinois. *Bishop v. Iroquois Iron Co.*, Bulletin No. 1, Ill., p. 108.

⁵⁵ (Wk. Comp. Act Wash. § 3) *Rulings Wash. Indus. Ins. Com.* 1915, p. 5.

Act of 1911 to the compensation which it provides, and as it expressly states that compensation under the schedule established by the Act shall not apply to nonresident alien dependents, the right of nonresident next of kin under the Death Act is taken away, and therefore there is no statutory remedy to such persons.⁵⁶

The title of the Illinois Act of 1913 is sufficient to cover a provision authorizing payment of compensation to nonresident alien dependents.⁵⁷

Under the Connecticut Act, as amended, compensation is awarded to alien dependents in one-half the amounts specified for other dependents, unless such alien dependents are residents of the United States, or its dependencies, or Canada, such alienage to be determined as of the date of the injury.⁵⁸ This amendment does not conflict with the treaty with Italy.⁵⁹ It has been held that it is

⁵⁶ *Gregutis v. Waclark Wire Works* (N. J.) 91 Atl. 98.

⁵⁷ *Victor Chemical Works v. Industrial Board of Illinois* (Ill.) 113 N. E. 173.

⁵⁸ Wk. Comp. Act. pt. B, § 10, as amended by Pub. Acts 1915, c. 288, § 6. In *Alvarez v. Eisenmann*, 1 Conn. Comp. Dec. 357, the totally dependent widow being a resident of Italy, she was awarded one-half the regular compensation due a resident dependent. In *Pansoda v. Bridgeport Hydraulic Co.*, 1 Conn. Comp. Dec. 118, a workman's totally dependent mother residing in Spain was awarded one-half the minimum compensation for death payable to a total dependent. In *Biero v. New Haven Hotel Co.*, 1 Conn. Comp. Dec. 52, where the deceased workman's father was a resident dependent, but his mother was an alien nonresident dependent, they were awarded \$2.50 and \$1.25 per week, respectively; the mother's compensation being reduced one-half because she was not a resident of this country. In *Iannace v. Jobson-Gifford Co.*, 1 Conn. Comp. Dec. 118, where a workman's widow was a nonresident alien dependent at the time of the injury, but later came to this country to live, she was awarded one-half regular compensation until she came to this country, and full benefit thereafter.

⁵⁹ In *Fabbian v. C. W. Blakeslee & Sons*, 1 Conn. Comp. Dec. 305, it was held by Commissioner Beers that the provision of the Connecticut Act that compensation to nonresident alien dependents shall be one-half the amount payable if they were residents of this country, is not invalid as conflicting with existing treaties between Italy and the United States. In *Viotti v. De Bisschop*, 1 Conn. Comp. Dec. 195, a dependent widow residing in Italy was

not declaratory of the prior law, and that for an injury occurring before the passage of the amendment the matter of alienage need not be determined as of the time of the injury, but a nonresident alien dependent may have his compensation payments increased to full amount upon taking up residence in this country after the injury.⁶⁰

§ 74. What children may be dependents

Children entitled to compensation as dependents include stepchildren,⁶¹ illegitimate children,⁶² especially where they lived with the workman and were actually cared for and supported by him prior to his death, and had a right to expect a continuation of that support,⁶³ children adopted by the workman,⁶⁴ though not children

awarded one-half the amount of death benefit payable to dependents residing in the United States; the commissioner holding it was not for him to decide whether this provision conflicted with any treaty rights between Italy and the United States.

⁶⁰ *Ostrowski v. Stanley Iron Works*, 1 Conn. Comp. Dec. 554.

⁶¹ Dependent stepchildren, who have been supported by the deceased workman, are included within the word "children" in this act. (P. L. 1911, p. 134) *Newark Paving Co. v. Klotz*, 85 N. J. Law, 432, 91 Atl. 91.

The word "child," as used in the Washington Act, includes a stepchild. (Wk. Comp. Act Wash. & 3) *Rulings Wash. Indus. Ins. Com.* 1915, p. 6.

⁶² Where a workman evaded the payment of an alimony decree rendered against him in favor of the mother of his illegitimate child, the only money obtained from him being £2 garnished from his employers, and was then killed by accident, the child was held to be partially dependent upon him. *Bowhill Coal Co., Ltd., v. Neish* (1910) 2 B. W. C. C. 253, Ct. of Sess.

⁶³ *Roberts v. Whaley* (Mich.) 158 N. W. 209.

Where a woman was living with the workman in an illicit relationship, the minor children of the pair, living with the father and dependent upon him for support, were "dependents." *Sexton v. Massachusetts Bonding & Insurance Co.*, 1 Cal. I. A. C. Dec. 48. Where the deceased workman leaves an illegitimate child, who was partially dependent upon him and received a certain portion of his earnings, that same portion of the death benefits will

⁶⁴ See note 64 on following page.

adopted by his widow after his death,⁶⁵ and also include posthumous children, legitimate or illegitimate.⁶⁶ A child adopted by a third person is not entitled to compensation by reason of the death of the natural parent.⁶⁷ A daughter over eighteen years of age is not a dependent, under the Washington act.⁶⁸ But in Minnesota a daughter of thirty, not physically or mentally incapac-

be awarded to the child. *Mitchell v. Fairchild-Gilmore-Wilton Co.*, 1 Cal. I. A. C. Dec. 71.

At the time of his death a workman who was killed in the course of his employment was living with and supporting a woman as his common-law wife and a child which had been born to them. It was held that the child was wholly dependent upon the workman for support at the time of his death. *In re Mary A. Gloyd*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 79.

⁶⁴ "‘Dependents’ means such members of the workman’s family as were wholly or in part dependent upon the workman at the time of the accident. And ‘members of a family’ for the purpose of this Act means only widow or husband, as the case may be, and children; or if no widow, husband or children, then parents and grandparents; or if no parents or grandparents, then grandchildren; or if no grandchildren, then brothers and sisters. In the meaning of this section parents include stepparents, children include stepchildren, and grandchildren include stepgrandchildren, and brothers and sisters include stepbrothers and stepsisters, and children and parents include that relation by legal adoption." (*Laws 1911, c. 218, § 9*) *Smith v. National Sash & Door Co.*, 96 Kan. 816, 153 Pac. 533.

⁶⁵ *State ex rel. Varchmin v. District Court of Ramsey County (Minn.)* 158 N. W. 250.

⁶⁶ A child which was born after its father had been killed by accident is entitled to compensation as his dependent. *Williams v. Ocean Coal Co., Ltd.* (1908) 9 W. C. C. 44, C. A. (Act of 1897). Where a workman acknowledged the paternity of an illegitimate child, and made plans to marry its mother, but was killed by accident before he had done so, and some months before the birth of the child, the child was a dependent of his. *Schofield v. Orrell Colliery Co., Ltd.* (1910) 2 B. W. C. C. 294, H. L., and 301, C. A.

⁶⁷ (*Wk. Comp. Act Wash. § 5*) *Rulings Wash. Indus. Ins. Com.* 1915, p. 16. The illegitimate child, whose mother was a farm servant, who promised a small sum semiyearly for its support to persons who adopted it without conditions, was not a dependent. *Briggs v. Mitchell* (1911) 4 B. W. C. C. 400, Ct. of Sess.

⁶⁸ (*Wk. Comp. Act Wash. § 3*) *Rulings Wash. Indus. Ins. Com.* 1915, p. 5.

tated, and yet actually deriving her support from her father, is entitled to the benefits of the Compensation Act as a partial dependent.⁶⁹

§ 75. Illegal and divorced wives—marriage

Compensation as a dependent may usually be recovered by the innocent victim of a bigamous marriage,⁷⁰ and by a common-law wife, if the common-law marriage was legal,⁷¹ but not by a woman

⁶⁹ (Laws 1913, c. 467, § 14 [Gen. St. 1913, § 8208], as amended by Laws 1915, c. 209, § 5). *State ex rel. Maryland Casualty Co. v. District Court (Minn.)* 158 N. W. 798.

⁷⁰ Where a woman is living with her reputed husband at the time of his death as, and believing herself to be, his lawful wife, in consequence of the performance of the usual marriage ceremony prescribed by California law, being ignorant of the performance of a prior ceremony uniting her supposed husband with another, and she has been supported by him up to his death, she is a member of his family, wholly dependent upon him. *Rossi v. Standard Oil Co.*, 2 Cal. I. A. C. Dec. 307.

Where a Welshman left his wife in 1896 and came to America, and in 1900 contracted a bigamous marriage with a woman, with whom he lived and whom he supported until his death, she having no knowledge of his former marriage, she was dependent upon him for support. *In re Elizabeth A. Jones*, vol. 1, No. 7, Bul. Ohio Indus. Com. 187.

⁷¹ A common-law wife is entitled to compensation. *In re Mary A. Gloyd*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 79.

Where applicant claimed as widow of deceased, and it appeared that no marriage ceremony was performed or marriage license issued, but that deceased and applicant had agreed to live together as husband and wife in Ohio some years before, and had from that time on so lived together, and had represented themselves to others at all times as husband and wife, and that common-law marriages so entered into were valid in Ohio at the time this relation was there entered into, the Commission held that applicant was entitled to a death benefit as widow of deceased. *Hill v. Fuller & Co.*, 1 Cal. I. A. C. Dec. 155.

Where the only evidence that a claimant residing in Italy was a wife of the workman was the statement of a parish priest that the parties had "contracted matrimony," but the claim itself alleged the claimant as a common-law wife, whereas a civil marriage is necessary in Italy, it was held claimant was not the legal wife of the workman, and hence not entitled to compensation. *Angelucci v. H. S. Kerbaugh, Inc.*, *The Bulletin*, N. Y., vol. 1, No. 12, p. 16.

living in an illicit relationship with the workman,⁷² nor by a wife divorced from the deceased workman, and for whose support he was obligated to pay a certain sum monthly, but who had received no such payments up to the time of his death.⁷³ It has been held in Massachusetts that an alleged marriage which was not legally solemnized did not entitle the woman to recover compensation as the dependent of her supposed husband, though she honestly believed that she was contracting a legal marriage.⁷⁴ But where a Wisconsin city was situated part in one county and part in another, and the workman and his widow, without any intention to circumvent the law requiring the procurement of a license in the county of their residence, obtained the license in the other county than that in which they lived, it was held that the marriage was valid, and that the widow was entitled to compensation.⁷⁵ The

⁷² *Sexton v. Mass. Bonding & Ins. Co.*, 1 Cal. I. A. C. Dec. 48.

Where a woman cohabits with a man for a long period of years, and is the mother of a family of children by him, but is not his wife, but the wife of a man who has previously deserted her, she is not a "member of the family" of the man she is living with, although she is in fact supported by and dependent upon him, and actually living with him as the mother of his children and member of his household. (*Wk. Comp. Act*, § 19 [c]) *Pollock v. Wagner Leather Co.*, 3 Cal. I. A. C. Dec. 37.

A woman living with the workman as though she were his wife and dependent on him for support, but not legally married to him, her marriage to him being illegal because he has a wife of whose existence she does not know, is not entitled to compensation under subsection 4 of section 2394—10, Stats., providing that "no person shall be considered a dependent unless a member of the family of the deceased employé, or one who bears to him the relation of husband or widow, or lineal descendant, or ancestor, or brother or sister." *Armstrong v. Indus. Com. of Wis.*, 161 Wis. 530, 154 N. W. 844.

⁷³ *Mitchell v. Crichton*, 2 Cal. I. A. C. Dec. 1005.

⁷⁴ One claiming to be the widow of the employé entered into a ceremony of marriage with him in good faith. It appeared, however, that the alleged marriage was not legal, and that the person who performed same was not authorized to solemnize marriages. It was held that claimant was not a dependent. *Gron v. Mass. Employés' Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 736 (decision of Com. of Arb.).

⁷⁵ *Reed v. Rothe*, Rep. Wis. Indus. Com. 1914-15, p. 33.

widow of a Japanese workman, married by proxy, is not considered a dependent under the Washington act.⁷⁶

§ 76. Nonsupport and desertion

As a general rule, it does not prevent the members of a workman's family from being dependent on him for support that at the time of his death he was unable or refused to support them,⁷⁷ or had deserted them,⁷⁸ especially where there was a reasonable ex-

⁷⁶ (Wk. Comp. Act Wash. § 3) Rulings Wash. Indus. Ins. Com. 1915, p. 5.

⁷⁷ Where a fisherman commonly sent money home to his father, but was so poorly paid during two shorter voyages that he was unable to send any home, and was drowned on the second voyage, the father was partially dependent. *Robertson v. Hall Bros. Steamship Co.* (1910) 3 B. W. C. C. 368, C. A. Where a workman who was drowned had previously often sent money home to help support his parents and sisters, but had not sent any money home on this particular voyage, the family were partially dependent upon him. *Turner v. Miller & Richards* (1910) 3 B. W. C. C. 305, C. A. A widow, who lived apart from her husband and received not over \$5 a year from him, being supported by the help of relatives, the small wages of a child, and occasional work she could do, was totally dependent. *Cunningham v. McGregor* (1901) 3 F. 775, Ct. of Sess. Where a husband who left his wife to find work obtained employment after two months, but was killed after working a week and before he had given his wife any money, the wife and a posthumous child were entitled to compensation as partly dependent. *Queen v. Clarke* (1900) 2 Ir. R. 135, C. A. (Act of 1897). Where a workman's wife had been in an insane asylum for four months previous to his death by accident, and he was legally responsible for her maintenance there, although he did not pay, she was a dependent. *Kelly v. Hopkins* (1908) 2 Ir. R. 84, C. A.

In *Jakubowski v. Brooks*, 1 Conn. Comp. Dec. 281 (affirmed by superior court on appeal), it was held that the fact that no contributions were made for a period of three months before the injury, though made at irregular intervals during the three years previous, did not terminate the dependency.

Parents not dependents.—Where a workman's father was in the workhouse at the time of the workman's death by accident, the father was not a dependent. *Rees v. Penrikyber Navigation Colliery Co., Ltd.* (1903) 5 W. C. C. 117, C. A. (Act of 1897). A woman who, at the time her son died, was being kept in an inebriate reformatory, and who had been in prison for the previous four years, all but ten months, during which time the deceased son supported her, was not a dependent. *Addie & Sons' Collieries, Ltd., v. Trainer* (1905) 7 F. 115, Ct. of Sess. (Act of 1897).

⁷⁸ Where a deceased employé, survived by a widow and minor child 20 months old, had deserted them some months prior to his death by accident,

pectation that he would return;⁷⁹ but there appear to be exceptions to this rule, as where a deserted wife has long been separated from her husband, the deceased workman, and has supported herself or secured support otherwise than from him, and had no reasonable expectation that he would soon return and support her.⁸⁰

without any fault on the part of his wife, and had since that time contributed nothing to their support, they were both nevertheless wholly dependent upon him for support. *In re Laura Shaffer*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 7.

A widow was dependent on her husband's support, even though he had deserted her three years before, and had since given her no money or support of any kind, where she was provided for by her mother and friendly charity during the three years. *Sneddon v. Addie & Sons' Collieries, Ltd.* (1904) 6 F. 992 (Act of 1897).

⁷⁹ Where a workman, after deserting his wife, no longer supported her, but at the time of his death by accident she was daily expecting return, there was evidence that she was dependent. *Coulthard v. Consett Iron Co.* (1906) 8 W. C. C. 87, C. A. (Act of 1897). Where a workman left his wife to look for work, and was not heard from for two years, although she expected his return, this was not sufficient evidence to rebut the legal presumption of dependency. *Stanland v. Northeastern Steel Co., Ltd.* [1907] 2 K. B. 425, C. A. (Act of 1897). Where, upon being left by her husband, who went in search of employment, a widow supported herself by working as a domestic, and, although receiving no support from him, she met him at times, and he was killed by accident two years later, a posthumous child being born after his death, the legal presumption of dependency was not sufficiently rebutted. *Williams v. Ocean Coal Co., Ltd.* (1908) 9 W. C. C. 44, C. A. (Act of 1897).

Failure of a husband in California to remit contributions during his imprisonment for one year and during the succeeding six months is not inconsistent with a total dependency in fact of his nonresident wife, where he had previously remitted to her sums sufficient for her support and there is no affirmative evidence of his intent during the period of nonremittance to sever family relations. *Claudio v. California Street Cable Ry. Co.*, 3 Cal. I. A. C. Dec. 7.

⁸⁰ "Actual dependents" mean dependents in fact, and do not include a wife whom the deceased employé had deserted at the time of his death, and who for more than six years had supported herself without his assistance or even knowledge of his whereabouts. (P. L. 1911, p. 139, § 2, par. 12) *Batista v. West Jersey & S. R. Co.* (N. J.) 88 Atl. 954, following *Miller v. Public Service R. Co.*, 84 N. J. Law, 174, 85 Atl. 1030.

Where a deserted wife was not living with her husband at the time of his

Where the wife has deserted her husband and supported herself, neither she nor, ordinarily, children whom she has taken with her and supported, can recover as dependents.⁸¹ This is particularly

death, her dependency upon him was a question of fact, and where the evidence showed that for some time prior to his death the husband had made no contribution to her support, dependency was not established. *Avery v. Pacific Gas & Electric Co.*, 2 Cal. I. A. C. Dec. 311.

Where a collier deserted his wife seven years before his death by accident, and in that time had sent her only 9s. 6d., she, living in the workhouse, was not dependent upon him. *Devlin v. Pelaw Main Collieries* (1912) 5 B. W. C. C. 349, C. A. Where a workman's wife had lived apart from him for twenty-two years, and he had not supported her during that time, she was not dependent upon him. *New Monckton Collieries, Ltd., v. Keeling* (1911) 4 B. W. C. C. 332, H. L., and 4 B. W. C. C. 49, C. A. Where a wife, whose husband had deserted her and did not support her, lived with another man, and bore him children, and then on the death of her husband, seven years later, sought compensation for herself and her two legitimate children, they were none of them dependents. *Lee v. S. S. Bessie (Owners of)*, (1912) 5 B. W. C. C. 55, C. A.

⁸¹ Where a widow of a deceased employé, who had separated from him prior to his death, and who was living apart from him at the time he was killed by an industrial accident, was earning her living without receiving any aid from him, she cannot claim compensation under dependency in fact, since she was not in fact supported by him at the time of his death. (Cal. Wk. Comp., etc., Act, § 19 [b]) *Delgado v. California Portland Cement Co.*, 1 Cal. I. A. C. Dec. 436. Dependency is not established as a matter of fact, where the evidence shows that the wife had deserted the husband, and for four months immediately preceding his death had not received from him any contributions for her support. *Holleron v. Hill*, 2 Cal. I. A. C. Dec. 289.

In *Filliger v. Allen*, 1 Conn. Comp. Dec. 35, it was held that a workman's widow, who had not lived with him for eleven months prior to the injury because he drank, and during that time only received \$10 from him for support, living with a son, who supported her, was not dependent upon the workman.

Where a wife left her husband, and took their child with her, making her own livelihood for twelve years, she and the child, upon the death of the father, cannot claim compensation as dependents. *Lindsay v. McGlashen & Son, Ltd.* (1909) 1 B. W. C. C. 85, Ct. of Sess. The wife of a workman who of her own wishes lived separate from him, and supported herself was not his dependent. *Polled v. Great Northern Ry. Co. (No. 2)*, (1912) 5 B. W. C. C. 620, C. A.

true where she has secured a divorce.⁸² On the other hand, where a wife residing out of the state with her child, and apart from her husband, was frequently visited by her husband, who sent regular and generous contributions for their support, she is entitled to a death benefit.⁸³ Where a workman takes into his family a minor child not related to himself or wife, and thereafter, without the child ever having been adopted, deserts his family and for several months prior to his death does not contribute to their support, the child is not a dependent of the workman.⁸⁴

§ 77. Dependents under federal Act

The federal Act of 1908, continued in force as to injuries prior to the Act of 1916, provides that, if the injured artisan or laborer die within the year, "leaving a widow, or a child or children under sixteen years of age, or a dependent parent," they shall be entitled to compensation. The word "parent" in the Act may be applied to include both parents,⁸⁵ but not to include a stepfather or step-mother,⁸⁶ or a foster parent, where there has been no legal adoption.⁸⁷ A foster parent by a legal adoption may, however, be a de-

⁸² Where a workman had been divorced by the mother of his two children, she obtaining the sole care and custody of the children, and he had contributed nothing to their support since that time, but had moved to another state in order to avoid responsibility, the children could not recover compensation as dependents. *Reed v. Rothe*, Rep. Wis. Indus. Com. 1914-15, p. 33.

⁸³ *Majeau v. Sierra Nevada Wood & Lumber Co.*, 2 Cal. I. A. C. Dec. 425.

⁸⁴ *Delgado v. California Portland Cement Co.*, 1 Cal. I. A. C. Dec. 436; *Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, 96 Atl. 1025.

⁸⁵ (Dec. Comp. of Treas.) Op. Sol. Dept. of L. 784.

⁸⁶ *In re McMurray*, Op. Sol. Dept. of L. 571.

⁸⁷ *In re Perkins*, Op. Sol. Dept. of L. 579.

A death claim was filed by two alleged widows and by a foster mother. The facts showed that neither was the legal widow, and as the foster mother had never legally adopted decedent she was held not a dependent parent. *In re Garcia*, Op. Sol. Dept. of L. 611. An adopted mother must sustain the legal relation to the employé of a parent before a payment can be made to her

pendent parent within the Act.⁸⁸ The question of dependence is one of fact, and the fact of dependence sufficiently appears if partial dependence is shown. Contributions by the deceased tend to establish a condition of dependence, but this is not the only criterion. The natural and equitable claim for support which the parents have upon their children makes it proper to consider the actual needs of parents; and in ascertaining such needs it is necessary to look to their age, circumstances, position in life, and earning capacity.⁸⁹ A parent is not dependent who did not in fact depend in some measure for the means of living upon the deceased; but, if the parent is in actual need, the fact of dependence is sufficiently shown if it further appears that the deceased attempted to supply such need even to a slight extent, or that, but for the death, the parent was reasonably assured that such need would be supplied in some substantial measure.⁹⁰ The word "child" or "children," as used in the Act, is not restricted to a child or children born in

as a "dependent parent" within the meaning of the federal Act. *In re Huff* (Dec. Comp. of Treas.) Op. Sol. Dept. of L. 568.

⁸⁸ *In re Huff*, Op. Sol. Dept. of L. 567.

⁸⁹ *In re Rock*, Op. Sol. Dept. of L. 573.

⁹⁰ *In re Branch*, Op. Sol. Dept. of L. 576.

The deceased employé had, previous to going to work for the Reclamation Service, assisted his parents in the operation of a small farm. On the day he began work he was killed. Considering the age, circumstances, and condition of the parents, they were held entitled as dependent parents. *In re Encinas*, Op. Sol. Dept. of L. 601. Where decedent was 20 years of age, and until a few days previous to his death in the government employ he had worked on the farm of his parents, to whom he had promised to contribute from his government wages, but met his death before receiving any, the parents were dependent. *In re Harris*, Op. Sol. Dept. of L. 598. Where decedent, a single man, contributed large sums to his parents, who had five younger children to raise, these facts, considering the financial condition of the parents, constituted dependency. *In re Scott*, Op. Sol. Dept. of L. 595. Decedent left a widow and widowed mother. The widow filed claim, but died before it was approved. The mother joined in the widow's claim, stating that she was not dependent on her son. Subsequent to the widow's death the mother filed a claim, setting forth her financial condition, that she was 61 years of age, and depended upon her efforts for support. It was held that,

wedlock, but includes illegitimate offspring,⁹¹ and also a child which has been legally adopted according to the law of the domicile.⁹² A woman living as the illegitimate wife of an employé in the Canal Zone does not, on his death, become his widow within the meaning of the Act.⁹³ A woman divorced from an employé and decreed the custody of his children is not entitled to compensation for his death, though compensation be payable to her as guardian for the children.⁹⁴ The marriage of a widow during the compensation year does not bar her from the benefits of the Act.⁹⁵ Where an injured workman dies before having made application for or received compensation, the spirit and purpose of the Act warrants payment of compensation from date of injury to date of death, as well as for the remainder of the year, to his widow or family.⁹⁶

although the son had not contributed, yet her financial and physical condition rendered her a dependent parent. In *re Munn*, Op. Sol. Dept. of L. 597.

Decedent was 21 years old. The parents claimed that he had contributed a certain amount, which was in excess of his earnings during a certain period. Considering all the circumstances of the case, including age and financial condition of the parents, it was held that they were not dependent to any extent upon the son; the mere fact of contributions not being sufficient of itself to establish that condition. In *re Rees*, Op. Sol. Dept. of L. 599. A son was in the habit of sending his mother in Ireland small sums of money about May and Christmas of each year. The mother was a pensioner of the British government and had three other sons. The deceased son left a widow. It was concluded that the mother was not a dependent parent. In *re Duffy*, Op. Sol. Dept. of L. 594.

⁹¹ In *re Harding*, Op. Sol. Dept. of L. 553.

⁹² In *re Estorga*, Apr. 3, 1915, Op. Sol. Dept. of L. p. 566.

⁹³ In *re Howell*, Op. Sol. Dept. of L. 549. The Act does not grant compensation to a woman who for several years lived in Barbados and as the "reputed wife" of an employé who was killed in the Canal Zone, and to whom she had borne three illegitimate children. In *re Agard*, Op. Sol. Dept. of L. 550.

⁹⁴ Op. Sol. Dept. of L. 551.

⁹⁵ (Dec. Comp. of Treas.) Op. Sol. Dept. of L. 783.

⁹⁶ In *re Sullivan*, Op. Sol. Dept. of L. 609. Where an injured employé dies several days or weeks after the injury, compensation is payable from that

§ 78. Claim of dependent

A dependent's claim for compensation does not arise from the workman's injury, but is a new and distinct right of action created by his death,⁹⁷ and not, therefore, barred by an award to or settlement with the workman.⁹⁸ It does not affect the right to recover on such claim that financial benefits have accrued to the dependent from the workman's death,⁹⁹ or that the workman's contribu-

date to and including the date of death, and for the balance of the year to his widow, children, or dependent parents, as the case may be. *In re McCarrell*, Op. Sol. Dept. of L. 607.

⁹⁷ (Workmen's Compensation Act, Gen. St. 1913, § 8208, as amended by Laws 1915, c. 209, § 5) *Nesland v. Eddy*, 131 Minn. 62, 154 N. W. 661. This case finds support in *Anderson v. Fielding*, 92 Minn. 42, 99 N. W. 357, 104 Am. St. Rep. 665; *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; *American R. Co. v. Didricksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456.

⁹⁸ *Milwaukee Coke & Gas Co. v. Industrial Commission*, 160 Wis. 247, 151 N. W. 245.

Payment of compensation to a minor employé does not bar the independent right of the parent to recover for the loss to herself from the injury to her son. Payment of such compensation is in no sense a payment of wages, though based on wages. *King v. Viscoloid Co.*, 219 Mass. 420, 106 N. E. 988.

Where a workman returned to work after the accident, but later died from its effects, the right of his dependents to recover is independent and separate, and is not affected by an implied agreement which might be assumed to have ended compensation when he returned to work. *Williams v. Vauxhall Colliery Co., Ltd.* (1908) 9 W. C. C. 120, C. A. (Act of 1897). The right of the dependents of a workman who had accepted money and given his employers a receipt in full satisfaction of all his claims under the Employers' Liability Act or at common law (which receipt was a mere device, covering compensation under the Compensation Act), was not affected or barred by this settlement, as their right was independent. *Howell v. Bradford & Co.* (1911) 4 B. W. C. C. 203, C. A. On claim for compensation by the dependents of a deceased workman, the fact that he had received payments under a registered agreement, which had been canceled on review, did not bar their independent right. *Jobson v. Cory & Sons, Ltd.* (1911) 4 B. W. C. C. 284, C. A.

As to effect of release to bar claim, see § 189, post.

⁹⁹ It is immaterial whether the claimant inherited anything from the workman's estate. *State ex rel. Crookston Lumber Co. v. District Court*, 131 Minn. 27, 154 N. W. 509.

The widow of a deceased workman was wholly dependent, notwithstand-

tions shall not have approximated the amount of the award, though it be the minimum provided by the statute.¹ A dependent is entitled to compensation for the full period allowed by the Connecticut Act, though, if he submitted to an operation, he might not thereafter be a dependent.² Apportionment of compensation between dependents is considered in a subsequent section.³

§ 79. Payment to representatives—Survival of claim

Compensation due minor dependents is payable to their guardian or trustee, or to their surviving parent where by operation of law he is entitled to receive the payment on their behalf.⁴ In some states, where a widow and child are both entitled to compensation, the whole amount may be awarded to the widow without apportionment, unless an apportionment is specially applied for.⁵ And where the deceased workman leaves minor children and a surviving dependent parent of such children, no guardian ad litem or trus-

ing the fact that she profited \$100 by his death. *Pryce v. Penridyber Navigation Colliery Co.* (1902) 4 W. C. C. 115, C. A.

See § 181, post.

¹ Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245.

² Id.

³ See § 192, post.

⁴ Compensation awarded to the infant children of a deceased workman may be paid to his widow, where by appointment or operation of law she is their general guardian. (Wk. Comp. Act, §§ 16, 20) *Woodcock v. Walker*, 170 App. Div. 4, 155 N. Y. Supp. 702.

Where the dependent is a minor, the benefits to which he is entitled will be ordered paid to a trustee for him. *Mitchell v. Fairchild-Gilmore-Wilton Co.*, 1 Cal. I. A. C. Dec. 71.

Where a deceased employé was survived by a wife and child of twenty months, both dependent, since the minor child is under the disability of infancy and in the custody of her mother, that part of the compensation apportioned her will be made payable to the mother for the use of the child. (Page & A. Gen. Code, § 1465—68) *In re Laura Shaffer*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 7.

⁵ *Taylor v. Seabrook*, 87 N. J. Law, 407, 94 Atl. 399. As to apportionment, see § 192, post.

tee will be appointed, if the surviving parent is a proper person and entitled to share in the award in her own right; but the entire death benefit will be made payable to her for the support of herself and family, without giving the minor children any legal share therein, thus avoiding the necessity of appointing a trustee or guardian and the giving of a bond.⁶ However, where lump sums are awarded in amounts sufficient to reasonably justify the investment, a guardian should usually be appointed.⁷ The mother of illegitimate children is a proper person to be appointed their guardian.⁸

When incapacity lasts more than 15 days, and the employé dies from causes other than those producing the original injury and before a formal claim is filed, the legal representatives, who under the federal Act are entitled to file a claim and receive payment covering period of incapacity, are the administrator, the executor, or the heirs or next of kin.⁹ Where, on account of death of an employé, compensation has been allowed under this Act to the widow and child, and the widow dies within the compensation period, and the care of the child devolves upon the child's maternal grandmother, the remainder of the year's compensation may be paid to such maternal grandmother for the use and benefit of the child.¹⁰

⁶ *La Salle v. Whiting-Mead Commercial Co.*, 1 Cal. I. A. C. Dec. 346. Where the deceased employé leaves a widow and minor children, the award is not to be divided among them, but is to be made payable to the widow alone, to be used by her for the support of herself and children in such manner as she sees fit; hence it is not necessary that a guardian ad litem be employed for the minor children, where the widow, their mother, is the applicant. *Kennedy v. Guardian Casualty & Guaranty Co.*, 1 Cal. I. A. C. Dec. 152.

Money allotted to infant children may be paid to the wife, without the appointment of a general guardian and the attendant expenses. *Woodcock v. Walker*, 170 App. Div. 4, 155 N. Y. Supp. 702.

⁷ (Wk. Comp. Act Wash. § 6) *Rulings Wash. Indus. Ins. Com.* 1915, p. 18.

⁸ *Sexton v. Massachusetts Bonding & Insurance Co.*, 1 Cal. I. A. C. Dec. 48.

⁹ *In re Karumbellas*, Op. Sol. Dept. of L. 614.

¹⁰ *In re Jefferson*, Oct. 1, 1910, Op. Sol. Dept. of L. p. 564.

Compensation due dependents residing in a foreign country will not usually be paid to a consul of that country until he shows authority to receive and transmit same.¹¹ It is not enough merely that he has been appointed administrator of the deceased employé.¹² But under the Ohio Act a foreign consul is entitled to receive the compensation payments due citizens and residents of his country without a specific power of attorney, unless the persons entitled to payment have selected, through power of attorney, some other representative.¹³

A dependent's right to compensation will survive, and if not satisfied before death of the dependent will pass to his or her personal representative, unless otherwise provided by statute.¹⁴

¹¹ A foreign consul will be paid compensation due dependents residing in a foreign country only when he files with the Commission a power of attorney from the person entitled to receive the money authorizing him to receive and transmit same. (Comp. Act, § 41) *In re Katharina Schatz*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 60.

In Salvatore v. Andreani & Gelormino, 1 Conn. Comp. Dec. 169, it was held that the official position of the Italian consul does not entitle him to receive the award of a dependent widow residing in Italy, but that it may be made to him where he has an authorization from her to receive her compensation.

¹² That the Greek consul at New York was appointed administrator of a deceased employé did not make him the legal representative of beneficiaries. *In re Lemanes*, Op. Sol. Dept. of L. 613.

¹³ *Vujic v. Youngstown Sheet & Tube Co.* (D. C.) 220 Fed. 390.

¹⁴ An award of compensation from the Ohio state insurance fund to a wholly dependent person vests in the dependent when the award is made, so that, in case of the death of such dependent, his or her personal representative is entitled to the balance, if any, remaining unpaid. (Workmen's Compensation Act, § 35; 103 Ohio Laws, p. 72) *State v. Industrial Commission*, 92 Ohio St. 434, 111 N. E. 299.

Compensation which had accrued to the employé's widow between death of the employé and her death became part of her estate, and claim therefor could not be made by their children as beneficiaries. *In re Towle*, Op. Sol. Dept. of L. 565.

Where the widow of a deceased workman claimed compensation, but died before the case was tried, her right survived to her legal personal representative. *Darlington v. Roscoe & Sons* (1908) 9 W. C. C. 1, C. A. (Act of 1897). Where the mother of a deceased workman, who was his only dependent, died

Thus, where a widow who was entitled to a death benefit under the California Act because of the death of her husband, died before an award was made, leaving a dependent son of herself and such employé, the son was entitled to the whole death benefit under a provision that the Commission "may order payment to a dependent subsequent in right, or otherwise entitled, upon good cause being shown therefor."¹⁵ But the liability of an employer paying compensation to the mother of a deceased workman ceases upon her death, as to payments then unaccrued, and her estate is not entitled to receive the remaining payments, which would have been due, had she lived.¹⁶ Therefore, where, after the death of the mother, her administrator files a claim for the payment to the estate of the award, the estate is entitled to only such portion of the award as would have been payable to her to the time of her death.¹⁷ Where in a Massachusetts case it appeared that the employé, a widower, left two minor children wholly dependent upon his earnings for support, and one of them died shortly after the decease of his father, the Supreme Judicial Court affirmed a decision that the sum due those wholly dependent should be paid the administrator for the benefit of the surviving child.¹⁸

Under the Connecticut Act, compensation for disability forms no part of the estate of a deceased workman, but ceases at his death, except that for medical and burial expense, which is payable to his

before she had claimed compensation, her claim survived to her legal personal representative. *United Collieries, Ltd., v. Hendry* (1910) 2 B. W. C. C. 308, H. L., and (1909) 1 B. W. C. C. 289, Ct. of Sess.

¹⁵ (Wk. Comp. Act Cal. § 19 [2]) *Hughes v. Degen Belting Co.*, 2 Cal. I. A. C. Dec. 595.

¹⁶ *Mateeny v. Vierling Steel Works*, 187 Ill. App. 448; *In re Murphy* (Mass.) 113 N. E. 283.

¹⁷ *Ledford v. Caspar Lumber Co.*, 2 Cal. I. A. C. Dec. 691.

¹⁸ *Janes v. Fidelity & Casualty Co. of New York*, 2 Mass. Wk. Rep. of Comp. Cases, 217 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct., 217 Mass. 192, 104 N. E. 556).

administrator. Under the New Jersey Act decedent's administrator may sue for the benefit of the dependents.¹⁹

§ 80. Determination of question of dependency

Actual dependency is a question of fact,²⁰ to be determined, in the absence of any applicable and conclusive statutory presump-

¹⁹ *Coreoran v. Farrel Foundry & Machine Co.*, 1 Conn. Comp. Dec. 42.

(Wk. Comp. Act, § 2, par. 19) *Connors v. Public Service Electric Co.* (N. J.) 97 Atl. 792.

²⁰ *Miller v. Public Service Ry. Co.*, 84 N. J. Law, 174, 85 Atl. 1030, affirmed in (Wk. Comp. Act, § 43) *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245; *Main Colliery Co., Ltd., v. Davies*, 16 T. R. 460; *Houlihan v. Connecticut River R. R.*, 164 Mass. 555, 42 N. E. 108; *American Legion of Honor v. Perry*, 140 Mass. 580, 5 N. E. 634; *Miller v. Riverside Storage Co.* (Mich.) 155 N. W. 462; *State ex rel. Globe Indemnity Co. v. District Court* (Minn.) 156 N. W. 120; *Muzik v. Erie R. Co.*, 85 N. J. Law, 131, 89 Atl. 248, 86 N. J. Law, 695, 92 Atl. 1087; *Havey v. Erie R. Co.*, 88 N. J. Law, 684, 96 Atl. 995; *Walz v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6, 155 N. Y. Supp. 703; *In re Branch*, Op. Sol. Dept. of L. 576; *In re Rock*, Op. Sol. Dept. of L. 573.

Where the evidence showed that deceased contributed to the support of his mother, and that she, while not immediately dependent for sustenance on such contributions, was, because of advancing years, condition of mind, and lack of regular employment and of property, liable to become a dependent, the question whether she was partially dependent on deceased was for the jury. *Appeal of Hotel Bond Co.*, supra.

Whether the daughter of a deceased workman was dependent upon him for her support is a question of fact. *In re Herrick*, 217 Mass. 111, 104 N. E. 432.

Where it appeared that the inability of the workman to obtain and to perform sufficiently remunerative permanent work was the cause of his failure to provide a home for his wife and child, that their living apart was chargeable to his mental and physical deficiencies and characteristics and not to his willful negligence, and that he paid doctors' bills and grocery bills, bought clothes for the child, and gave \$200 or \$300 to his wife, the Industrial Accident Board should have determined as a fact whether his wife was dependent upon him at the time of his death. *St. 1911, c. 751, pt. 5, § 2 (c)*, as amended by *St. 1914, c. 708, § 3*; *In re Newman's Case*, 222 Mass. 563, 111 N. E. 359, *L. R. A. 1916C, 1145*. It was a question of fact whether the mother and sister of a deceased employé, to whose support he had contributed, were wholly dependent upon him. (*St. 1911, c. 751, pt. 2, § 6*) *Bartley v. Boston & N. St.*

tion,²¹ from the circumstances of the particular case,²² usually those circumstances existing at the date of the injury,²³ rather than at the date of death, as specified by some Acts.²⁴ The Minnesota

Ry., 198 Mass. 163, 83 N. E. 1093; *Potts v. Niddrie & Benhar Coal Co.*, [1913] A. C. 531, 538; *Petrozino v. American Mut. Liability Co. (Caliendo's Case)*, 219 Mass. 498, 107 N. E. 370.

Whether the father and mother and minor brothers and sisters, living together in the same household and subsisting in part on the earnings contributed by the deceased to his father, the head of the household, and applied by the father to the support of himself and his family, were actual dependents on the deceased, was a question of fact for the trial judge. *Havey v. Erie R. Co.*, 87 N. J. Law, 444, 95 Atl. 124. Where decedent's sister was of age, her actual dependency was a pure question of fact. *Connors v. Public Service Electric Co. (N. J.)* 97 Atl. 792.

Where, after deserting his children and paying nothing to help support them, a father three years later, upon obtaining a good position, agreed to give them a monthly sum, but was injured and died before he had paid anything, the question of dependency must be decided as a question of fact, and the finding made by the sheriff-substitute that they were not dependent "in fact and in law" cannot stand. *Dobbies v. Egypt & Levant Steamship Co., Ltd.* (1913) 2 B. W. C. C. 348, Ct. of Sess.

²¹ See §§ 81, 82, post.

²² *Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, 96 Atl. 1025; *Garcia v. Indus. Acc. Com. of Cal.*, 2 Cal. I. A. C. Dec. 630, 171 Cal. 57, 151 Pac. 741; *Stevenson v. Illinois Watch Case Co.*, 186 Ill. App. 418.

²³ *Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, 96 Atl. 1025.

In Massachusetts, whether an employé's wife and child, who were living apart from him at the time of his death, were dependent on him for support, must be determined on the evidence of the fact as it existed "at the time of the injury." (St. 1911, c. 751, pt. 2, § 7) In *re Bentley*, 217 Mass. 79, 104 N. E. 432.

Whether a person within the class which may be partially dependent, but not within the class conclusively presumed to be wholly dependent, is a dependent, is a question of fact to be determined as of the date of the injury. *Miller v. Riverside Storage & Cartage Co. (Mich.)* 155 N. W. 462.

Dependency is a question of fact, determinable according to the facts existing in each particular case at the time of the fatal injury, except in the instances specified in paragraph 4 of section 35 of the Compensation Act. In *re Maude M. Hughes*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 148.

²⁴ The New York Act makes dependency at the time of death a condition for making an award to the dependent. (Wk. Comp. Act, § 16, subd. 4) *Tirre v. Bush Terminal Co.*, 172 App. Div. 386, 158 N. Y. Supp. 883.

Supreme Court has held that the right to compensation is controlled by the law in force at the time of death, rather than at the time of accident.²⁵

§ 81. Presumption of dependency—Husband and wife

The widow of a workman killed in his employment is usually entitled to compensation, regardless of the question of dependency. The mere fact of widowhood dispenses with proof of dependency.²⁶ As used in a statutory provision that a wife shall be conclusively presumed to be dependent for support on a husband "with whom she lives" or "with whom she was living at the time of his death," the words quoted mean living together as husband and wife in the ordinary acceptance of these words.²⁷ The conclusive presumption

²⁵ State ex rel. Carlson v. Dist. Ct., 131 Minn. 96, 154 N. W. 661.

Where the death of the deceased occurred on April 30, 1914, the right to compensation was governed by Laws 1913, c. 467 (Gen. St. 1913, §§ 8195-8230), and not by the amendment of 1915 (Laws 1915, c. 209). State ex rel. Globe Indemnity Co. v. District Court (Minn.) 156 N. W. 120.

²⁶ Moell v. Wilson, The Bulletin, N. Y., vol. 1, No. 10, p. 15.

²⁷ The phrase "with whom she lives" means living together as husband and wife in the ordinary acceptance and significance of these words in common understanding. They mean maintaining a home and living together in the same household, or actually cohabiting under conditions which would be regarded as constituting a family relation. There may be temporary absences and incidental interruptions arising out of changes in the house or town of residence, or out of travel for business or pleasure. But there must be a home and a life in it. The matrimonial abode may be a roof of their own, a hired tenement, a boarding house, a rented room, or even a room in the house of a relative or friend, however humble or temporary it may be. But it is the situation arising from the absence of a common home, a place of marital association and mutual comfort, broken up or put in peril of hardship or extinction by the husband's death, which is protected by the conclusive presumption of dependency established beyond the peradventure of dispute by the statute. Under such circumstances the widow is given the benefit of an irrefutable assumption that she was supported by the husband. It well may be that this was a legislative concession to the recognized benefit to society arising from the living together of husband and wife, and that like concession should not be made to the anomalous situation of a marital relation

will not be prevented from arising by a separation for a long term of years, where during the time the husband evidenced an intent to renew family relations by contributing regularly and substantially to the support of the dependents.²⁸ That husband and wife are

not accompanied by a living together, leaving the fact of dependency in such cases to be proved as it is in other cases. There may be many instances where there is a total dependency, though a temporary separation. There may be a physical dissociation and a breaking up of the home, with a definite purpose to resume the normal conditions of married life. The Act provides for these cases by requiring dependency to be determined in accordance with the truth. But words which signify living together do not describe such a situation. These words exclude a condition where there is neither a home nor an actual dwelling together, and where the suspension of this relation is something more than a mere temporary incident of a changing family habitation. In *re Nelson*, 217 Mass. 467, 105 N. E. 357, disapproving *North-western Iron Co. v. Industrial Commission*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877, so far as inconsistent with this decision.

Where it is not shown that the wife was living apart from her husband for justifiable cause, the question of her dependency on him should be determined under St. 1914, c. 708, § 7, and it should not be conclusively presumed that she was wholly dependent upon him under section 3, cl. "a." In *re Newman's Case*, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C, 1145. Living together means normal marital cohabitation. In *re Fierro's Case*, 223 Mass. 378, 111 N. E. 957.

A wife is conclusively presumed to be dependent upon a husband with whom she was living at the time of his death. (Wk. Comp. Act Cal. § 19 [a] [1]) *Irwin v. Globe Indemnity Co. of N. Y.*, 1 Cal. I. A. C. Dec. 547; *White v. Scioto Land Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 114. This is true, even though they had been estranged for about four months prior to the date of the fatal injury, where a reconciliation had taken place shortly before the injury, and they were living together for a period of eight days before he died. *Peloquin v. Fidelity & Deposit Co. of Md.*, 2 Mass. Wk. Comp. Cases, 718 (decision of Com. of Arb.).

²⁸ *Tomasi v. Mazzotti & Butini*, 2 Cal. I. A. C. Dec. 936. Where a workman, coming to this country seven years before the accident, left in Italy his wife and children, to whom he sent regular contributions for their support, averaging over \$180 annually during the last three years, the wife was living with him at the time of his death within the meaning of section 19 (a) (1) of the Act, and therefore conclusively presumed to be totally dependent. *Id.* Where up to the time of his death a workman had been supporting his

physically dwelling apart will not prevent this conclusive presumption from arising, where it is intended that their separation shall be merely temporary.²⁹ But this presumption does not arise

wife, who during the four years of his absence from her had remained in the foreign country of their birth, she was "living with" him at the time of his death, within section 19. *Chulata v. Ransome-Crummey Constr. Co.*, 2 Cal. I. A. C. Dec. 1026. There was a similar holding in *Lopez v. Fremont Cons. Mining Co.*, 3 Cal. I. A. C. Dec. 31.

Where a widow residing in Italy was wholly supported by and wholly dependent upon her husband, although for three years she had been separated from him by reason of his residence in California, and it clearly appeared that he intended to reunite with her, which intention was about to be carried out at the time of his death, she was "living with" him at the time of death, and because of that fact, and also because of her actual support, she was entitled to a death benefit as a total dependent. *Petrucchi v. Red River Lumber Co.*, 3 Cal. I. A. C. Dec. 40. But a wife, resident abroad and for nine years separated from her husband, will not be conclusively presumed to be "living with" him, within section 19(a)(1) of the California Act, in the absence of sufficient evidence of regular and substantial contributions by him tending to show an intent to renew family relations. *Claudio v. California Street Cable Ry. Co.*, 3 Cal. I. A. C. Dec. 7.

In *Salvatore v. Andreani & Gelormino*, 1 Conn. Comp. Dec. 169, where the deceased workman had been in America six years, and had continually during that time sent sums of money to his wife in Italy, and expected later to rejoin her in Italy, they were "living together" within the contemplation of the Connecticut Act, and she was held to be presumptively dependent upon him.

²⁹ A wife is living with her husband at the time of his death, within the meaning of paragraph 4 of section 35 of the Compensation Act, where there has been no legal or actual separation in the nature of an estrangement, although they are not physically dwelling together, and no facts appear suggesting the inference that either husband or wife had abandoned the other, and had formed the intention of permanently living separate and apart. In *re Militza Bonsanar*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 87.

Where the deceased and his wife have been living together as husband and wife, but for two months prior to the accident the wife had been visiting with a sister in Wyoming until the deceased could prepare a home for her in San Diego, where she had planned to join him the week following the accident, it was held that such facts warrant the finding that deceased and his wife were living together as man and wife at the time of the accident and death, within the meaning of the Workmen's Compensation, Insurance, and Safety Act. State Compensation Insurance Fund of the State of Cal.

where the alleged wife is not a legal wife.³⁰ Nor does it ordinarily arise where they are living apart,³¹ particularly where the wife is

v. Breslow, 1 Cal. I. A. C. Dec. 194. But evidence that an Italian resident of California in 1912 sent \$140 to his wife, who had remained in Italy, and, after remitting \$40 to her the following February, was then imprisoned until the next January, and on resuming work was accidentally killed during the next June, having made no further remittance, with no evidence otherwise of his intent to renew family relations, was insufficient to establish that they were "living together." *Claudio v. California Street Cable Ry. Co.*, 3 Cal. I. A. C. Dec. 7.

The husband and wife are to be considered as living together, even though one or the other may be absent from the home for a considerable length of time and separated by great distance; they are living together when they are not living apart, when there is neither legal nor actual separation of the bonds of matrimony. *Nevadjic v. Northwestern Iron Co.*, Bul. Wis. Indus. Com. vol. 1, p. 93; *Id.* 1912-13, p. 21, affirmed in 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877.

³⁰ The presumption of dependency does not arise where the woman living with the workman at the time of his death as his wife is in fact not his legal wife because of the existence of a prior undissolved marriage. *Rossi v. Standard Oil Co.*, 2 Cal. I. A. C. Dec. 307. Where the mother of an illegitimate child is actually living with the father of the child as his wife, and actually wholly dependent upon him, and it is provided that such child is conclusively presumed dependent only in cases of "there being no surviving parent, member of the family of such employé," such mother, living in illicit relations with the employé, is not a member of his family, and therefore not considered a dependent, within the meaning of subsections (a), (3), and (c) of section 19 of the Act. *Bustamente v. Gate City Ice & Precooling Co.*, 2 Cal. I. A. C. Dec. 918.

³¹ *Holleron v. Hill*, 2 Cal. I. A. C. Dec. 289. Where at the time of the death of an injured employé his wife is not living with him, and for a long time prior had received no contributions to her support from him, the dependency of the wife is not established. *Rossi v. Standard Oil Co.*, 2 Cal. I. A. C. Dec. 307. Total dependency of a wife upon her husband at the time of his death is not established where, because of his prior desertion of her, she is not living with him at that time. *Avery v. Pacific Gas & Electric Co.*, 2 Cal. I. A. C. Dec. 311. Where a husband has been residing away from his wife for twelve years in a foreign country, she was not living with him, within the meaning of subdivision (a), 1. of section 19 of the Workmen's Compensation Act, and the extent of her dependency is a matter to be proven by evidence. *Reis v. Standard Portland Cement Co.*, 2 Cal. I. A. C. Dec. 869. Where the husband and wife are living separate and apart, and he is killed by indus-

not being supported by the husband,³² or where their living apart is voluntary³³ and without justifiable cause on the part of the wife. Under the express provisions of the Massachusetts Act, a wife living apart from her husband for justifiable cause is entitled

trial accident, there can be no presumption of entire dependency of the wife, and the facts must establish the dependency, if any. *Bristol v. Gartland*, 1 Cal. I. A. C. Dec. 632.

³² Where a husband and wife had lived apart for several years, and she had worked for her own support, to which he contributed a part, they were not living together, so as to entitle her to compensation under the conclusive presumption that a wife living with her husband is dependent upon him, though they had occasionally spent a few days together. (St. 1911, c. 751, as amended by St. 1914, c. 708, § 3) *In re Newman's Case*, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C, 1145.

A widow of a deceased employé, who had separated from him prior to his death, and who was living apart from him and earning her living without receiving any aid from him, is not entitled to a death benefit. She cannot claim the benefit of the conclusive presumption of dependency under section 19 (a) 1 of the Workmen's Compensation, Insurance, and Safety Act, because she was not living with him at the time of his death. *Delgado v. California Portland Cement Co.*, 1 Cal. I. A. C. Dec. 436.

A wife who is living apart from her husband, following a vocation in another state, which was her means of livelihood prior to her marriage, cannot be said to be wholly dependent upon him for her support, within the meaning of the Workmen's Compensation Law, and on his death entitled to maximum compensation from his employer. *Finn v. Detroit, Mt. Clemens & Marine City Ry.*, Mich. Wk. Comp. Cases (1916) 222.

An employé was killed, leaving a widow whom he married in South Wales in 1877. He was a native of Wales, and left his wife in 1896, and came to America, in 1900 contracting a bigamous marriage with a woman with whom he lived and whom he supported until the day of his death, she having no knowledge of his former marriage and believing herself to be his lawful wife. He had contributed nothing toward the support of his first wife since before the time of his bigamous marriage. The Commission held that his lawful wife was not dependent upon him for support at the time of his death. *In re Elizabeth A. Jones*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 187.

³³ Where the workman and his wife were voluntarily living apart at the time of his death, each earning a living, the conclusive presumption of total dependency of a wife upon a husband "with whom she lives" at the time of his death does not arise. (St. 1911, c. 751, pt. 2, § 7, cl. "a") *In re Nelson*, 217 Mass. 467, 105 N. E. 357.

to compensation.³⁴ The "justifiable cause" need not be such cause as will entitle her to a divorce; it may be ill-treatment or misconduct of a lesser degree.³⁵ But a wife cannot be said to be living apart from her husband for justifiable cause where there has been no failure of marital duty on his part.³⁶ Thus, where a husband and wife separate by mutual consent, and such separation is justifiable because he is not earning enough to support his family, but it appears that, though at the time of his death his earnings had so increased that he was amply able to support his family, she still continued to live away from him by mutual agreement, she was not entitled to compensation as a dependent. Her living apart at the time of his death was not for justifiable cause.³⁷ The wife and child of a deceased workman, who were both living apart from him at the time of his death, are not conclusively presumed to have been wholly dependent on him for support, but that question is to be determined by the evidence of the fact as it existed at the time of the injury.³⁸

The provision of the California Act "that the following shall be conclusively presumed to be wholly dependent for support upon

³⁴ *In re Newman's Case*, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C, 1145. St. 1911, c. 751, pt. 2, § 7, cl. "a," was amended by St. 1914, c. 708, § 7, cl. "a," by a provision that, if at the time of the husband's death the Industrial Board shall find that the wife was living apart for justifiable cause or because he had deserted her, she is conclusively presumed to be wholly dependent on her husband. *In re Gallagher*, 219 Mass. 140, 106 N. E. 558; *In re Fierro's Case*, 223 Mass. 378, 111 N. E. 957.

³⁵ *In re Newman's Case*, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C, 1145. This decision finds support in *Lyster v. Lyster*, 111 Mass. 327; *Watts v. Watts*, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509; Rev. Laws, c. 153, § 33.

³⁶ *In re Newman's Case*, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C, 1145; *Mayhew v. Thayer*, 8 Gray (Mass.) 172; *Sturbridge v. Franklin*, 160 Mass. 149, 35 N. E. 669; *Watts v. Watts*, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509.

³⁷ *In re Newman's Case*, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C, 1145.

³⁸ *In re Bentley*, 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559.

deceased employé: 1. A wife upon a husband with whom she was living at the time of his death. 2. A husband upon a wife upon whose earnings he is partially or wholly dependent at the time of her death"—does not prevent a husband and wife from being dependent partially or wholly upon the earnings of a child. The conclusive presumption referred to operates only where the deceased employé is the husband or wife, and not where the employé is the son or daughter of the dependents. In the latter case dependency is determined in accordance with the fact, as the fact may be at the time of the death.³⁹

Under the Iowa Act it is immaterial that the surviving wife was a wage-earner and helping to support herself at the time of the injury.⁴⁰ She is entitled to compensation if she was married to the deceased at the time of the injury and had not deserted him without fault on his part.⁴¹

Under the Washington Act a wife and children, defined to be dependents, are conclusively presumed to be dependent.⁴² In construing and applying this Act, a divorced man who is paying alimony is considered single.⁴³

In a case under the Wisconsin Act it was held that, where there has been no actual separation between husband and wife in the nature of an estrangement, they may be said to be "living together," though they are not actually dwelling together,⁴⁴ and that the fact

³⁹ (Wk. Comp. Act, § 19, subds. [a], [b]) *Cannon v. Original Mining & Milling Co.*, 1 Cal. I. A. C. Dec. 278.

⁴⁰ Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 30.

⁴¹ (Code Supp. 1913, § 2477m16 [c] [1]) *Id.*

⁴² (Wk. Comp. Act Wash. § 3) *Rulings Wash. Indus. Ins. Com.* 1915, p. 6.

⁴³ (Wk. Comp. Act Wash. § 5) *Opinion Atty. Gen.* May 16, 1912.

⁴⁴ *Northwestern Iron Co. v. Industrial Commission of Wis.*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877.

The relation of husband and wife, having once existed, is presumed to continue. *Id.*; *State ex rel. Coffey v. Chittenden*, 112 Wis. 569, 88 N. W. 587.

that husband and wife had been separated for more than three years, she remaining in their native country while he was here, did not create a presumption that they were not living together, where the evidence showed that the marital relations continued without a break.⁴⁵ The court in an opinion by Judge Kerwin said: "Proof of total dependency is dispensed with under the statute, where the husband and wife are 'living together' at the time of the death of the injured employé. It seems, therefore, quite obvious that the Legislature intended by the use of the words to include all cases where there is no legal or actual severance of the marital relation, though there may be physical separation of the parties by time and distance. The 'living together' contemplated by the statute, we think, was intended to cover cases where no break in the marriage relation existed, and therefore physical dwelling together is not necessary, in order to bring the parties within the words 'living together.' There must be a legal separation, or an actual separation in the nature of an estrangement, else there is a 'living together' within the meaning of the statute. This seems to be the reasonable and practical construction of the law, and the one which we think the Legislature intended. If the law should receive the construction that there must be physical dwelling together in order to satisfy the statute, it is plain that the purpose of the law would be in many cases defeated, because in many cases the spouse may be absent from home for long intervals, although there be no break in the marriage relation, no estrangement, and no intent to separate or sever the existing relations or obligations created by the marriage contract. * * * There seems to be no solid reason why an absence of a month, or a year, or less, should require a different construction of the words 'living together' than an absence of three years and three months, or more. The question does not turn on time or distance, but upon the nature and character of the

⁴⁵ *Northwestern Iron Co. v. Industrial Commission of Wis.*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877.

absence and the intention of the parties respecting it. Intent is an important element in determining the nature of absence." ⁴⁶

Where the evidence in an action under the New Jersey Act shows that a deceased workman, when at work, contributed a substantial part of his earnings toward the support of his wife and daughter, and that he and his wife were not living in a state of legal separation, the presumption of dependency was not rebutted, though it further appeared that he did not work steadily, was inclined to dissipate, did not live at home all the time, and that his wife's position was not very satisfactory. ⁴⁷

The question of intent is an important factor in determining whether the parties were living together. This is ordinarily a question of fact. ⁴⁸ However, what constitutes "living together," where the facts are undisputed and no conflicting inferences can be drawn from the evidence, is a question of law for the court. ⁴⁹

§ 82. — Parent and child

Where there is a direct legal obligation to support, as in the case of a father to his minor children, coupled with the reasonable prob-

⁴⁶ *Northwestern Iron Co. v. Industrial Commission of Wis.*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877, supported by *Ex parte Gilmore*, 3 Eng. Com. B. 967; *Williams v. Williams*, 122 Wis. 27, 99 N. W. 431; *Thompson v. Thompson*, 53 Wis. 153, 10 N. W. 166; *Miller v. Sovereign C. W. of W.*, 140 Wis. 505, 122 N. W. 1126, 28 L. R. A. (N. S.) 178, 133 Am. St. Rep. 1095.

⁴⁷ *Taylor v. Seabrook*, 87 N. J. Law, 407, 94 Atl. 399.

⁴⁸ *Northwestern Iron Co. v. Industrial Commission of Wis.*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877, supported by *Hoff v. Hackett*, 148 Wis. 32, 134 N. W. 132.

Whether the parties were living together was a question of fact to be tried and determined by the Commission. *Northwestern Iron Co. v. Industrial Commission of Wis.*, *supra*; *Travelers' Ins. Co. v. Hallauer*, 131 Wis. 371, 111 N. W. 527. Where the deceased employé was a foreigner, and his wife was yet in a foreign country, and he occasionally sent her money, the question whether they were living together was one of fact. (St. 1911, § 2394—10, subsec. 3) *Northwestern Iron Co. v. Industrial Commission of Wis.*, *supra*.

⁴⁹ *Northwestern Iron Co. v. Industrial Commission of Wis.*, *supra*.

ability of such obligation being fulfilled, dependency is established, even though no support was in fact being furnished at the time of the workman's death.⁵⁰ The law does not limit dependency of minor children living apart from their parents to cases where actual support was being furnished or contributions made, as such a rule would in many instances exclude children from the benefits of a law that was clearly intended for their protection.⁵¹

The Massachusetts Act should be interpreted broadly in harmony with its main aim of providing support for those dependent upon a deceased employé. Under a provision thereof that "a child or children under the age of eighteen years (or over that age but physically or mentally incapacitated from earning) shall be conclusively presumed to be wholly dependent upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving dependent parent," the child of an employé by a former wife, who is presumed to be dependent, is conclusively presumed to be wholly dependent, because there is, as to it, no surviving dependent parent. Children of the deceased, who are children of the widow, are not conclusively presumed to be dependent, because as to them there is a surviving parent.⁵² This conclusive statutory presumption is clearly conditioned on the nonexistence of a surviving dependent parent.⁵³ The word "parent" means the lawful father or mother by blood, and not a step-father or stepmother, or any one standing in loco parentis.

Under the Ohio Act there is no presumption that the father or mother of an unmarried grown son, residing with them, is in any

⁵⁰ *Malzac v. Brule Timber Co.*, Mich. Wk. Comp. Cases (1916) 330.

⁵¹ *Id.*

⁵² *Coakley v. Coakley*, 216 Mass. 71, 102 N. E. 930, Ann. Cas. 1915A, 867, 4 N. C. C. A. 508.

⁵³ *In re Employers' Liability Assur. Corporation*, 215 Mass. 497, 102 N. E. 697. "The provisions of 6 Edw. VII, c. 58, § 13, as to the dependents entitled to payments, are wholly different from those of our own Act, and decisions of the English courts have no bearing on the case at bar." *Id.*

degree dependent upon him for support,⁵⁴ nor is there any presumption that a child over sixteen years of age is dependent upon its father for support.⁵⁵ Whether a woman whose husband is living is dependent in any degree for support on her grown son is a question of fact.⁵⁶

§ 83. — California

Under the California Act there is no conclusive presumption that nonresident parents are dependent on the deceased workman, whether they are thus dependent being a question of fact.⁵⁷ The only legal obligation from which dependency may be found to exist as a conclusive presumption of law is that of a parent at the time of his death for the maintenance of a minor child, there being no dependent parent surviving.⁵⁸ Nonresident children under eighteen years of age receiving support from their father in California, being within this rule of presumption, are conclusively

⁵⁴ *In re Joseph Hora*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 173.

⁵⁵ *In re Maude M. Hughes*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 148. Although a son may be living with his father at the time of the latter's death, if the son be over 16 years of age, there is no presumption that he was dependent upon the father for support. *White v. Scioto Land Co.*, vol. I, No. 7, Bul. Ohio Indus. Com. p. 114.

⁵⁶ *In re Emma Hoffman*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 41.

⁵⁷ (Wk. Comp. Act [St. 1913, p. 289], § 19a) *Garcia v. Indus. Accident Com. of Cal.*, 171 Cal. 57, 151 Pac. 741.

⁵⁸ *Prichard v. American Beet Sugar Co.*, 2 Cal. I. A. C. Dec. 341. Where a divorce decree gave the custody of a minor child to the mother, and obligated the father to pay \$30 a month alimony for support of the mother and the child, the child was conclusively presumed to be wholly dependent for support upon the father, though up to the time of his accidental death in his employment the father made no payments of alimony. *Mitchell v. Crichton*, 2 Cal. I. A. C. Dec. 1005. Where a deceased employé leaves a minor child, the issue of himself and a woman living with him as his wife, but to whom he was not married, and the child is living with him at the time of his death and being legally entitled to maintenance by him, such child is conclusively presumed to be wholly dependent on him. *Bustamente v. Gate City Ice & Precooling Co.*, 2 Cal. I. A. C. Dec. 918.

presumed to be dependent, if the law of California makes enforceable against such father claims for maintenance furnished the children in the other state.⁵⁹ But where an employé takes into his family a minor child not being related to himself or wife, and no adoption proceedings are had, and the employé deserts his family, and for several months before his death makes no payments for their support, and is killed by industrial accident without resuming such payments, the child is not a dependent. Such child cannot claim any conclusive presumption given by the Act, as the deceased was not a parent legally liable for its support, nor can it claim under the section relating to dependency in fact, as there was no dependency in fact at the time of the death.⁶⁰ Where a minor daughter has been awarded to the mother by a divorce decree, without any order being made for the child's support, the father is not responsible for such support, and hence there is no presumption of the dependency of the child on the father.⁶¹

§ 84. Proof of dependency

In the absence of the operation of any statutory presumption, the burden of showing the facts necessary to warrant payment of compensation rests upon the dependents as much as it does on the plaintiff in any proceeding at law. The dependents must do more than show a state of facts equally consistent with no right to compensation as with such right. They can no more prevail, if factors

⁵⁹ *Holleron v. Hill*, 2 Cal. I. A. C. Dec. 289. Where a parent residing in California is legally bound for the support of his minor child by the law of the foreign state where it resides, such law is enforceable in California, the child is conclusively presumed to be totally dependent upon him for support. *Rossi v. Standard Oil Co.*, 2 Cal. I. A. C. Dec. 307. Minor children, living in Oklahoma, for whose support their father, living in California, is legally liable, are conclusively presumed wholly dependent on him. *Avery v. Pacific Gas & Electric Co.*, 2 Cal. I. A. C. Dec. 311.

⁶⁰ *Wk. Comp. Act*, § 19, subds. (a), (b); *Delgado v. California Portland Cement Co.*, 1 Cal. I. A. C. Dec. 436.

⁶¹ *Morse v. Royal Indemnity Co.*, 1 Cal. I. A. C. Dec. 53.

necessary to support the claim are left to surmise, conjecture, guess, or speculation, than can a plaintiff in an ordinary action of tort or contract. A sure foundation must be laid by a preponderance of the evidence in support of the claim before the dependents can succeed. The elements that need to be proven are quite different from those of the ordinary action at law or suit in equity; but, so far as these elements are essential, they must be proved by the same degree of probative evidence. Of course this does not mean, as was said by Lord Loreburn, "that he must demonstrate his case. It only means if there is no evidence in his favor upon which a reasonable man can act, he will fail."⁶² On the question of proof

⁶² (St. 1911, c. 751) In re Sponatski, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333; quotation from Marshall v. Owners of Steamship Wild Rose, [1910] A. C. 486.

The burden of proving dependency rests on one claiming compensation as a dependent. In re Fierro's Case, 223 Mass. 378, 111 N. E. 957. The burden was on the widow of a deceased employé, where she sought compensation, to show that the employé's service was such as to entitle her to compensation, and that he was not merely a casual employé. This burden did not shift. (St. 1911, c. 751, pt. 5, § 2, as amended by St. 1914, c. 708, § 13) In re King, 220 Mass. 290, 107 N. E. 959.

Claims for compensation by alleged children of a deceased workman will be disallowed, in the absence of substantial proof of paternity. Angelucci v. H. S. Kerbaugh, Inc., The Bulletin, N. Y., vol. 1, No. 12, p. 16.

Sufficiency of proof.—Testimony of a wife, who had been separated from her husband, who was killed by accident, that she had received regular monthly contributions for her support, which testimony was contradictory and entirely unsupported, and conflicted with testimony of his sister-in-law to the effect that for the past eight or nine months he had been out of work and unable to pay for his board, was insufficient to prove dependency. Lewis v. Heafey, 2 Cal. I. A. C. Dec. 492.

Burden of proof of death.—The burden of proof is upon the applicant to establish by competent testimony the fact of the death of the employé as a condition precedent to receiving the death benefit. Circumstantial evidence is sufficient where, as in this case, it is impossible to establish the fact of death by production of the body. Shea v. Western Grain & Sugar Products Co., 2 Cal. I. A. C. Dec. 550.

Proof of marriage.—The fact that a man and woman lived together for ten months is not evidence that they were married. Fife Coal Co., Ltd., v. Wallace (1910) 2 B. W. C. C. 264, Ct. of Sess. But in Pappiani v. White Oak

to establish the fact of dependency, it has been held that, where a son who had been giving his father substantial money contributions was killed by accident, the fact that the father supported or helped to support a crippled brother was not conclusive evidence of his nondependence, and he was in fact partially dependent,⁶³ but that the mere fact that a father receives money from a son and expends it is not alone sufficient to establish dependency.⁶⁴ Evidence that deceased gave his wages to his father, and that such wages were devoted to the support of the family, was sufficient to support a finding that the members of the family were actual dependents.⁶⁵ Where claimants for compensation under the Washington Act reside abroad, a sworn statement of dependency must be made before a magistrate, whose authority to take deposition is to be attested by an American consul.⁶⁶ In dealing with death benefit claims of nonresident dependents, the California Commission requires at least some of the testimony as to contributions for support to be corroborated by documentary evidence of remittances.⁶⁷ Where the parents, residing in Turkey, applied for a death benefit, basing their claim on their own uncorroborated and indefinite testimony and on hearsay evidence, there being no direct evidence of any specific amount of money sent at any particular time for their support, a death benefit was denied.⁶⁸ But it does not

Crushed Stone Co., 1 Conn. Comp. Dec. 619, where all direct evidence of claimant's marriage to deceased had been destroyed, but there was abundant testimony that she had lived with the deceased as his wife for a number of years, and appeared in papers concerned with the adoption of children as his wife, the Commissioner held that she was shown to have been the wife of the deceased.

⁶³ *Legget & Sons v. Burke* (1902) 4 F. 693, Ct. of Sess. (Act of 1897).

⁶⁴ *Main Colliery Co. v. Davies*, 2 W. C. C. 108.

⁶⁵ *Havey v. Erie R. Co.*, 87 N. J. Law, 444, 95 Atl. 124.

⁶⁶ (Wk. Comp. Act Wash. § 3) *Rulings Wash. Indus. Ins. Com.* 1915, p. 6.

⁶⁷ *Claudio v. California Street Cable Ry. Co.*, 3 Cal. I. A. C. Dec. 7.

⁶⁸ *Andrew v. Alaska Packers' Ass'n*, 2 Cal. I. A. C. Dec. 770.

necessarily preclude recovery that the dependents can furnish no exact account of the workman's contributions to their support.⁶⁹ For example, want of evidence of the exact amount of the workman's contributions to the support of his parent will not prevent recovery of compensation, where it conclusively appears that the parent's entire support was received from the workman.⁷⁰ In a Wisconsin case, where it appeared that the father and mother had become more or less incapacitated through age and disease, and that without the aid of their children they would not have been able to have managed the farm and provided for their own support in their customary manner of living, the Commission concluded that the deceased son contributed a portion of his earnings to his parents.⁷¹

⁶⁹ *Bradford v. Union Hollywood Water Co.*, 2 Cal. I. A. C. Dec. 792.

⁷⁰ *Dennehy v. Flinn & Tracy*, 1 Cal. I. A. C. Dec. 302.

⁷¹ *Pliska v. Hatton Lumber Co.*, Bul. Wis. Indus. Com. vol. 1, p. 95.

CHAPTER V

CIRCUMSTANCES UNDER WHICH COMPENSATION
BECOMES DUE

Section

- 85-100. Article I.—Injury and accident.
 85-91. Division I.—Accident.
 92-96. Division II.—Personal injury.
 97-98. Division III.—Diseases.
 99-100. Division IV.—Proof.
 101-126. Article II.—Arising out of and in course of employment.
 101-104. Division I.—In general.
 105-114. Division II.—Arising in the course of employment.
 115-125. Division III.—Arising out of employment.
 126. Division IV.—Proof.
 127-137. Article III.—Cause and result.
 138-139. Article IV.—Occupational diseases.

ARTICLE I

INJURY AND ACCIDENT

DIVISION I.—ACCIDENT

Section

85. Necessity, definition, and characteristics.
 86. Unexpected untoward event—Extraneous or not.
 87. Intentional act of another.
 88. Industrial accidents.
 89. Voluntary act in emergency.
 90. Fortuitous event.
 91. Question of law and fact.

DIVISION II.—PERSONAL INJURY

92. Definition.
 93. Federal Act.
 94. Physical violence or not.
 95. Nervous shock.
 96. Hernia.

DIVISION III.—DISEASES

97. Diseases compensable as injuries.
 98. Previously existing diseases.

DIVISION IV.—PROOF

99. Proof of accident.
 100. Proof of injury.

DIVISION I.—ACCIDENT

§ 85. Necessity, definition, and characteristics

A comparison of the various American Compensation Acts discloses that some do not make "accident" a condition to the right to recover compensation,¹ while others, following the English Act,²

¹ The federal Act, and those of West Virginia, Washington, Kentucky, Louisiana, Iowa, Ohio, Massachusetts, Texas, and Connecticut, omit the word "accidental" in modifying "injury." *Yume v. Knickerbocker Portland Cement Co.*, 3 N. Y. St. Dep. Rep. 353.

Under the Massachusetts Workmen's Compensation Act it is not required that the injury be also an accident, differing in this respect from the English Act and being more liberal to the employé. The element of accident was not intended to be imported into the Massachusetts Act. In *re Hurle*, 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919. The name "Industrial Accident Board," which is the administrative body created by part 3, is a mere title, and cannot fairly be treated as restrictive of its duties. *Id.* "The standard established by the Massachusetts Workmen's Compensation Act as the ground for compensation is simply the receiving of 'personal injury arising out of and in the course of' the employment. This standard is materially different from that of the English Act and of the Acts of some of the states of this nation. That standard is 'personal injury by accident,' both in the Act of 1897 and 1906. See 60 & 61 Vict. 1897, c. 37, § 1 (1); 6 Edw. VII, 1906, c. 58, § 1 (1). The difference between the phraseology of our Act and the English Act in this respect cannot be regarded as immaterial or casual. The English Act in its present form was passed several years before ours. It was known to the Legislature which enacted the Massachusetts statute and was followed as to its general frame and in many important particulars. *Gould's Case*, 215 Mass. 480, 486, 102 N. E. 693, Ann. Cas. 1914D, 372; *McNicol's Case*, 215 Mass. 497, 499, 102 N. E. 697, L. R. A. 1916A, 306. This difference must be treated as the result of deliberate design by the General Court, after intelligent comprehension of the

² The English Act of 1897 was entitled: "An act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment." The body of the act provided that: "If in any employment, to which this act applies, personal injury by accident arising out of and in the course of employment is caused to any workman, his employer shall be liable."

"It is not enough to say that the injury was caused by the employment, but there must be the further element of accident." *Cozens-Hardy, M. R.*, in *Broderick v. London County Council* (1909) 1 B. W. C. C. 219, C. A.

prescribe not only that there shall be a personal injury, but that the injury shall be by accident.³ The word "accident" refers to

limitation expressed by the words of the English Act. The freer and more comprehensive words in the Massachusetts Act must be given their natural construction, with whatever added force may come from the intentional contrast in phraseology with the English Act. The 'personal injury by accident,' which by the English Act is made the prerequisite for the award of financial relief, is narrower in its scope than 'personal injury.'" In *re Mad-den*, 222 Mass. 487, 111 N. E. 379.

It is intended that all injuries shall be compensated for unless willfully incurred; disease only being excluded. (Wk. Comp. Act, § 3) *Stertz v. Industrial Insurance Commission of Washington* (Wash.) 158 Pac. 256. The use of the word "accident" in the administrative portions of the Act is for brevity only, and it does not operate to detract from or vary the meaning of the words "fortuitous event." *Id.*

In *Blackall v. Winchester Repeating Arms Co.*, 1 Conn. Comp. Dec. 183, it was held that it is not necessary under the Connecticut Act that the injury arise by accident. The words "by accident," found in the English Act, are omitted from this statute.

Within the language of the federal Act, an employé may be injured without having suffered a definite accident. In *re Clark*, Op. Sol. Dept. of L. 188.

³ As "accident" is the controlling word in the Michigan Act, Massachusetts decisions relative to the element of accident have little, if any, bearing on the Michigan Act. In *Adams v. Acme White Lead & Color Wks.*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283, the court, in an opinion by Judge Stone, says: "Our attention has been called to the Massachusetts Act, which differs in many respects from our Act. The whole scope of the Act seems to be to provide for compensation for personal injuries received in the course of employment. In many instances where the word 'accident' occurs in our statute the word 'injury' is used in the Massachusetts statute. It is true that the Massachusetts board is termed an 'Industrial Accident Board,' but, aside from the use of the word 'accident' in that title, we are unable to find the word in the body of the act, except in two instances in section 18 of part 3, which provides for the keeping of a record and making a report by the employer in case of accident. This may be said not to be very controlling; but, in our judgment, it has to do with the inquiry as to the scope of the Act. We are unable to follow those cases as authority under our statute." Followed in *Robbins v. Original Gas Engine Co.* (Mich.) 157 N. W. 437.

Even though an injury arises out of and in the course of the employment, there can be no recovery, unless it is an "accident," within the purview of the Act. *Walther v. American Paper Co.* (N. J. Sup.) 98 Atl. 264.

The benefits of the California Act are limited to cases of injury arising from accident. *McDonald v. Dunn*, 2 Cal. I. A. C. Dec. 71.

the cause of the injury,⁴ and is here used in its ordinary and popular sense as denoting an unlooked for mishap or an untoward event which is not expected or designed⁵ by the workman himself,⁶ a

⁴ In *re Hart*, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 18; (Rev. St. 1913, § 3693 [b]) *Johansen v. Union Stockyards Co.*, 99 Neb. 328, 156 N. W. 511.

⁵ *Adams v. Acme White Lead & Color Wks.*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283; *Walker v. Lilleshall Coal Co.*, [1900] 1 Q. B. 488; *Robbins v. Original Gas Engine Co. (Mich.)* 157 N. W. 437; *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620; *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *Clayton & Co. v. Hughes* [1910] A. C. 242, 26 T. L. R. 359; *Fenton v. Thorley & Co.* (1903) 5 W. C. C. 6.

The words "accident" and "accidental" in the Compensation Acts are used in their popular and ordinary sense, and mean happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected. *Robbins v. Original Gas Engine Co.*, *supra*.

"Accident" means an unexpected or unforeseen event, happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. (Wk. Comp. Act [Laws 1913, c. 198] § 52 [b]) *Johansen v. Union Stockyards Co.*, 99 Neb. 328, 156 N. W. 511.

In *Mutual Acc. Ass'n v. Barry*, 131 U. S. 100, 121, 9 Sup. Ct. 755, 762 (33 L. Ed. 60), the term "accidental," as used in an accidental insurance policy, is defined as used "in its ordinary popular sense, as meaning 'happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected'; that if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted through accidental means."

The popular and ordinary definition of the word "accident," and not the

⁶ *Trim Joint District School v. Kelly* (1914) 7 B. W. C. C. 274, H. L., and (1913) 6 B. W. C. C. 921, C. A. "An occurrence, I think, is unexpected, if it is not expected by the man who suffers by it, even though every man of common sense who knew the circumstances would think it certain to happen." Lord Macnaghten, in *Clover, Clayton & Co. v. Hughes* (1910) 3 B. W. C. C. 275, H. L. For 70 years in England the word "accident" has been publicly and descriptively used as inclusive of occurrences intentionally caused by others. *Trim Joint District School v. Kelly*, *supra*.

When the act, as far as the injured employé is concerned, is an unforeseen, unlooked-for mishap, unprovoked and uninvited, the resultant injury is occasioned by an "accident." *Walther v. American Paper Co.* (N. J. Sup.) 98 Atl. 264.

physiological injury as the result of the work he is engaged in,⁷ an unusual effect of a known cause,⁸ a casualty.⁹ It implies that there

stricter definition used in construing accident insurance policies, is to be used in compensation cases, and an employé who, while assisting in the loading of lumber on a truck, either slipped or in some manner wrenched his back and fell down, sustained an accident within the meaning of the Act. *Southwestern Surety Ins. Co. v. Pillsbury* (Cal. Sup.) 158 Pac. 762.

An injury is accidental if it is "unforeseen," "without design," "happening without the concurrence of the injured party," "unintended or unexpected" by the employé, or "a risk of his occupation." *Johnston v. Mountain Commercial Co.*, 1 Cal. I. A. C. Dec. 100. Accidental means are those which produce effects which are not their natural and probable consequence. An effect which is a natural and probable consequence of an act or course of action is not an accident, but one which is not a natural and probable consequence of an act or course of action is produced by accidental means and is an accident. *Rep. Nev. Indus. Com.* 1913-14, p. 25.

An accident arises from something unforeseen, unexpected, or unusual, and is not the natural result of ordinary means, voluntarily employed, in a not unusual or unexpected way. *In re Clark*, Op. Sol. Dept. of L. 188. An effect which does not ordinarily follow the use of familiar means, and which cannot reasonably be anticipated, is an accident. *Id.* To constitute an injury within the federal Act, it will suffice if an element of accident clearly appears, or if the injury is of a type which, in the interpretation of statutes of similar scope and purpose, has been accepted as properly included in the class comprehensively known as accidental injuries. *In re Irving*, Op. Sol. Dept. of L. 249.

"The word 'accident' has, when used in this statute, long ceased to have

⁷ *Stewart v. Wilsons and Clyde Coal Co., Ltd.* (1902) 5 F. at page 122. The death of an employé of a mill run by water power, who was drowned in attempting to clean racks which protected the intake flume, was an accident, within the Act. *Boody v. K. & C. Mfg. Co.*, 77 N. H. 208, 90 Atl. 859, L. R. A. 1916A, 10, Ann. Cas. 1914D, 1280.

A log roller, who had his toe frozen on an exceptionally cold day while rolling logs in the woods, suffered an accidental injury (*Linck v. Millard*, 4 N. Y. St. Dep. Rep. 385), as also did an employé who froze his fingers while harvesting ice when the temperature was 30 degrees below zero (*Cole v. Callahan & Sperry*, 4 N. Y. St. Dep. Rep. 345).

⁸ *Ismay, Imrie & Co. v. Williamson* (1909) 1 B. W. C. C. at page 235.

"Accidental" means happening by chance or unexpectedly taking place, not according to the usual course of events. *Naud v. King Sewing Mach. Co.*, 95 Misc. Rep. 676, 159 N. Y. Supp. 910.

⁹ See note 9 on following page.

was an external act or occurrence which caused the injury or death. It contemplates an event not within one's foresight and expectation resulting in a mishap causing injury to the employé. Such an occurrence may be due to purely accidental causes, or may be due to oversight and negligence.¹⁰ It may be due to carelessness, not

the meaning the man in the street would attribute to it." Sir Samuel Walker, L. C., in *Sheerin v. Clayton & Co., Ltd.*, [1910] 2 Ir. R. 110. In *Hensey v. White*, [1900] 1 Q. B. 481, the language of an earlier case was approved where it was said: "I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident.'" "The word 'accident' is to be taken in its popular ordinary sense. It denotes or includes any unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence." Lord Shand, in *Fenton v. Thorley & Co., Ltd.* (1903) 5 W. C. C. 1, H. L. (Act of 1897).

⁹ In *Bystrom Bros. v. Jacobson*, 162 Wis. 180, 155 N. W. 919, Judge Marshall says: "The term 'accident' as used in the Workmen's Compensation Act * * * is susceptible of being given such scope that one would hardly venture to define its boundaries. Courts have indulged in very general statements in regard to it, but have not worked out any very definite guide."

An "accident" is a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured. *Richards v. Travelers' Ins. Co.*, 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; *Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 147 Pac. 1175; *Southwestern Surety Ins. Co. v. Pillsbury* (Cal. Sup.) 158 Pac. 762.

An "accident" is an unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty. *Adams v. Acme White Lead & Color Wks.*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283; *Black's Law Dictionary*.

¹⁰ *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273. The broad meaning attributable to the word "accident," and which is called for by the spirit of the Workmen's Compensation Act, was adopted by this case. The court said: "The term 'accidental,' as used in compensation laws, denotes something unusual, unexpected, and undesigned. The nature of it implies that it was an external act or occurrence which caused the personal injury." The contracting of typhoid fever by an employé by his drinking impure water furnished by the employer was held to satisfy all requirements of that definition.

The term "accident," when used in Workmen's Compensation Acts, should be taken in a broad sense as including a violent straining of the muscles,

willful, to fatigue, or to miscalculation of the effects of voluntary action.¹¹ It is something capable of being assigned to a particular time and place and of which notice can be given.¹² This has been

resulting in a rupture or other bodily hurt to an employé from physical over-exertion in performing his work. *Bystrom Bros. v. Jacobson*, 162 Wis. 180, 155 N. W. 919.

"The words 'by accident' are * * * introduced parenthetically as it were to qualify the word 'injury,' confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design." *Fenton v. J. Thorley & Co., Ltd.* [1903] A. C. 443.

¹¹ "An examination of cases arising principally upon accident insurance policies, some of which are collected in a note to *Lehman v. Great Western Accident Ass'n*, 42 L. R. A. (N. S.) 562, discloses that in the opinions which seem to be best considered the distinction is observed between the means by which an injury is produced and the result of the producing cause or causes. It is not sufficient that there be an unusual and unanticipated result; the means must be accidental—involuntary and unintended. There must, too, be some proximate connection between accidental means and the injurious result. It is doubtful, however, if, in applying the Michigan statute, its general purpose being considered, the court should exactly follow the rules suggested and applied in the cases referred to. The statute seems to contemplate that an accidental injury may result by mere mischance; that accidental injuries may be due to carelessness, not willful, to fatigue, and to miscalculation of the effects of voluntary action." *Robbins v. Original Gas Engine Co.* (Mich.) 157 N. W. 437.

¹² "'Accident' is something of which notice can and must be given." *Cosens-Hardy, L. J.*, in *Steel v. Cammell, Laird & Co., Ltd.* [1905] 2 K. B. p. 238. "The accident must be something which is capable of being assigned to a particular date, and which is in the popular and ordinary sense an accident." *Collins, M. R.*, in *Marshall v. East Holywell Coal Co.*, *Gorley v. Backworth Collieries* (1905) 7 W. C. C. 19 (Act of 1897). "A workman cannot recover compensation under the Act unless he can satisfy the court that there is a particular time, place, and circumstance in which the injury by accident happened. Unless he can do that, he must fail." *Cozens-Hardy, M. R.*, in *Martin v. Manchester Corporation* (1912) 5 B. W. C. C. 259, C. A. "It seems to me that all these interpretations of the word point to some particular event or occurrence which may happen at an ascertainable time, and which is to be distinguished from the necessary and ordinary effect upon a man's constitution of the work in which he is engaged day by day. So defined, the word 'accident' seems to me to exclude the anticipated and necessary consequence of continuous labor." *Lord Kinnear*, in *Coe v. Fife Coal Co., Ltd.* (1910) 2 B. W. C. C. 8, Ct. of Sess.

held, however, not to mean capable of being assigned to some particular moment or hour of time.¹³ It follows that there is no "injury by accident" within a Workmen's Compensation Act, when no specific time or occasion can be fixed upon as the time an alleged accident occurred.¹⁴ A pre-existing weakness or disease will not prevent the injury from being the result of an accident if the accident is the immediate cause of the injury.¹⁵

An "accidental injury" is clearly distinguished from an injury in the nature of a vocational disease sustained in the course of an employment where from the inherent nature of the work disease is likely to be contracted.¹⁶

¹³ "It would be unreasonable to assume that the court means that the disease or incapacity must necessarily be assigned to some particular moment or hour of time. Its language with respect to time and place is to be construed reasonably. If, in a period of say twelve hours, or possibly one day, there can be established certain fortuitous and unexpected causes peculiar to the employment which have produced the disease or incapacity, then the case may be compensable." *Linnane v. Aetna Brewing Co.*, 1 Conn. Comp. Dec. 677 (appeal pending in superior court).

¹⁴ *Liondale Bleach, Dye & Paint Works v. Riker*, 85 N. J. Law, 426, 89 Atl. 929.

Where lead poisoning contracted by a workman could not be traced to any definite time, but was the cumulative effect of inhalation of the enamel powder, extending over a considerable period of time, it was not an accidental injury within the meaning of the Act. *Derkinderen v. Rundle Mfg. Co.*, Rep. Wis. Indus. Com. 1914-15, p. 16.

¹⁵ A rupture due to an unusual strain in lifting a heavy weight was an accidental injury, though the rupture would not have occurred but for a pre-existing physical weakness. *Robbins v. Original Gas Co.* (Mich.) 157 N. W. 437.

Where a hack driver was injured from being thrown from his seat while he was helpless from dizziness, due to disease, his fall was an "accident." (Wk. Comp. Act, Pub. Laws 1911-12, c. 831, art. 1, § 1) *Carroll v. What Cheer Stables Co.* (R. I.) 96 Atl. 208.

¹⁶ *Naud v. King Sewing Mach. Co.*, 95 Misc. Rep. 676, 159 N. Y. Supp. 910. As to occupational diseases, see § 138 et seq., post.

Medical evidence showing that the applicant's falling of the womb was directly caused by straining and heavy lifting done in the course of her employment, no disease being present, though the injury was made possible

§ 86. Unexpected untoward event—Extraneous or not

The unexpected untoward event may arise out of efforts being put forth by the workman himself, as where he strains his back in lifting;¹⁷ or is incapacitated by sunstroke while working in an exposed position;¹⁸ it may arise from something wholly extraneous to the workman, as where, while at work on a building, he is struck by an iron bar which another workman causes to fall from an upper story;¹⁹ or it may arise partly from his efforts and partly from something extraneous thereto.²⁰ No doubt, the ordinary accident is associated with something external, the bursting of a boiler, or an explosion in a mine, for example. But it may be really from the man's own miscalculation, such as tripping and falling: Or it may be due both to internal and external conditions, as if a seaman

by laceration at the time of the birth of a child 30 years before, showed that the injury was caused by an accident. *Loustalet v. Metropolitan Laundry Co.*, 1 Cal. I. A. C. Dec. 318.

¹⁷ A workman, who in putting a derailed coal hutch back upon the rails strains his back in so doing, is injured by accident. *Stewart v. Wilsons and Clyde Coal Co., Ltd.* (1902) 5 F. 120, Ct. of Sess.

¹⁸ Where a seaman was incapacitated by sunstroke while painting the sides of his ship, it was a personal injury by accident. *Morgan v. S. S. Zenaida (Owners of)*, (1910) 2 B. W. C. C. 19, C. A.

Except in those cases where the sunstroke was due to an exposure peculiarly severe because of the nature and location of the employment, a sunstroke received under ordinary and not unnatural conditions should be treated as an illness due to the weakened condition of the employé rather than as a personal injury. *Op. Sp. Counsel to Iowa Indus. Com.* 1915, p. 26.

¹⁹ *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458.

²⁰ Where a lineman in the employ of a railroad company took shelter from a violent rainstorm under a car standing on a switch, and on the car being moved was struck by a projection thereof and fell, so that his legs were severed by the wheels, the injury was accidental. (*Wk. Comp. Law*, § 10) *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620. It was a personal injury by accident where a dock laborer, who was unloading bran containing grit, got some in his eye, and, rubbing it, caused an abrasion, necessitating the removal of the eye. *Adams v. Thompson* (1912) 5 B. W. C. C. 19, C. A.

were to faint in the rigging and tumble into the sea. It may also be something going wrong within the human frame itself,²¹ such as the straining of a muscle, or the breaking of a blood vessel. If that occurred when he was lifting a weight, it would be properly described as an accident. So rupturing an aneurism when tightening a nut with a spanner may be regarded as an accident.²² But where a fellow employé, at the request of an employé troubled with pimples, opens a pimple in an unsanitary manner, causing blood poisoning, the injury does not result from an accident.²³ It has been held that death resulting from a ruptured artery was not accidental when the rupture occurred while the insured was reach-

²¹ Where an employé worked continuously for 21 hours, except 1½ hours off for meals, during which time he had to climb 216 steps three different times, besides being on his feet most of the time, and was found dead in his chair in a saloon a half hour after quitting, death being due to angina pectoris, he suffered an accident. *McMurray v. J. J. Little & Ives Co.*, 3 N. Y. St. Dep. Rep. 395.

²² *Clover, Clayton & Co., Ltd., v. Hughes* (1910) 3 B. W. C. C. 280.

The employé was working on a construction car when the trolley wire broke, causing the boom at the end of the trolley pole to strike him. This blow, together with a shock of electricity from the wire, incapacitated him for work and brought on a condition of acute nephritis and loss of vision. The employé was held to be entitled to compensation. *Cooper v. Mass. Employés' Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 573 (decision of Com. of Arb.).

Where, although the strain was received while in the performance of applicant's ordinary work, it was the result of an extraordinary exertion, it should be classed as an accident within the meaning of the Act. *Scott v. What Cheer Coal Co.*, Mich. Wk. Comp. Cases (1916) 1. But hernia occurring without any strain and without the elements that are necessary to constitute an accident would not come within the meaning of the law. *Id.*

Rupture, caused by a strain while at work, is an "accident." *Poccardi v. Public Service Commission*, 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299.

But where a workman was found to be suffering from hernia, without anything out of the ordinary having happened, the disease being caused by continued strain, and having developed gradually and without any sudden strain or overexertion, there was no "accident." *Lichtenberger v. Strack*, Rep. Wis. Indus. Com. 1914-15, p. 13; *Reseberg v. Hamilton Mfg. Co.*, Rep. Wis. Indus. Com. 1914-15, p. 14.

²³ *Rebello v. Marin County Milk Producers*, 1 Cal. I. A. C. Dec. 87.

ing from a chair to close a window, did not slip or fall or lose his balance, and nothing unforeseen occurred except the bursting of the artery.²⁴

§ 87. — Intentional act of another

The circumstance that the injury was the result of a willful or criminal assault by another does not exclude the possibility of injury by accident. An injury caused by the attack of a third person may be accidental so far as the injured person is concerned.²⁵

²⁴ *Feder v. Iowa State Trav. Men's Ass'n*, 107 Iowa, 538, 78 N. W. 252, 43 L. R. A. 693, 70 Am. St. Rep. 212.

²⁵ *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398; *Western Metal Supply Co. v. Pillsbury* (Cal. Sup.) 156 Pac. 491.

Injury by assault, where such assault arises out of the employment, is an injury by accident. *Rudder v. Ocean Shore Railroad Co.*, 1 Cal. I. A. C. Dec. 209. While a premeditated simple assault does not fall within either the commonly accepted or the legal definition of accident, it is the clear intent of the law that all public peace officers, as public employes, are entitled to the benefits of the Act, and an injury by assault suffered incidental to the employment of such officer, in the course of his employment, and arising out of his employment, is accidental. *Emmert v. Trustees of the Preston School of Industry*, 1 Cal. I. A. C. Dec. 17. Where a newspaper reporter was ordered by his employer to get a first copy of the newspaper off the press to see if the makeup was correct, and was forcibly resisted by the pressman, the reporter repeatedly and properly attempting to do as he was instructed, and then, when about to report the matter to his superior, and as a consequence of his proper efforts, was unexpectedly and without other provocation assaulted, such assault was an accident. *Brown v. Berkeley Daily Gazette*, 2 Cal. I. A. C. Dec. 844.

Where a workman was injured in a fight with two Italians, who disliked him because he had taken their place when they were discharged some time before, he suffered an accident. *Hartnett v. Steen*, 2 N. Y. St. Dep. Rep. 492 (affirmed 169 App. Div. 905, 153 N. Y. Supp. 1119, and 216 N. Y. 101, 110 N. E. 170). An assistant foreman, assaulted by two workmen whom he had just reprimanded for not doing their work properly, sustained an accident. *Yume v. Knickerbocker Portland Cement Co.*, 3 N. Y. St. Dep. Rep. 353 (affirmed in 169 App. Div. 905, 153 N. Y. Supp. 1151).

It was a personal injury by accident where an unpopular master of an industrial school was assaulted in pursuance of a conspiracy among the boys (*Trim Joint District School v. Kelly* [1914] 7 B. W. C. C. 274, H. L., and

An injury due to the playful act of a coemployé may constitute an accident.²⁶ The death or injury of an employé in defending his employer's place of business from robbery is accidental.²⁷ But where a brewing company agrees to furnish its employé's good beer to drink, and an employé is injured from drinking beer poisoned by his fellow workmen, the contract does not make the employer liable for compensation. Even though he intentionally furnished bad beer, this fact would render him liable only in an action at law, and would not establish an industrial accident.²⁸

§ 88. Industrial accidents

As a general rule, the employer is not liable for purely industrial accidents where the workman has not brought himself within the Act.²⁹ The usual purpose of these Acts is to compensate for injuries resulting from industrial accidents only, and not for occupa-

[1913] 6 B. W. C. C. 921, C. A.); where a cashier, who was carrying wages by train to a colliery, was shot and robbed (*Nisbet v. Rayne and Burn* [1910] 3 B. W. C. C. 507, C. A.); where boys dropped a stone from a bridge upon an engine, fatally injuring the driver (*Challis v. London & Southwestern Railway Co.* [1905] 7 W. C. C. 23, C. A.); and where a gamekeeper on duty was attacked by poachers and injured (*Anderson v. Balfour* [1910] 3 B. W. C. C. 588, C. A.); but not where an errand boy was assaulted by his employer, a man who had been in an asylum and was subject to fits of melancholia (*Blake v. Head* [1912] 5 B. W. C. C. 303, C. A.).

²⁶ Injury to an eye was due to accident where the employé while in the toilet felt something strike her arm, and looked through a crack to see where the article had come from, whereupon a girl in the adjoining toilet thrust some scissors through the crack into her eye. *De Fillipis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. Supp. 761.

²⁷ *Johnston v. Mountain Commercial Co.*, 1 Cal. I. A. C. Dec. 100. That a night watchman was killed through the willful act of a third person did not prevent his death from being accidental. *Western Metal Supply Co. v. Pillsbury* (Cal. Sup.) 156 Pac. 491.

An assault on a night watchman by a coemployé, for the purpose of robbery, was an accident. *Walther v. American Paper Co.* (N. J. Sup.) 98 Atl. 264.

²⁸ *Koch v. Oakland Brewing & Malting Co.*, 1 Cal. I. A. C. Dec. 373.

²⁹ *Salus v. Great Northern Ry. Co.*, 157 Wis. 546, 147 N. W. 1070.

tional diseases.³⁰ The determination of what constitute industrial accidents consequently becomes important. Loss of vision by wood alcohol poisoning is an industrial accident, rather than an occupational disease, particularly where the effect of the wood alcohol was not a cumulative and gradual destruction of the optic nerve, but a sudden attack precipitated by an extraordinary use of the liquid just before the eye trouble appeared.³¹ Where an employé, after working two weeks in snapping and stripping string beans in a cannery, notices a blister on her thumb, which within two or three days becomes infected and very painful, subsequently requiring the amputation of the thumb, the injury is due to accident, and not to occupational disease. It is not indispensable that the applicant be able to swear what bean pod it was that finally, by the friction of its rough surface against the thumb, made a hole in the skin, but sufficient that a hole was made, that infection entered, and that disability was caused thereby.³² Where an employé fell between an engine and tender in consequence of the slippery condition of the apron on which he was standing, the fall, being the result of a hazard incident to his employment, was held to be a compensable industrial accident.³³

§ 89. Voluntary act in emergency

Injury sustained by a workman in voluntarily doing an act in emergency, with knowledge of the risk incurred, may constitute injury by accident. Thus when a workman who was employed on the quay side voluntarily went down into the hold of a ship to rescue a fellow workman who had been overcome by noxious gas was himself suffocated, it was a personal injury by accident.³⁴

³⁰ Federal Rubber Mfg. Co. v. Havolic (Wis.) 156 N. W. 143.

³¹ De Witt v. Jacoby Bros., 1 Cal. I. A. C. Dec. 170.

³² Pettit v. Mendenhall, 2 Cal. I. A. C. Dec. 212.

³³ (St. 1913, §§ 2394—1 to 2394—95) Milwaukee Coke & Gas Co. v. Industrial Commission, 160 Wis. 247, 151 N. W. 245.

³⁴ London & Edinburgh Shipping Co. v. Brown (1905) 7 F. 488, Ct. of Sess. (Act of 1897).

§ 90. Fortuitous event

The Supreme Court of Washington held that hernia due to an attempt to remove a heavily loaded truck was a "fortuitous event" within a provision of the Compensation Act of that state stipulating that the words "injury" or "injured" as used therein "refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease," and said in an opinion by Judge Morris: "It is the contention of the Commission that these circumstances do not disclose that the injury resulted from a 'fortuitous event,' and that no accident occurred which produced the injury, contending that, inasmuch as respondent did not slip or fall, nothing struck him, and nothing happened out of the ordinary which produced the rupture or hernia, it cannot be said that the hernia resulted from some fortuitous event. 'Fortuitous' is defined as 'occurring by chance as opposed to design; coming or taking place without any cause; accidental; casual,' and a fortuitous cause is said to be 'a contingent or accidental cause' ³⁵ The sustaining of an injury while using extreme muscular effort in pushing a heavily loaded truck is as much within the meaning of a fortuitous event as though the injury were the result of a fall or the breaking of the truck. To hold with the Commission that, if a machine breaks, any resulting injury to a workman is within the Act, but, if the man breaks, any resulting injury is not within the Act, is too refined to come within the policy of the Act as announced by the Legislature in its adoption and the language of the court in its interpretation. The machine and the man are within the same class as producing causes, and any injury resulting from the sudden giving way of the one, while used as a part of any industry within the Act, is as much within the contemplation of the Act as the other." ³⁶ In a case arising out of the British Act, it

³⁵ Quotation from Standard Dictionary.

³⁶ *Zappala v. Industrial Inc. Commission*, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295.

was held that an internal injury caused to a person in a normal state of health was a fortuitous and unforeseen event, where he suddenly tore several fibers of the muscles of his back while lifting a heavy beam.³⁷ It was likewise held in another case that a workman in his master's field, who, finding that the grain had been trodden down by bullocks, stooped to raise it and sprained his left leg, was within the remedies of this Act. The language of the British Act is "personal injury by accident arising out of and in the course of employment." The English cases make no distinction between an accident and a fortuitous event as used in some acts; for it is said in the case last mentioned, in answering the contention there made that an injury, to be within the British Act, must be caused by some fortuitous and external event, that: "The word 'accident' is a popular word of very wide meaning. Originally a grammarian's word, it has been used from Dr. Johnson's time until to-day to mean 'that which happens unforeseen, casualty, chance.' For four years this man had successfully used these muscles to lift this weight; owing, perhaps to carelessness, perhaps to a slip, perhaps to some other cause, except disease, he snaps the fibers of the muscles that had always successfully done the work, and if any ordinary person had been asked what had happened to him, he would have said that the man had had an 'accident,' and I think the word would have been rightly used. To me it is the same as if he had been using a rope strong enough for the purpose, and by overstrain or sudden jerk the rope had snapped and the beam had fallen upon him. That would be an accident. In one case the work is done by a rope; in the other, by a set of muscles. In each case the machinery is normally fit for the work, but the unexpected happens, the rope or muscle snaps and there is an accident. To my thinking, there is in the word 'accident' always an element of injury. * * *

As to the word 'fortuitous,' I do not think I need trouble much about it. If the injury were caused by disease, it is clear that the

³⁷ Boardman v. Whitworth, 3 W. C. C. 33.

applicant could not recover, but I find as a fact that the man was not in any way diseased. Indeed, it was not seriously contended that he was. 'Fortuitous' means 'accidental,' 'casual,' 'happening by chance,' and I have already said that, in my opinion, this injury was caused by an accidental and fortuitous event. * * * In determining whether the injury has been caused by an accident or not, one must discriminate between that which must occur and that which need not necessarily occur in the course of the employment. If the thing must happen, it is not an accident, but if it need not happen, then there is the fortuitous element, and there is an accident."³⁸ Another English case arose out of these circumstances: The workman, while turning a wheel attached to a press, "suddenly felt something which he describes as a tear in his inside, and upon examination it was found that he was ruptured. There was no evidence of any slip, wrench, or sudden jerk." It was held below, following *Hensey v. White*, 2 W. C. C. 1, that there could be no recovery because of "an entire lack of the fortuitous element." This contention was overruled, and it was said that the word "accident," as used in the British Act, was used in its popular ordinary sense as denoting an unlooked for mishap of an untoward event which is not expected or designed.³⁹

§ 91. Question of law and fact

Whether an injury is an "accident" is a mixed question of law and fact.⁴⁰ When applied to ascertained facts it is a question of law.⁴¹

³⁸ *Purse v. Hayward*, 85 L. T. 502.

³⁹ *Fenton v. Thorley & Co.*, 5 W. C. C. 1.

⁴⁰ *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *Roper v. Greenwood* (1900) 83 L. T. 471.

⁴¹ *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *Fenton v. Thornley & Co.* (1903) A. C. 443, 19 L. T. R. 684.

DIVISION II.—PERSONAL INJURY

§ 92. Definition

The words "personal injury" have been given in many connections a comprehensive definition.⁴² They had a well-defined meaning in the law prior to the passage of the Compensation Acts, and, under the rule that words of common and approved meaning should be given such meaning in the construction of a statute, they retain this meaning in the Compensation Acts.⁴³ They include, as

⁴² In *re Hurle*, 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919.

⁴³ In *re Madden*, 222 Mass. 487, 111 N. E. 379. In this case the court, in discussing a construction of these words as used in the Massachusetts Act, said: "It is argued that grave economic consequences of far-reaching effect may follow from the Act as thus construed. It is said that persons not in good health may be altogether excluded from employment, to their severe hardship, while the cost of conducting commercial and industrial enterprises may become prohibitively large, all to the detriment of the general welfare and of the financial resources of the commonwealth. These considerations are of great public moment. But these factors relate to legislative questions, and the arguments founded on them are distinctly legislative arguments. They may be entitled to attention and deliberation at the hands of the legislative department of government. In the present forum they cannot have decisive significance, even if it were plain that the enumerated consequences were inevitable. The function of the judicial department of the government is simply to determine whether an act is within the power vested by the Constitution in the Legislature, and then to enforce it according to its true meaning in cases as they arise. While the consequences to which a particular construction or application of a statute would lead have an important bearing in determining what may have been the intent of the Legislature in using words of doubtful import (*Greene v. Greene*, 2 Gray [Mass.] 361, 364, 61 Am. Dec. 454), they cannot control a plain rule of positive law established by clear language in a legislative mandate. The words 'personal injury' had meaning in the law prior to the passage of the Workmen's Compensation Act sufficiently definite and well defined clearly to include the kind of personal harm here disclosed, so that it hardly can be assumed under all the circumstances that the Legislature used them in a different or unusually constricted sense. There are no conditions which warrant a judicial interpretation of the words 'personal injury' in the Act as meaning the same as 'personal injury by accident,' or as excluding from the scope of 'personal injuries'

used therein, whatever lesion or change in any part of the system produces harm or pain or a lessened faculty of the natural use of any bodily activity or capability.⁴⁴ Heat prostration sustained in the course of employment is an "injury," within the meaning of the Compensation Acts.⁴⁵ As used in the Nevada Act, the words "injury" or "injured" refer to an event or mishap not expected or designed.⁴⁶

The acceleration or aggravation of a pre-existing ailment may be a personal injury.⁴⁷

§ 93. — Federal Act

The word "injury" is used comprehensively in the federal Act to embrace all the cases of incapacity to continue the work of the

those instances where a diseased physical condition may have invited, or rendered the employé unusually susceptible to, 'personal injury.' It may be that the Legislature intended a more narrow field than actually was described by the words used. But, if that be so, the remedy must be sought from the Legislature. There are no means by which the court can ascertain the purpose and effect of a statute, except from the words used when given their common and approved meaning." *Bergeron, Pet'r*, 220 Mass. 472, 475, 107 N. E. 1007.

⁴⁴ Compensation was properly allowed for permanent incapacity of both legs from paralysis, due to an injury to the spinal cord, though, in a technical sense, there was no direct injury to the legs. The word "injury," as it should be construed in this connection, includes whatever lesion or change in any part of the system produces harm or pain or a lessened faculty of the natural use of any bodily activity or capability. (St. 1911, c. 751, pt. 2, § 11, amended by St. 1913, c. 696) *In re Burns*, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787. Where an employé, after carrying a heavy bag of coal and while reaching for another, falls to the ground in a dying condition in consequence of the muscles of his heart being overtaxed by his exertion, his death is caused by an "injury" within the meaning of the Workmen's Compensation Act. *In re Fisher*, 220 Mass. 581, 108 N. E. 361.

An unusual exertion or strain, resulting in incapacity for work, is an

⁴⁵ *Ress v. Youngstown Sheet & Tube Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 194.

⁴⁶ *Rep. Nev. Indus. Com.* 1913-14, p. 25.

⁴⁷ *Hartz v. Hartford Faience Co.*, 90 Conn. 539, 97 Atl. 1020. See § 98, post.

employment, including all cases where as a result of the employé's occupation he becomes unable to carry on his work.⁴⁸ Where a bodily affliction is not the result of a gradual process or slow accumulation of trifling hurts or of a constant repetition of known or injurious effects, but, though caused without definite accident, develops rapidly and is recurrable to a fixed time, and is neither a necessary result nor a result reasonably to be feared, it is an injury within the federal Act, regardless of the fact that it is the natural result of surrounding conditions.⁴⁹ But a disability referable to no definite accident or occurrence, though arising in the course of employment, involving chiefly a gradual weakening, wearing out, or breaking down of the employé, is not an injury within the Act.⁵⁰ An employé obeying orders of his superior and submitting to vaccination, and disabled thereby, is injured within the Act,⁵¹ as is a plate printer following his usual occupation and sustaining a sprain of the wrist and a rupture of the synovial sac.⁵² Frozen feet constitute an injury.⁵³ An injury caused by a strain due to the condi-

injury within the meaning of the Compensation Act. *Hackford v. Veeder & Brown*, *The Bulletin*, N. Y., vol. 1, No. 8, p. 10.

⁴⁸ *In re Clark*, 27 Op. Atty. Gen., Op. Sol. Dept. of L. (1915) 200.

⁴⁹ *In re Irving*, Op. Sol. Dept. of L. 249. Where claimant was engaged in scaling the inner plating of a caisson, and particles of the red lead being scaled became imbedded in sore spots on the face or were inhaled into the system, causing incapacity, it was held to be an injury. *In re Thayer*, Op. Sol. Dept. of L. 266.

⁵⁰ *In re Hewitt*, Op. Sol. Dept. of L. 248.

The statute, if not restricted to injuries of an accidental nature, is at least confined to injuries which are referable to some particular event capable of being fixed in point of time. *In re Clark*, Op. Sol. Dept. of L. 188. *In re Flora*, Op. Sol. Dept. of L. 226.

⁵¹ An employé, vaccinated by direction of his superior officer upon recommendation of local health authorities and the public health service, is injured within the act if incapacity follows. *In re Haley*, Op. Sol. Dept. of L. 255.

⁵² *In re Clark*, Op. Sol. Dept. of L. 188.

⁵³ *In re Luttrell*, Op. Sol. Dept. of L. 219.

tion under which the work must be performed is within the Act,⁵⁴ but the breaking of an artificial leg is not.⁵⁵

§ 94. Physical violence or not

At common law the incurring of a disease or harm to health is such a personal wrong as to warrant a recovery if the other elements of liability for tort are present.⁵⁶ In recent years the majority of actions grounded upon some physical violence has tended to emphasize the aspect of injury which depends upon visual contact or direct lesion. But that is by no means the exclusive signification of the word either in common speech or in legal use.⁵⁷ The words "personal injury by accident," used in many of the Acts, are not limited to injuries caused by violence, but include disease incurred by accident.⁵⁸ "Personal injury" within the Massachusetts Act is not limited to injuries caused by external violence, physical force, or as the result of "accident" in the sense in which that word is to be given a much broader and more liberal meaning, and includes any bodily injury.⁵⁹ It includes any injury or disease which arises out of and in the course of the employment, which

⁵⁴ An injury caused by a strain from rushing work under a time-record efficiency system, whereby a strong, healthy man was kept under a high, nerve-racking tension during every minute of an eight-hour workday, is an injury within the act. In re Manning, Op. Sol. Dept. of L. 279. An injury caused by continuous strain, due to the nature of the work, and which develops gradually, has been held to be an injury covered by the act. In re Sargent, Op. Sol. Dept. of L. 275 (overruling Crellin Case).

⁵⁵ In re Rodriguez, Op. Sol. Dept. of L. 227.

⁵⁶ In re Hurle, 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919.

⁵⁷ Id.

⁵⁸ Johnson v. London Guarantee & Accident Co., Ltd., 217 Mass. 388, 104 N. E. 735.

⁵⁹ (St. 1911, c. 751, as amended by St. 1912, c. 571) Johnson v. London Guarantee & Accident Co., Ltd., 217 Mass. 388, 104 N. E. 735.

causes incapacity for work, and thereby impairs the ability of the employé for earning wages.⁶⁰

§ 95. Nervous shock

"Personal injury by accident" includes a nervous shock.⁶¹ The nervous condition of an injured workman is personal injury by accident where he regains his muscular condition, but honestly believes himself unable to work,⁶² as is also a nervous shock, pro-

⁶⁰ Id.

⁶¹ *Yates v. South Kirby, Featherstone and Hemsworth Collieries, Ltd.* (1910) 3 B. W. C. C. 418, C. A. "It can be said that nervous shock due to accident is as much personal injury due to accident as a broken leg." *Farwell, L. J.*, in *Yates v. South Kirby, Featherstone and Hemsworth Collieries, Ltd.* (1910) 3 B. W. C. C. 418, C. A.

A motorman, whose car collided with another, and who became insane as a result of the shock, suffered an accidental injury. *McMahon v. Interborough Rapid Transit Co.*, 5 N. Y. St. Dep. Rep. 374.

⁶² *Eaves v. Blaenclydach Colliery Co., Ltd.* (1910) 2 B. W. C. C. 329, A. C.

That the workman, but for want of sufficient will power, could have thrown off the condition of hysterical blindness and neurosis caused by the injury, did not deprive him of his right to compensation. *In re Hunnewell*, 220 Mass. 351, 107 N. E. 934.

Compensation may be awarded for traumatic neurosis. *Finley v. San Francisco Stevedoring Co.*, 2 Cal. I. A. C. Dec. 174. Where a workman receives a blow on the head, causing no apparent serious injury, but inducing him to sincerely believe that he is incurably injured, which belief incapacitates him for work, he is entitled to compensation until his mental balance is regained. *Rollnik v. Lankershim*, 1 Cal. I. A. C. Dec. 45. Where there is serious injury to the spinal column of a workman caused by a fall, which results in a long period of total disability, followed by a period of partial disability, during which the workman is in a nervous or hysterical condition known as traumatic neurosis, he is entitled to disability indemnity for the loss of earnings during the latter period. *Manfredi v. Union Sugar Co.*, 2 Cal. I. A. C. Dec. 920. Where an employé, who is injured by accident, and who after the healing of his injuries complains of pain and suffering, loses weight, and gradually becomes an invalid, without any physical cause therefor, and his condition is pronounced by medical experts to be traumatic neurosis, a mental or hysterical condition, which is real and not simulated, though without a physical basis, he is entitled to compensation. Such condition has long been recognized as a natural consequence of nervous shock accompanying bodily injury (*Hakala v. Jacobsen-bade Co.*, 1 Cal. I.

ducing neurasthenia and incapacity, received by a workman while assisting an injured fellow workman.⁶³ The possibility of witnessing some shocking injury to a fellow workman and receiving a nervous shock therefrom is a risk of any employment. Such nervous shock arises out of and is incidental to the employment, and is compensable if it definitely causes the injury. Thus, where an employé is present at the scene of the death by accident of several of his fellow employés while working on the employer's premises, and attempts to aid in their rescue, and becomes insane in consequence of the shock incident to the excitement, peril, and sense of duty to aid in the rescue, such is disability caused by accident. There is no distinction between such mental breakdown and a physical breakdown in so far as they affect the right to compensation. It is only essential in such case that the breakdown, whether mental or physical, be proximately caused by accident occurring in the course of the employment.⁶⁴ It has been held by the Michigan Industrial Accident Board, however, that where death or disability results from fright, unaccompanied by any immediate physical injury, no compensation can be had.⁶⁵

§ 96. Hernia

A hernia or rupture due to the employé's exertions in the performance of his work is compensable⁶⁶ where it is caused directly,

A. C. Dec. 32S), and is to be distinguished from malingering (*Kelly v. Pacific Electric Ry. Co.*, 1 Cal. I. A. Dec. 150). "It seems to be entirely a fallacy to say that a man's right to compensation ceases when the muscular mischief is ended, but the nervous or hysterical effects still remain." *Cozens-Hardy, M. R.*, in *Eaves v. Blaenclwydach Colliery Co., Ltd.* (1910) 2 B. W. C. C. 329, C. A.

⁶³ *Yates v. South Kirby, Featherstone and Hemsworth Collieries, Ltd.*, 3 B. W. C. C. 418, C. A.

⁶⁴ *Reich v. City of Imperial*, 1 Cal. I. A. C. Dec. 337.

⁶⁵ *Visser v. Mich. Cabinet Co., Op. Mich. Indus. Acc. Bd.*, Bul. No. 3, p. 24.

⁶⁶ *Zappala v. Industrial Ins. Commission*, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295.

A workman, who ruptured himself while trying to turn a wheel without

and not merely aggravated, by the accident,⁶⁷ notwithstanding a prior structural weakness in the region where the injury occurred.⁶⁸ But where an existing hernia is well formed and of long standing, the descent of the bowel into the hernial sac is an incident of such great likelihood to occur at any time from any cause, or from no cause, as not to be a proper charge against the employer or industry.⁶⁹ In Coley's monograph on Hernia in Keen's Surgery, vol. 4, p. 27, it is said: "Kaufman of Zurich has made a careful study of this question based upon medical jurisprudence. These are his conclusions: A hernia, in order to be entitled to any indemnity, must appear suddenly, must be accompanied by pain, and must immediately follow an accident. There must be proof that hernia did not exist prior to the accident."⁷⁰

Relative to hernia the Nevada Industrial Commission made the following statements and adopted the following rules, which will prove of general interest:

"Hernia has been well said to be the stumbling block in the amicable adjustment of personal injury cases. Physicians agree that hernia, or rupture, due to an accident—real traumatic hernia—is rarely met with, and that most of the so-called ruptures at-

any wrench or jerk, suffered a personal injury by accident. *Fenton v. Thorley & Co., Ltd.* (1903) 5 W. C. C. 1, H. L.

⁶⁷ *Puljevich v. Lime Rock Sugar Co.*, 1 Cal. I. A. C. Dec. 165.

⁶⁸ *Bell v. Hayes-Ionia Co.* (Mich.) 158 N. W. 179.

Where hernia was caused by the strain from lifting a gasoline engine, the workman was entitled to compensation, though the hernia would not have resulted but for a pre-existing physical weakness. *Robbins v. Original Gas Engine Co.* (Mich.) 157 N. W. 437.

⁶⁹ *Kavas v. Northern Electric R. R. Co.*, 2 Cal. I. A. C. Dec. 196; *United States Fidelity & Guaranty Co. v. Rawling*, 1 Cal. I. A. C. Dec. 64.

A claim based on incapacity caused by hernia following an injury may be allowed, though medical examination shows prior existence of hernia. In *re Miro*, Op. Sol. Dept. of L. 728.

⁷⁰ *Massa v. Crowe*, 1 Conn. Comp. Dec. 86. In *Dufrene v. Risdon Tool & Machine Co.*, 1 Conn. Comp. Dec. 411, compensation was awarded for a hernia due to overexertion in lifting; claimant feeling a sudden severe pain in the groin at the time.

tributed to accidents or "strains" during employment are not the result of employment, but coincident with employment. Courts and Commissions, however, disagree—failing to recognize that this subject is purely scientific and belongs more to the province of medicine rather than law.

"Very briefly, the following is the accepted teaching of medical science regarding hernia the world over, and which has been for fifteen or twenty years. This teaching is corroborated from a surgical standpoint by all noted surgeons: In a perfectly normal man, one in whom the canal is closed, as nature intended it should be during childhood, it is impossible to produce a hernia by traumatism or accident alone, unless the accident be so great as to puncture or rend the abdominal or belly wall itself. This is a real rupture. This real and true condition is very rare. The common or so-called rupture, which is really all we meet with, is a diseased condition present, which exists from birth, and which predisposes this man to a rupture, showing, so that he can see it most any time. This 'sac' in which the rupture shows up must be present to start with, or may be months or years in forming. It cannot be formed at once. If the man is honest and happens to be at his regular labor, of course he attributes the showing up of his so-called rupture to whatever force is applied to the abdomen. It is not an accident. The fact is it is simply the final step in the evolution of the disease called hernia.

"A hernia cannot, therefore, be considered a permanent partial disability due to an injury. However, it is a permanent, partial disability. It cannot be so considered even in an honest man who really notices the swelling for the first time while at work. Neither can it be so considered by a dishonest man, who had his hernia for a long time and states that he noticed it after a strain, etc. The fact remains the same; i. e., that it is a diseased condition, a permanent partial disability a long time in coming.

"In adopting a ruling on hernia, this Commission has been guided by the advice of its chief medical adviser. It has leaned towards

the medico-legal side of the controversy rather than the purely legal point of view. Without wishing to either express or imply disrespect for court decisions, we cannot accept their opinion as the final word on a purely medical question. To do so would leave this question perplexing and unsettled. Where there is a direct question stated with all the facts presented, it would seem as if a physician were as competent to express a sane opinion on a purely medical question.

"Medical science teaches and has taught for the past twenty years that which is now accepted as a medical and scientific fact, corroborated as such by the foremost surgeons and anatomists of the world; that is, that hernia (or so-called rupture) is a disease ordinarily developing gradually, and which is very rarely the result of an accident.

"With the object of treating the subject of hernia justly to both employer and employé, and in accordance with medical and scientific teachings and facts, the Commission rule as follows:

"Rule I. Real traumatic hernia is an injury to the abdominal (belly) wall of sufficient severity to puncture or tear asunder said wall and permit the exposure or protruding of the abdominal viscera in some part thereof. Such an injury will be compensated as a temporary, total disability, and as a partial permanent disability, depending upon the lessening by the injury of individual's earning capacity.

"Rule II. All other hernias, whenever occurring or discovered and whatsoever the cause, except as under rule I, are considered to be diseases causing incapacitating conditions, or permanent partial disability; but the permanent, partial disability and the causes of such are considered to be as shown by medical facts, to have either existed from birth, to have been years in formation, or both, and are not compensatory except as provided under rule III.

"Rule III. All cases coming under rule II in which it can be proven: First, that the immediate cause, which calls attention to the presence of the hernia, was a sudden effort or severe strain or blow

received while in the course of employment; second, that the descent of the hernia occurred immediately following the cause; third, that the cause was accompanied, or immediately followed, by severe pain in the hernial region; fourth, that the above facts were of such severity that the same were noticed by the claimant and communicated immediately to one or more persons—are considered to be aggravations of previous ailments or diseases, and will be compensated as such for time loss only and to a limited extent only, depending upon the nature of the proof submitted and the result of the local medical examination.

“Rule IV. Rules I, II, and III, respectively, are adopted as general, tentative rules covering hernia cases, and are subject to revision, change, amplification, or alteration with, or without, notice. The Commission will not be bound by precedent. It holds that every case differs in some material feature from almost any other, and that each case depends for its decision upon the particular facts.”⁷¹

DIVISION III.—DISEASES

§ 97. Diseases compensable as injuries

There are many diseases readily distinguishable from occupational diseases,⁷² which may be, and frequently are, contracted by accident, and are compensable as personal injuries by accident.⁷³ The fact that an injury may be classed as a disease does not prevent

⁷¹ Rep. Nev. Indus. Com. 1913-14, p. 16.

⁷² *Adams v. Acme White Lead & Color Wks.*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283.

⁷³ *Heileman Brewing Co. v. Industrial Commission*, 161 Wis. 46, 152 N. W. 446; *Voelz v. Industrial Com'n*, 161 Wis. 240, 152 N. W. 830. Diseases caused by accident to employes, while “performing services growing out of and incidental to the employment,” are injuries within the contemplation of the Workmen's Compensation Act. *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273.

A disease, not contracted, but caused by physical means, under circum-

it from being an accidental injury. Sunstroke, though classed as a disease, is not such a disease as may be contracted in the same sense as ordinary diseases may be, but is an injury of an accidental

stances involving an element of accident, is an injury within the federal Act. In *re Murray*, Op. Sol. Dept. of L. 239. Disability resulting from a disease directly due to a physical injury of an accidental nature, or lighted up thereby, is an injury. In *re Ellmore*, Op. Sol. Dept. of L. 245. A disease, not contracted, but caused by physical means, under circumstances involving an element of accident, is an injury. In *re Withy*, Op. Sol. Dept. of L. 273. Incapacity caused by the inhalation of fine dust into the lungs in the course of employment is held to be an injury. In *re Edmonds*, Op. Sol. Dept. of L. 259.

Loss of vision by wood alcohol poisoning is not an occupational disease. *De Witt v. Jacoby Bros.*, 1 Cal. I. A. C. Dec. 170. The evidence showed that the workman was not suffering from the results of carbon monoxide poisoning, where it showed that there was no suffocation while at work sufficient to cause loss of consciousness, and failed to show exposure to a low percentage of carbon monoxide for a long period of time theretofore. *Burgess v. Star*, 2 Cal. I. A. C. 269.

Where an employé was working on a punch press as a machinist, and while so working, felt a numbness in hand and arm, subsequently losing the power of his arm, which became totally disabled as a result of the jolting and jarring of the machine, that injury comes within the Workmen's Compensation Act. *Reid v. Thomas Elevator Co.*, Bulletin No. 1, Ill., p. 144.

Petitioner was not injured by an accident where, after ten days' service in defendant's bleachery, he was affected with a rash which was pronounced to be a condition of eczema that might have been caused by acids, the trial judge having found that the petitioner's condition was caused by contact with the dampened goods. *Liondale Bleach, Dye & Paint Works v. Riker*, 85 N. J. Law, 426, 89 Atl. 929.

Discases constituting injuries: An *abscess* developing after an accident. *Cripps v. Aetna Life Ins. Co.*, 2 Mass. Wk. Comp. Cases, 68 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct. Mass., 216 Mass. 586, Ann. Cas. 1915B, 828, 104 N. E. 565). *Apoplexy*, superinduced by over-exertion. In *re Ellen Fair*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 83; *Aitken v. Pinlayson, Bousfield & Co., Ltd.* (1914) 7 B. W. C. C. 918, Ct. of Sess. [An apoplectic shock has been held not an injury, when there was no accident. *Ledoux v. Employers' Liability Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 493 (decision of Com. of Arb.).] *Blood poison*, which develops from a personal injury. Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 26. *Acute bronchitis* and lead poisoning contracted as a result of the inhalation of gas fumes from an oxyacetylene-burning machine. In *re Arata*, Op. Sol. Dept. of L. 264. *Cardiac hypertrophy* developed from the inhalation of the

nature.⁷⁴ In a New York case it appeared that the deceased workman inadvertently came in physical contact with poison ivy, and

fumes of ether in the course of employment in a "mixing house" at the Naval Proving Ground at Indianhead, Md. In re Clark, Op. Sol. of L. 270. *Erysipelas* resulting from frost-bite, which caused a lesion of the skin and tissues. Larke v. John Hancock Mut. Life Ins. Co., 90 Conn. 303, 97 Atl. 320. *Hysterical neurosis* which comes as a result of an injury, the one injured being entitled to compensation during the continuance of the disability arising from that cause. Linsner v. Consumers' Ice & Fuel Co., Mich. Wk. Comp. Cases (1916), 61. *Infection* of the hand and a secondary infection of the leg, resulting from an abrasion of the skin and the accidental introduction of a foreign substance. In re Green, Op. Sol. Dept. of L. 237. A gonorrhœal infection partially destroying the sight of a workman's eye. Cline v. Studebaker Corporation (Mich.) 155 N. W. 519, L. R. A. 1916C, 1139. *Kidney trouble* due to a sudden chill contracted by working for a fortnight in water up to the knees. Sheerin v. Clyton & Co., Ltd. (1910) 2 I. R. 105, C. A. *Paralysis* which resulted from the rupture of a small blood vessel in consequence of the unusual heat and overexertion by the employé. La Veck v. Park, Davis & Co. (Mich.) 157 N. W. 72. *Pleurisy and tuberculosis* resulting where an employé, in order to save being hurt when the crane which he was operating broke, jumped into a river. (Workmen's Compensation Law, § 3, subd. 7) Rist v. Larkin & Sangster, 171 App. Div. 71, 156 N. Y. Supp. 875. *Pneumonia* contracted by a miner by returning to his working place three minutes after he had fired a shot, and while it was still full of smoke. Kelly v. Auchenlea Colliery Co., Ltd. (1911) 4 B. W. C. C. 417, Ct. of Sess. *Pneumonia* resulting from a chill contracted where a defect in the pump in a wet pit allowed water to accumulate and compelled the miners to leave their work, and while they were waiting some twenty minutes for the cage icy cold water arose to their knees. Alloa Coal Co., Ltd., v. Drylie (1913) 6 B. W. C. C. 398, Ct. of Sess. *Pneumonia* due to a chill contracted by a miner who had to wait for an hour and a half for the cage at the foot of a shaft in a draught of cold air, because of a breakdown in another shaft. Brown v. Watson, Ltd. (1914) 7 B. W. C. C. 259, H. L., and (1913) 6 B. W. C. C. 416, Ct. of Sess. *Sciatica* contracted by a boatman in consequence of jumping, to escape drowning, from a ketch he had been piloting into his own small boat, which was nearly filled with water by the sudden weight. Barbeary v. Chugg (1915) 8 B. W. C. C. 37, C. A. *Septicæmia* contracted by an injured workman and causing his death. (Workmen's Compensation Act, § 3, subd. 7) Rist v. Larkin & Sangster, 171 App. Div. 71, 156 N. Y. Supp. 875. *Tetanus* resulting where a collier's foot was injured by a fall of coal. Stapleton v. Dinnington Main Coal Co., Ltd. (1912) 5 B. W. C. C. 602, C. A. *An ulcer* which develops from a bruise. Hoffman v. Korn, 2 Cal. I. A. C. Dec. 166.

⁷⁴ In re Walsh, Op. Sol. Dept. of L. 231.

that the poison to his system caused thereby resulted in sickness which reduced his power of resistance and made him susceptible to bronchitis. The attending physician treated him for ivy poisoning, and then found that he had developed more or less infection, the blebs breaking open, and in that way became infected, and developed into oedema of the lungs, and he died quite suddenly. It appeared, as found by the Commission, that the ivy and septic poisoning was the remote cause of his death, and that his poisoned condition predisposed him to the acute congestion of the lungs of which he died. It was held that the injury could not be called an occupational disease, and that therefore compensation could be awarded.⁷⁵ A disease is ordinarily contracted by accident where a workman becomes afflicted with typhoid fever from drinking water furnished him by his employer,⁷⁶ or becomes chilled from standing in cold water while at work in a coal pit, and contracts pneumonia as a result,⁷⁷ or where the bacillus of anthrax alights

⁷⁵ *Plass v. New England Ry. Co.*, 169 App. Div. 826, 155 N. Y. Supp. 854.

⁷⁶ "The fact that deceased became afflicted with typhoid fever while in defendant's service would not in the sense of the statute constitute a charge that he sustained an accidental injury; but the allegations go further, and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant as an incident to his employment. These facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap incident to his employment. These allegations fulfill the requirements of the statute that the drinking of the polluted water by the deceased was an accidental occurrence, while he was 'performing services growing out of and incidental to his employment.'" *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273. But in a case under the federal Act (*In re Potter*, Op. Sol. Dept. of L. 272) it was decided otherwise. The employé in this case developed typhoid fever, which turned into pneumonia and empyema. It was claimed that the typhoid was caused by drinking water which had been contaminated and which was furnished by the government. It was decided that the cause of incapacity was not of an accidental nature, and therefore not an injury within the meaning of the act.

⁷⁷ *Drylie*, a workman in a coal pit, through accident was exposed to icy cold water up to his knees and became chilled, which made him sick, result-

on a wool sorter's eye and he dies from the disease.⁷⁸ The phrase "personal injuries" may include the case of a workman suffering a total loss of sight in both eyes from an acute attack of optic neuritis caused by coal tar gases escaping from furnaces about which he worked,⁷⁹ and a case where the inhalation of damp smoke and drenching with water resulted in lobar pneumonia.⁸⁰ But injuries sustained from a fall due to a faint or an epileptic seizure do not entitle a workman to compensation unless there is some peculiar hazard connected with the place of the fall.⁸¹

§ 98. Previously existing diseases

It is fundamental principle that the employer takes the employé subject to his physical condition when he enters his employment. Compensation losses are not made solely for the protection of

ing in pneumonia, of which he died. Upon the evidence adduced the court found that the pneumonia was caused by the chill, and that death resulted from "injury by accident." *Alloa Coal Co. v. Drylie*, 1 Scot. L. T. 167, 4 N. C. C. A. 899.

⁷⁸ *Brintons, Ltd., v. Turvey* (1904) 6 W. C. C. 1, C. A., and (1905) 7 W. C. C. 1, H. L.

In *Higgins v. Campbell*, 1, K. B. 328, affirmed A. C. 230, a workman employed in a wool-combing factory, in which there was wool which had been taken from sheep infected with anthrax, contracted that disease by contact with the anthrax bacillus which was present in the wool. In that case compensation was allowed, and it was held that the workman was injured by accident arising out of and in the course of his employment, within the meaning of the English Act of 1897. The court treated the disease as caused by an accident, by one particular germ striking the eyeball. It was considered that the accidental alighting of the bacillus from the infected wool on the eyeball caused the injury. It was treated as if a spark from an anvil hit the eye. This may be seen from the statement of Lord Macnaghten: "It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye."

⁷⁹ (Wk. Comp. Act 1911, pt. 2, § 1) In *re Hurle*, 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919.

⁸⁰ In *re McPhee*, 222 Mass. 1, 109 N. E. 633.

⁸¹ *Kowalski v. Trostel & Sons*, Rep. Wis. Indus. Com. p. 17.

employés in normal physical condition, but for those also who are subnormal,⁸² except in exaggerated cases where, in consequence of constitutional diseases or disorders, such as tuberculosis or

⁸² *Fischer v. Union Ice Co.*, 2 Cal. I. A. C. Dec. 72. The Compensation Act does not make any exception for cases of injury to men whose health is impaired or below the normal standard. Neither does it except from its benefits the man who carried in his body a latent disease which in case of injury may retard or prevent recovery. It applies to every man who suffers disability from accidental injury, and does not exclude the weak or less fortunate physically. *Hills v. Oval Wood Dish Co.*, Mich. Wk. Comp. Cases (1916), 11.

The above-stated principle was applied in each of the following cases: Where the workman had an abnormally high blood pressure, rendering him liable to hemorrhage in the eyes at any time when engaging in violent work or exercise, and a hemorrhage did occur while he was doing work in the course of his employment, he was entitled to compensation. *Gurney v. Los Angeles Soap Co.*, 1 Cal. I. A. C. Dec. 163. That the fractures of the workman's legs were due to a disease of the bones would not, unless the bones were made brittle by some virulent disease of long standing, overcome the rule that the employer is responsible for results of injury, though such results be more serious than would be the case with a normal person. *Block v. Mutual Biscuit Co.*, 2 Cal. I. A. C. Dec. 274. A slight prior inflammation, causing redness of the eyelids and making the eyes vulnerable to heat and smoke, did not deprive a fireman of disability indemnity for blindness, where the heat and smoke seriously aggravated the previous condition, so as to make incurable what might have been easily cured. *McGrath v. City of San Jose*, 2 Cal. I. A. C. Dec. 349. Where, following an accidental wrench to the back, an employé developed osteo-arthritis, of which no symptoms had theretofore appeared, although investigations showed that a chronic disease of the spine had begun, but disability had been precipitated only by the accident, and there were no indications of chronic infectious disease to which the osteo-arthritis might be attributable, the employer was liable for compensation. *Turner v. City of Santa Cruz*, 2 Cal. I. A. C. Dec. 991. Where there was involved no tearing of the ligaments or fascia of the workman's feet, but rather a disability which developed as a result of his being in bed for many weeks, and later extraordinary use of his right foot while on crutches, his pre-existing flat-foot condition did not constitute a defense against a claim for disability resulting from the injury to such flat feet. *Frech v. San Joaquin Light & Power Corp.*, 2 Cal. I. A. C. Dec. 948. It is no defense that the injuries would not have been as great, except for the effect of prior injury received before entering the employment of the defendant. *Bedini v. Northwestern Pacific R. R. Co.*, 1 Cal. I. A. C. Dec. 312.

syphilis, an injured workman suffers for a period far beyond what would be the case if he were in ordinary health,⁸³ in which cases compensation will be awarded only for the longest period of disability for which a normal person sustaining the same accidental injury would reasonably be disabled.⁸⁴ It follows that neither a congenital weakness⁸⁵ nor a pre-existing disease will render non-compensable an injury received under conditions which would otherwise make it compensable.⁸⁶ But this does not, of course, dis-

⁸³ *Walters v. Brune*, 2 Cal. I. A. C. Dec. 249.

⁸⁴ *Van Dalsem v. Di Fiore*, 1 Cal. I. A. C. Dec. 229.

Where the employé sustains a slight injury which normally would not result in disability lasting more than a few weeks, and because of a previously existing disease the injury results in a continuing disability, such continuing disability is not compensable beyond the normal period of disability resulting from the injury. *Johnson v. Lowe*, 2 Cal. I. A. C. Dec. 568. Where an employé, who had long been suffering from a slow tubercular process in progress in the lungs, falls off in front of a handcar and is crushed and bruised under it, he is entitled to compensation for the disability proximately caused by the accident, but not for the continuing disability due to depressed vitality, change of habits and surroundings, and poor hygiene incident to failing resources, these not being caused by the accident, but only remotely attributable to it. *Masich v. Northwestern Pacific R. R. Co.*, 2 Cal. I. A. C. Dec. 545.

⁸⁵ A claim is not barred by evidence of congenital weakness which may have contributed to cause an injury to result in incapacity. *In re Mulverhill*, Op. Sol. Dept. of L. 672.

⁸⁶ *In re Madden*, 222 Mass. 487, 111 N. E. 379; *Forrest v. Roper Furniture Co.*, 187 Ill. App. 504.

Decedent, a man over middle age, working in defendant's woodworking shop, at the time of seizure just preceding his death, was furrowing certain posts, pushing them forward against the knives of the furrowing machine by pressing his abdomen forcibly against the end of the post. When he had finished part of them, he sat down, evidently in great pain, and died three days later from internal hemorrhage, which defendant claimed was produced by rupture resulting from cancer. The court held that, though decedent was suffering from internal cancer, such facts warranted a finding that the unusual pressure of the posts on parts weakened by disease was the proximate cause of his death, and hence it was caused by an accident arising out of and in the course of his employment. *Voorhees v. Smith Schoonmaker Co.*, 86 N. J. Law, 500, 92 Atl. 280, which cites the case of *Jones v. Public Service*

Ry. Co., 86 N. J. Law, 646, 92 Atl. 397, holding that, where a passenger suffering from chronic Bright's disease and a valvular disease of the heart, dropped while walking on the street about 20 hours after derailment of the car on which he was riding, the question whether the accident was the cause of his death was for the jury.

Though there is a diseased condition before the injury, and it would not have caused death but for this antecedent condition, still if septicæmia ensues naturally, actually, and apparently unavoidably from the injuries, the case is compensable. *Mazzarisi v. Ward*, 170 App. Div. 868, 156 N. Y. Supp. 964.

Where an employé has previously been suffering from tuberculosis of the lungs, which condition had become quiescent, and on the happening of the accident, causing a fractured rib, such tubercular condition is lighted up, compensation is payable for increased disability due to the recurrence of the tuberculosis. *Birk v. Matson Navigation Co.*, 2 Cal. I. A. C. Dec. 177. Where a carpenter at work in a cramped position on his knees strained his knee upon arising, which strain results in prolonged disability, and on being operated upon it was discovered that he was affected with fibrolipoma or fatty tumor under the kneecap, not caused by the accident, but previously in existence, though no impairment of the knee had been suffered prior thereto, the disability was compensable. *Globe Indemnity Co. v. Terry*, 2 Cal. I. A. C. Dec. 682.

In *Schmidt v. O. K. Baking Co.*, 1 Conn. Comp. Dec. 683, on rehearing, it was held that the previous health of the employé is not a factor, provided that it be shown that the incapacity or death of the employé was due to some injury that would be otherwise subject to compensation. In *Flotat v. Union Hardware Co.*, 1 Conn. Comp. Dec. 5, it was held that injuries received two years prior to the passage of the Act, which aggravated the effect of a later compensable injury by accident, were not to be considered.

Where a foundry helper received a slight burn from the spattering of hot iron, and later received a second burn in the same place, and also was suffering from a varicose condition, which was aggravated by such burns, necessitating an operation, he was entitled to compensation. *Mustaikas v. Casualty Co. of America*, 2 Mass. Wk. Comp. Cases, 547 (decision of Com. of Arb.). While the employé, a boy of 16, was operating a milling machine, a piece of emery flew into his right eye. A fellow employé removed the particle of emery a day or two thereafter, using the end of a bone or ivory handle of a tooth brush for the purpose. The eye was badly inflamed at the time of the removal of the emery, and it was shown that the injury itself, together with the physical effects of removing the emery so aggravated and accelerated a sluggish, inflammatory disease of a chronic nature as to cause total incapacity for work. The classification of the disordered condition of the eye before the injury could not be determined with certainty. The Committee of Arbitration and Board held that the employé was entitled to compen-

sation. *Fleming v. Mass. Employés' Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 411 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

Decisions under federal Act.—A physical injury, which aggravates a previous ailment, so as to disable an employé, where disability would not have been caused, but for such previous ailment, is an injury within the Act. In *re Jarvis*, Op. Sol. Dept. of L. 219. An accidental injury, received in the course of employment, but arising in consequence of a disease, is an injury within the Act; the accident being regarded as the proximate, and the disease as the remote, cause. In *re Clements*, Op. Sol. Dept. of L. 228. An injury by a fall, which lights up or aggravates a previous ailment, causing incapacity, was held to be an injury within the Act. In *re Springer*, Op. Sol. Dept. of L. 267. A physical injury, brass poisoning, which aggravates a previous ailment, here tuberculosis, so as to disable an employé, when disability would not have been caused, but for such previous ailment, is an injury within the Act. In *re Devine*, Op. Sol. Dept. of L. 277. Claimant suffered an injury which aggravated an existing acute nephritis, causing incapacity; the injury itself not being sufficient to produce incapacity. Claim held to have been established. In *re Hickman*, Dec. 1, 1913, Op. Sol. Dept. of L. p. 751. An injury in the nature of a strain, which lights up, excites, or aggravates a pre-existing ailment, thereby producing incapacity when the existing ailment had not previously caused incapacity, was held to be the result of the injury. In *re Halloran*, Op. Sol. Dept. of L. 756.

Injuries held accidental and compensable under English Act, notwithstanding previously existing disease: Where a workman who had an aneurism of the aorta, which was so far advanced that it was apt to burst at any time, was ruptured while tightening a nut with a spanner without any extraordinary strain. *Clover, Clayton & Co. v. Hughes* (1910) 3 B. W. C. C. 275, H. L. Where a ship's fireman, with diseased arteries, had an apoplectic fit in the stokehold. *Broforst v. S. S. Blomfield (Owners of)*, (1913) 6 B. W. C. C. 613. Where a cerebral hemorrhage was sustained, through overexertion at work, by a workman whose arteries were in a bad condition. *McInnes v. Dunsmuir and Jackson* (1909) 1 B. W. C. C. 226, Ct. of Sess. Where a workman who had a weak heart, after pushing an empty truck, fell and died soon afterward. *Doughton v. Hickman, Ltd.* (1913) 6 B. W. C. C. 77, C. A. Where a workman, whose heart was so weak that any slight exertion might cause death, was descending the side of a ship by means of a rope ladder, and, the ladder twisting, he fell into the water; his death not being caused by drowning, but by heart failure. *Trodden v. McLennard & Sons, Ltd.* (1911) 4 B. W. C. C. 190, C. A. Where a man of low vital condition, who was employed as a trimmer on board a liner, suffered a heat stroke when he was drawing ashes from a ship's furnaces. *Ismay, Imrie & Co. v. Williamson* (1909) 1 B. W. C. C. 230, H. L. Where a debilitated workman, who had injured his knee, took a long time to get home on a cold day, and contracted pneumonia as a result. *Ystradowen Colliery Co., Ltd., v. Griffiths* (1910) 2 B. W. C. C. 357, C. A. Where the hand of a workman having gouty diathesis was jarred by a mishit

pense with the necessity that the injury shall have been actually caused by an accident or occurrence in the course of employment.⁸⁷

of a fellow workman with a hammer, and gout was brought on by the jar. *Lloyd v. Sugg & Co., Ltd.* (1900) 2 W. C. C. 5, C. A. Where a scullion, with an abnormally sensitive skin, sustained inflammation of the hands from washing crockery in hot water and soda. *Dotzauer v. Strand Palace Hotel, Ltd.* (1910) 3 B. W. C. C. 387. Where an osteo-arthritic condition existed prior to the accident, and the disability was thereby prolonged beyond a reasonable time for recovery from the injury, compensation could not be allowed for disability which could be attributed solely to the previous condition of osteo-arthritis. *Mullan v. Rogers*, 2 Cal. I. A. C. Dec. 927.

⁸⁷ An employé, overtaken while at work by a disability due to some unascertained internal disorder, not shown to have been caused by any accident or occurrence in the course of employment, is not injured within the act. In *re Trammell*, Op. Sol. Dept. of L. 244.

An employé had been away from his place of employment on an errand, and had returned, when suddenly, while watching his subordinate repair a warp, he fell to the floor unconscious. The employé had not been performing any act in the course of his employment; he had not made any undue exertion; he had not received any hurt or harm or injury; he had started to assist his loom fixer when he dropped to the floor, without warning of any kind, and died 20 minutes later. The medical examiner, and the physician who was called to attend him, diagnosed the case as heart failure. It was held that he died from natural causes and that his widow was not entitled to compenstion. *Lightbrown v. American Mutual Liability Ins. Co.*, 2 Mass. Wk. Comp. Cases, 243 (decision of Com. of Arb.).

Where continued disability followed the blowing of cement dust into the eyes of a workman previously suffering from trachoma, award could be made for a continued disability arising out of the disease of trachoma, which is highly infectious and ordinarily contracted without the intervention of any accident whatever, and is therefore not compensable. *Beaushamp v. Chanslor-Canfield Midway Oil Co.*, 2 Cal. I. A. C. Dec. 510. Where a girl doing fairly heavy work, as a packer of dried fruit, suddenly suffers pain and is unable to continue at her work, and an X-ray shows a condition of cervical ribs existing from birth, which of itself ordinarily results in disability before the age of 30, and explains the nature of the disability suffered, there being no evidence of an accident causing the disability to come sooner than usual, compensation cannot be awarded. *Nesselroad v. Castle Bros.*, 2 Cal. I. A. C. Dec. 529.

Where it appeared that the applicant had suffered from glaucoma of his eye several years before, and that this was a disease which was apt to recur at any time without warning, and without the victim's being able to specify

Nor does a disease which under any rational work is likely to progress so as to finally disable the employé become a "personal injury" merely because it reaches the point of disability while the work

any definite cause, and the evidence of an accident by getting glue or caustic soda in the eye was peculiarly indefinite, the disability was held due to disease, and not to an accident. *Damerow v. Paine Lumber Co.*, Rep. Wis. Indus. Com. 1914-15, p. 34.

It has been held not to be personal injury by accident where a farm laborer was feeding corn into a machine by shoving a basket into a heap of corn on the floor, lifting it four or five feet, and tilting it into the hopper of the machine, and died of heart failure while so working (*Kerr v. Ritchies* [1913] 6 B. W. C. C. 419, Ct. of Sess.); where a workman, who had an advanced case of heart disease of long standing, felt a sudden pain when he was lifting a hutch onto the rails, and was compelled to quit work (*Spence v. Baird & Co., Ltd.* [1912] 5 B. W. C. C. 542); where an omnibus driver, who had heart disease, was sitting on his omnibus at the station, and fell to the ground and died, the judge finding from the conflicting evidence that death was caused by heart disease and not by the fall (*Thackway v. Connelly & Sons* [1910] 3 B. W. C. C. 37, C. A.); where a workman's heart was in a bad condition, and he collapsed at work and died the same day from angina pectoris (*Hawkins v. Powell's Tillery Steam Coal Co., Ltd.* [1911] 4 B. W. C. C. 178, C. A.); where a workman, who had progressive heart disease, died while he was rushing to the railway depot with a package for his employer (*O'Hara v. Hayes* [1910] 3 B. W. C. C. 586, C. A.); where an old rupture became strangulated while a farm steward was driving a sow across the rough moorland, and death took place later after an operation (*Walker v. Murrays* [1911] 4 B. W. C. C. 409); where a workman, who wore a truss and was employed at heavy work as a stoker, shortly after returning from his dinner hour in good health, was found to be in great pain and died soon afterwards from strangulated hernia (*Scales v. West Norfolk Farmers' Manure & Chemical Co., Ltd.* [1913] 6 B. W. C. C. 188, C. A.); where an old hernia became strangulated while a collier was at work, but there was no evidence of strain (*Perry v. Ocean Coal Co., Ltd.* [1912] 5 B. W. C. C. 421); where a collier, who was in an advanced stage of Bright's disease, told a fellow workman he had hurt himself, and went home, shortly afterwards dying of uræmia caused by Bright's disease (*Ashley v. Lilleshall Co., Ltd.* [1912] 5 B. W. C. C. 85, C. A.); where a collier, whose arteries were so diseased as to render apoplexy probable at any time, died in working hours while engaged in the heavy work of building a pack, but there was no evidence that death supervened during exertion (*Barnabas v. Bersham Colliery Co.* [1911] 4 B. W. C. C. 119, H. L., and 3 B. W. C. C. 216, C. A.); and where a workman with heart disease quit work, saying that he had strained his heart when he was turning a

is being done.⁸⁸ Since it is only when there is a direct causal connection between the exertion of the employment and the injury that an award of compensation can be made, the material question to be determined is whether the diseased condition was the cause, or whether the employment was the proximate contributing cause. In the former case no award can be made; in the latter it ought to be made.⁸⁹ Thus, where pre-existing heart disease of an employé is accelerated to the point of disablement by the exertion and strain of the employment, not due to the character of the disease acting alone or progressing as it would in any rational work, there may be found to have been a personal injury.⁹⁰ Where it is impossible to determine how much of the disability is due to accident and how much to the pre-existing condition, the whole disability is compensable.⁹¹

heavy valve, but there was no other evidence of accident, and the judge, although disbelieving his evidence, awarded in his favor, there was not sufficient proof of accident (*Beaumont v. Underground Electric Railways Co. of London, Ltd.* [1912] 5 B. W. C. C. 247, C. A.).

⁸⁸ *In re Madden*, 222 Mass. 487, 111 N. E. 379.

⁸⁹ *Id.*

⁹⁰ (*St. 1911, c. 751*) *Id.*; *La Veck v. Parke, Davis & Co.* (Mich.) 157 N. W. 72; *In re Brightman*, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321; *Weimert v. Boston Elev. Ry.*, 216 Mass. 598, 104 N. E. 360; *Clover, Clayton & Co., Ltd., v. Hughes* [1910] A. C. 242.

Where an employé, having an impaired heart, suffered further injury through muscular exertion required of her by her work, she was entitled to compensation. *In re Madden*, 222 Mass. 487, 111 N. E. 379.

⁹¹ Where a man past 60 years of age, weighing over 200 pounds, who for a considerable time had been in so vulnerable a condition that a comparatively slight injury would be followed by a relatively long period of disability, was actively disabled by the falling upon him of a heavily loaded wheelbarrow, which caused him to twist and sprain his ankle, this being followed by continuing disability, consisting of arterio-sclerosis, leg ulcers, varicose veins, eczema of the legs, and flat foot, leaving it impossible to determine clearly how much of such disability was proximately due to the accident and how much of it was due to the pre-existing condition, all of such disability is compensable, since the employer takes the employé as he finds him. *Rouda & Spivock v. Heenan*, 3 Cal. I. A. C. Dec. 36.

DIVISION IV.—PROOF

§ 99. Proof of accident

Under Acts making the occurrence of an accident a condition to the right to recover compensation and in cases where accident is relied on, proof of injury by accident is essential to the validity of an award.⁹² While proof which is as consistent with the theory of

⁹² *Englebreton v. Industrial Accident Commission*, 170 Cal. 793, 151 Pac. 421. In *Butler v. Sheffield Farms*, *The Bulletin*, N. Y., vol. 1, No. 4, p. 11, compensation was denied where there was not sufficient evidence that claimant's fall was due to an accident.

The burden of proving that death was caused by accident rests on the party seeking compensation. *Reimers v. Proctor Pub. Co.*, 85 N. J. Law, 441, 89 Atl. 931.

The burden of proof is upon an applicant for death benefits to establish the fact of accident. *Holden v. Maryland Casualty Co.*, 1 Cal. I. A. C. Dec. 14; *Lucien v. Judson Mfg. Co.*, 1 Cal. I. A. C. Dec. 59; *Wallace v. Regents of University of California*, 1 Cal. I. A. C. Dec. 97. The burden of proof is on the employé to show that the accident is the proximate cause of the disability, and where it appears clearly that the employé's condition prior to the accident was such that an operation for hydrocele would be beneficial and was contemplated by him, the fact that he had a fall from a ladder making such operation immediately necessary is not sufficient to place the burden of responsibility on the industry for the disability. *Baine v. Libby, McNeil & Libby*, 2 Cal. I. A. C. Dec. 433. Where the only testimony as to the occurrence of an accident is to the effect that the employé felt a pain in his finger and supposed a small sliver of steel from a tack had penetrated into it, but no foreign object could be found then, or thereafter when the finger became infected, such evidence is insufficient to establish the cause of the injury as penetration by such sliver of steel. The presence of such sliver is based upon assumption only. The burden of proof is upon the applicant, and is not fulfilled by this testimony. *Seiberlich v. Buckingham & Hecht*, 1 Cal. I. A. C. Dec. 372.

Sufficiency of proof of accident.—Where a gamekeeper handled an animal on August 5th which later died of anthrax, and on August 11th he himself fell ill of the same disease and died, it was held not proven that there was an accident. *Sherwood v. Johnson* (1912) 5 B. W. C. C. 686, C. A. In *Lorenzo v. Bigelow-Hartford Carpet Co.*, 1 Conn. Comp. Dec. 216, it was held on conflicting evidence that the claimant had established by the preponderance

no accident as with the theory of accident is insufficient,⁹³ proof of accident need not negative every other possibility,⁹⁴ nor need it

of the evidence an accident in his employment, consisting of the falling of an iron roller on his foot, causing a small bruise, resulting in tuberculosis of the bones. In *Dube v. Clayton Bros., Inc.*, 1 Conn. Comp. Dec. 441, where the workman claimed to have sustained a rupture by falling against the corner of a tank, but the examining physician found no evidence of such an injury, and the other witness for the claimant testified he had been offered pay to testify that he saw claimant fall, though he did not, it was held the claimant's burden of proof was not discharged. In *Palama v. Chase Metal Works*, 1 Conn. Comp. Dec. 444, where a workman was found dead sitting on the floor in an apparently natural position, and it was shown that the electric current in an uninsulated wire from which claimant contended decedent was electrocuted had been shut off several hours before he met death, it was held the burden of proof was not discharged. In *Beckster v. Pattison*, 1 Conn. Comp. Dec. 61, where the claimant could show no specific time of injury, and could show nothing in his employment to which his blood poisoning was due, it was held that his claim was not established. The employer's report of the accident, made out by a representative of the insurance carrier, saying that the workman slipped and struck his side on the corner of a scrap box, was sufficient proof of an accident. *Griffin v. A. Roberson & Sons*, *The Bulletin*, N. Y., vol. 1, No. 10, p. 18.

⁹³ *McCoy v. Michigan Screw Co.*, 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A, 323; *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243.

It has been held that the occurrence of an accident was not proved where a collier, who was obliged to work on his knees, died from blood poisoning resulting from an abscess in his knee, but there was no evidence as to how the abscess was really caused (*Howe v. Fernhill Colliers, Ltd.* [1912] 5 B. W. C. C. 629, C. A.); where a ship's stoker, while in the tropics, went from the stokehold into a coal bunker, and was found there suffering from heat apoplexy, which might or might not have been caused by exertion in his work (*Olson v. S. S. Dorset [Owners of]*, [1913] 6 B. W. C. C. 658, C. A.); where a workman at work cried out that he had hurt his back (although no one saw what happened), and was taken to his home, in which he died a week later from intestinal obstruction (*Farmer v. Stafford, Allen & Sons, Ltd.* [1911] 4 B. W. C. C. 223, C. A.); where a ship's fireman slipped and complained of his knee, and was the next day found to be suffering from an old rupture

⁹⁴ Although the burden of proof is on the applicant, it is not necessary for him, in proving the cause of death, to negative every other possibility of death by accidental means. *W. R. Rideout Co. v. Pillsbury* (Cal. Sup.) 159 Pac. 435.

be direct and positive. It may rest on circumstances.⁹⁵ Thus, where a person is found dead, the law imparts to the circumstances

(Clarkson v. Charente Steamship Co., Ltd. [1913] 6 B. W. C. C. 540, C. A.); and where a workman, who had been climbing a steep path, was covered with mud, as if he had had a fall, complained of pain, and went home to bed, and died later, after vomiting, from an old hernia, which was not down when he went home, but came down after the vomiting (Marshall v. Sheppard [1913] 6 B. W. C. C. 571, C. A.).

⁹⁵ Heileman Brewing Co. v. Shaw, 161 Wis. 443, 154 N. W. 631.

An employer, in order to dry out an empty beer tank, burned in it 10 pounds of charcoal. Ten hours afterwards an employé went into the tank to clean it, and in a few minutes was found unconscious, and shortly thereafter died. The autopsy disclosed all the signs of carbon monoxide poisoning and no other injuries. The evidence showing that carbon monoxide would be produced and remain in said tank under such circumstances, it was held that the employé was killed by accidental poisoning. Markt v. National Brewing Co., 2 Cal. I. A. C. Dec. 881. Where an employé, whose duties as a night watchman of the warehouse and wharves of the employer, required the keeping up of steam in boilers, the making of regular rounds about the plant, and other duties, was found missing in the morning on the arrival of the other employés, no steam in the boilers, his lantern still burning, the electric lights not turned off, a card indicating 12 o'clock as the last hour on which the watchman made his rounds, the gates open, suspicious footprints about, two suspicious characters known to have been about, a pool of blood on the wharf, and a trail of blood to the edge, the torn cap of the watchman in the blood, a complete disappearance of the body of the watchman, no evidence whatever of any reason but the death of the employé to account for his disappearance, this evidence was held sufficient to warrant a finding that the employé was killed on the night in question. Shea v. Western Grain & Sugar Products Co., 2 Cal. I. A. C. Dec. 550.

Where the employé, a watchman, was found at the foot of a stairway in his employer's plant, with a lantern near him which he had carried on his rounds, this fact, together with the employer's report of accident that the injuries were supposed to have been caused by a fall from the stairway, was sufficient proof of an accident. Fogarty v. National Biscuit Co., The Bulletin, N. Y., vol. 1, No. 6, p. 9.

Circumstances held sufficient proof of accident: Where deceased was found lying under a train of cars with a hole about six inches in diameter in his abdomen. De Fazio v. Goldschmidt Detinning Co. (N. J. Sup.) 88 Atl. 705. Where a workman employed in building a bridge over a river near its outlet was last seen alive at his home some miles from his work, and his dead body was later found in the bay, there being no evidence as to how he met death. Steers v. Dunnewald, 85 N. J. Law, 449, 89 Atl. 1007. *West Virginia.* Where a

the prima facie significance that death was caused by accident rather than by suicide. This presumption persists in its legal force until overcome by evidence.⁹⁶ The existence of an accident cannot, however, be inferred without some substantial basis for the inference,⁹⁷ nor can it be established by evidence which is merely

workman in previous good health discovered, two days after an unusually heavy lift in the course of his work, that he was ruptured, and died from a surgical operation to relieve it; the operating surgeon saying that the rupture was caused by a lift. *Poccardi v. Public Service Commission*, 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299. *Wisconsin*. Where a workman in a brewery, part of whose duty was to clean up after the day's work and to turn on steam in certain machines, was found injured and unconscious on the floor of the basement of the building, and afterward died. *Heileman Brewing Co. v. Shaw*, 161 Wis. 443, 154 N. W. 631. *California*. Where a deck hand on a steamboat, so loaded as to make it convenient to go forward by walking along the narrow side rail, after being seen to go forward, was next seen in the water, drowning, there being no evidence of any reason for suicide. *Olsen v. Hale*, 2 Cal. I. A. C. Dec. 607. *England*. Where a healthy workman, working in the hold of a ship, came up the ladder in great pain, and was sent home, where it was found that he had marks on his ribs, and later developed pneumonia and died. *Lovelady v. Berrie* (1910) 2 B. W. C. C. 62, C. A. Where a workman, apparently in good health, was found injured after moving some very heavy glazed sinks, and after a fortnight returned to work, but still complained of a pain in his back, and some months after died in a hospital from a fracture of one of the lumbar vertebrae. *Hewette v. Stanley Bros.* (1913) 6 B. W. C. C. 501, C. A. Where a sailor, who went on deck at night to get fresh air, was found next morning in the water, dead. *Marshall v. Owners of Ship Wild Rose* (1910) 3 B. W. C. C. 514, H. L., and 2 B. W. C. C. 76, C. A.

⁹⁶ *Milwaukee Western Fuel Co. v. Industrial Commission*, 159 Wis. 635, 150 N. W. 998.

Where it is not clear concerning a condition or an existing state of facts that may be material, and relates to the manner in which an injury occurred, the presumption is that it was accidental. *Hanson v. Commercial Sash Door Co.*, Bulletin No. 1, Ill., p. 30.

⁹⁷ It is not sufficient to think this or that is probable. There must be practical probability. *Howe v. Fernhill Collieries, Ltd.* (1912) 5 B. W. C. C. 629, C. A.

It is necessary that proof of an accident be reasonably clear, and where a baker found to have a hernia attributed it to a strain occurring while he was lifting a truck load, at which time he claimed to have felt a pain, but he said

hearsay,⁹⁸ or, as a general rule, by uncorroborated statements of the injured workman.⁹⁹ For corroborative testimony to be sufficient, it must be direct and substantial,¹ but it may consist of state-

nothing about it to his fellow workmen and continued to work for over a month thereafter, it was not proven that the hernia resulted from the strain alleged. *Vogler v. M. Carpenter Baking Co.*, Rep. Wis. Indus. Com. 1914-15, p. 35. Where there was nothing extraordinary in the employé's work at the time of the strain alleged to have caused a hernia, nothing unforeseen or fortuitous happened to him at that time, and the pain was not serious, but only sufficient to call his attention to his condition, an accidental injury was not established. *Toennes v. Milwaukee Electric Ry. & Light Co.*, Rep. Wis. Indus. Com. 1914-15, p. 26. Where the strain alleged as the cause of a hernia was of a slight and insignificant character, and resulted in only slight pain, not causing a cessation in work, and came while the workman was engaged in doing an ordinary task not at all strenuous, the accident—that is, an incident of sufficient moment to develop the hernia—was not established. *Drolshagen v. Milwaukee Pattern & Mfg. Co.*, Rep. Wis. Indus. Com. 1914-15, p. 25.

Where a delivery boy, after several falls from his bicycle, is operated upon for hydrocele, the existence of which was observed by the physician at the time of the first accident, the physician testifying that it was then admitted as having existed before that, the proof of accident origin was insufficient. *Young v. Paris*, 2 Cal. I. A. C. Dec. 518.

⁹⁸ In this proceeding to review an award of compensation it is held that the award must be annulled, for the lack of proof that the injury was accidental, since the only testimony in proof of the accident was hearsay. *Employers' Assur. Corp., Ltd., v. Cal. Indus. Acc. Com.*, 2 Cal. I. A. C. Dec. 453, 170 Cal. 800, 151 Pac. 423; *Englebreton v. Indus. Acc. Com.*, 2 Cal. I. A. C. Dec. 449.

⁹⁹ In the proceeding to review an award allowing compensation to a wife for the death of her husband, there was no proof that the injury resulting in death was accidental, where the only proof was the hearsay statements and explanations of the deceased. *Employers' Assur. Corp., Ltd., v. Cal. Indus. Acc. Com.*, 2 Cal. I. A. C. Dec. 452, 170 Cal. 800, 151 Pac. 423.

Where the workman's own description of the accident differed materially in his notice of accident, his claim, and his testimony, he made no claim until after leaving the defendant's employ, his evidence was unsupported, and the motormen on his car denied any knowledge of the happening of any accident, it was held there was not sufficient proof of accident. *Graf v. Brooklyn Rapid Transit Co.*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 9.

¹ Where the workman had told various persons that he did not know whether the injury to his finger had been caused by a passing wheelbarrow

ments made by him to his fellow workman near the time of the occurrence,² especially when they are in accord with the reports of a medical expert.³ In a case wherein the evidence as to the happening of the alleged accident and as to the nature of what happened at the time was equally divided, and conflicting in both fact and credibility, it was held that expert and unprejudiced medical advice corroborating the probability of applicant's testimony authorized a decision in favor of the applicant.⁴ That the workman, as frequently happens, is mistaken or confused as to the date of injury, does not invalidate his claim.⁵ A *prima facie* case may, of course, be rebutted by proof that the injury was not accidental.⁶

or handling a hammer, and his claim of injury by a wheelbarrow, although corroborated by two fellow employés, is doubtful because of the location of the injury this evidence is insufficient to prove an industrial accident. *Nicoletti v. Penn. Mining Co.*, 2 Cal. I. A. C. Dec. 347.

² When an employé claims to have fallen and bruised himself, returning to work the next day, infection thereafter setting in and causing disability, the uncontradicted testimony of two fellow workmen that he told them of his fall at the end of the day of the accident is sufficient corroboration of his story to prove the accident. *Bridgewood v. Union Iron Works Co.*, 2 Cal. I. A. C. Dec. 599.

³ Where an employé claims an injury, and the only corroborative evidence that it was the result of an accident was his statement at the hospital two days after the alleged accident, which was in accord with his testimony at the hearing, and a medical expert reports that in his judgment the trouble was the result of an injury, and not of a gonorrhœal infection, there was sufficient corroboration of his testimony that an accident took place. *Pattberg v. Young & Swain Baking Co.*, 2 Cal. I. A. C. Dec. 883.

⁴ *Whitsell v. Montgomery*, 1 Cal. I. A. C. Dec. 572.

⁵ *Ponce v. Engstrum Co.*, 2 Cal. I. A. C. Dec. 370.

⁶ "If personal injury is caused to a workman, and it arises out of and in the course of an employment to which the Act applies, it appears to me that *prima facie* the Act entitles him to compensation, but that this inference may be displaced by proof that the injury is attributable to his own serious and willful misconduct, or to some other cause which shows that the injury was not accidental." Lord Lindley, in *Fenton v. Thorley & Co., Ltd.* (1903) 5 W. C. C. 9.

The statutory presumption that, in the absence of substantial evidence to the contrary, the claim comes within the Compensation Act, is overcome

The mere fact that an employé may have a predisposition of hernia, and even a slight or latent hernia, is no proof that a serious hernia brought on while in the course of and occurring during his employment is not an "accident."⁷

§ 100. Proof of injury

The burden of proof is on the applicant to establish the fact of injury, but, where the injury is such that objective symptoms are absent, dependence must be placed on the history of the case given by the applicant, if he appears to be dependable.⁸ Where his story of how the injury was sustained is reasonable in itself, and corroborated by the testimony of the attending surgeon that his illness resulted from an injury, and there is no evidence tending to disprove an injury received in the course of the employment, sufficient evidence is presented to establish the fact of injury.⁹ A claim may be approved where only circumstantial evidence of the injury can be adduced,¹⁰ and circumstances may be sufficient to corrobo-

by the testimony of the employé's helper and two bystanders that they were present at the time and place the accident was alleged to have occurred and did not see any accident whatsoever, and the testimony of an examining physician that he found no bruises, discolorations, or abrasions on the workman's body (Laws 1914, c. 41, § 21). *Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507, reversing 169 App. Div. 450, 155 N. Y. Supp. 1.

⁷ *Hasenstab v. Chicago House Wrecking Co.*, Bulletin No. 1, Ill., p. 62.

The question as to whether or not an injured employé had a predisposition to hernia, or a weakness toward hernia, is not material, when an accident occurs which brings forth a protrusion of the intestines and causes disability; it being an accident within the meaning and scope of the Workmen's Compensation Act. *Fobes v. Killeen*, Bulletin No. 1, Ill., p. 68.

⁸ *Murphy v. Casualty Co. of America*, 1 Cal. I. A. C. Dec. 54.

⁹ *Jenkins v. Pieratt*, 1 Cal. I. A. C. Dec. 114.

But where claimant's testimony that he had sustained a hernia by a sudden strain while lifting, had felt sudden and severe pain, and that he had had no former hernia, was flatly contradicted by several witnesses, compensation was denied. *Silverman v. Zibulsky Bros.*, The Bulletin, N. Y., vol. 1, No. 6, p. 13.

¹⁰ *In re Simpson*, Feb. 15, 1909. Op. Sol. Dept. of L. p. 675.

Where the manner in which a workman was compelled by his employment

rate a claimant's unsupported statement as to injury in the absence of proof to the contrary;¹¹ but, as was said in the next preceding section relative to proof of accident, evidence which is as consistent with the theory that death or incapacity was due to natural causes as that it was due to injury is insufficient to establish the fact of injury.¹² Where injury and accident are proven, and the employer

to handle heavy bales of waste was peculiarly calculated to produce severe abdominal strain, and while at work he was suddenly seized with pain in the abdomen, felt weak, and changed to lighter work, and was later found to have a hernia, it was held there had been an accidental injury. *Ratzberg v. Deltex Grass Rug Co.*, Rep. Wis. Indus. Com. 1914-15, p. 34.

In *Maloney v. Waterbury Farrel Foundry & Machine Co.*, 1 Conn. Comp. Dec. 220, where the deceased workman felt a sudden pain while lifting a heavy crank shaft, and after working for part of the week with continual pain, was found to have an inguinal hernia, it was held he had sustained a compensable injury.

¹¹ In *re Davis*, Op. Sol. Dept. of L. 740. Claimant contended that she struck and injured her arm while at work in the Bureau of Engraving and Printing; she made no immediate report, as it did not cause incapacity at the time. Review of circumstances showed them to be compatible with the truth of statement, and claim was held to be established. In *re Johnson*, Op. Sol. Dept. of L. 748. The claimant was not given an opportunity to file a claim immediately following the injury, and owing to misunderstanding it was some time before he was permitted to file same. The local officials in the field of the Forest Service contended that claimant was not injured as alleged, and cited the fact that he had worked in a coal mine subsequent to his alleged injury. Upon consideration of all evidence submitted, it was concluded that claimant had been injured as alleged by him, and the medical evidence further established the fact of an injury from the nature of which incapacity could be presumed. In *re Lissy*, Op. Sol. Dept. of L. 752.

¹² Where a person engaged in cleaning fish had his hand punctured by a fish fin, and disability followed from infection setting in, but two fellow workmen, instead of admitting that the injured workman had told them of the injury on that day, as claimed, stated that the applicant had received a puncture several days previously, and before his employment, at which time they had put peroxide on the hand, and the injured workman admitted a previous fish puncture, the fact of injury by accident while under employment was established. *Chamberlain v. Southern Fish Co.*, 2 Cal. I. A. C. Dec. 424. The employé, a granite cutter, fell in the cutting shed of the subscriber and died four days later from cerebral hemorrhage. The evidence given by fellow employés, who were presumably eyewitnesses of the occurrence, was wholly

contends that the injury is not a new one, but is the result of a former accident, the burden is on him to prove this contention.¹³

Delay in reporting an injury and presenting a claim therefor under the federal Act does not establish nonexistence of the injury. Evidence that an employé was strong and healthy until he complained of a hurt received while doing heavy lifting, and that he died suddenly a few days thereafter for no other assignable cause, is sufficient to show that he had sustained some internal injury, though there were no external manifestations thereof.¹⁴ But evidence of a slight blow on the jaw is not evidence that tuberculosis of the cervical glands causing incapacity is an injury.¹⁵

at variance with the weight of the medical testimony. An impartial physician was appointed to perform an autopsy, and his report and evidence showed that the said employé did not in fact receive a personal injury. It was held that the dependent widow was not entitled to compensation. *Birnie v. Contractors' Mutual Liability Insur. Co.*, 2 Mass., Wk. Comp. Cases, 619 (decision of Com. of Arb.).

¹³ Where a workman, who had wrenched his knee three years before and had several times since felt pain, felt a similar pain on rising from a kneeling position, and found that the cartilage of the knee was ruptured, it was a personal injury by accident; the onus being on the employers to show that there was no new injury. *Borland v. Watson, Gow & Co., Ltd.* (1912) 5 B. W. C. C. 514, Ct. of Sess.

¹⁴ *In re Powers*, Op. Sol. Dept. of L. '214.

¹⁵ *In re Hicks*, Op. Sol. Dept. of L. 217.

ARTICLE II

ARISING OUT OF AND IN COURSE OF EMPLOYMENT

DIVISION I.—IN GENERAL

Section

- 101. "In course of" and "out of"—Necessity and distinction.
- 102. Employments.
- 103. Hazardous employments.
- 104. Federal Act.

DIVISION II.—ARISING IN THE COURSE OF EMPLOYMENT

- 105. In general.
- 106. Term of employment.
- 107. Going to work.
- 108. Returning from work.
- 109. Premises of employer.
- 110. Means of conveyance.
- 111. Leisure periods—Attendance on personal comforts and necessities.
- 112. Negligence and recklessness.
- 113. Disobedience.
- 114. Deviation from original employment.

DIVISION III.—ARISING OUT OF EMPLOYMENT

- 115. Risks due to employment.
- 116. Risks peculiar to employment.
- 117. Risks of commonalty.
- 118. Risks external to the employment, but special exposure to risk due to employment.
- 119. Injury from forces of nature.
- 120. Injury caused by coemployé or others.
- 121. Injury from horseplay or practical joking.
- 122. Area of duty—Absence—Entry and exit.
- 123. Incurring of additional risks.
- 124. Intoxication.
- 125. Susceptibility to risk.

DIVISION IV.—PROOF

- 126. Burden, requisites, and sufficiency of proof.

DIVISION I.—IN GENERAL

§ 101. "In course of" and "out of"—Necessity and distinction

According to the usual language of the Acts, to warrant recovery of compensation for the injury or death of a workman, the injury must be one "arising out of and in the course" of his employment.¹⁶ This phrase is used in the same sense in the Acts of England and of many of the states, and, though its literary construction is well settled, its application to particular cases has given rise to differences of opinion not easily harmonized.¹⁷ Attempts of the courts

¹⁶ (Laws 1913, c. 198) *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N. W. 509, Ann. Rep. Neb. St. Dept. of L. p. 94; *Lanigan v. Lanigan*, 222 Mass. 198, 110 N. E. 285; *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243.

Compensable injuries under the Wisconsin Act are such as are incidental to and arise out of the employment. *Heenig v. Indus. Com.*, 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339. "The language of the Act provides for compensation for injuries accidentally received while in the course of employment. The English Act provides for compensation for injuries accidentally received growing out of the employment. We have had occasion to construe this difference in language between the English Act and our Act heretofore, and we have held that the meaning of the two Acts is the same, and this construction has been upheld by the Supreme Court. The legislative committee in its report says that 'compensation shall be paid when the injury grows out of the employment. It makes no difference who was to blame. It is sufficient that the industry caused the injury.' This language of the legislative committee construing the section referred to can only mean one thing, and that is compensation is to be paid for industrial accidents—accidents that grow out of the industry. *Arnold v. Holeproof Hosiery Co.*, Rep. Wis. Indus. Com. 1914-15, p. 32.

¹⁷ *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 363.

The words "out of and in the course of the employment" admit of an inexhaustible variety of application according to the nature of the employment and the character of the facts proved." Lord Loreburn, L. C., in *Kitchenham v. S. S. Johannesburg (Owners of)*, (1911) 4 B. W. C. C. at p. 312. "There cannot be imagined a more difficult part of this difficult Act to determine than that which relates to injuries by accident arising out of and in the course of a man's employment." Lord Loreburn, L. C., in *Warner v. Couchman* (1912) 5 B. W. C. C. at p. 179.

Considering that the members of the Wainwright Commission which draft-

to formulate general rules relative to the distinction between the terms "out of" and "in the course of" have not been entirely successful. All agree, however, that the terms are not intended to be synonymous. An injury may be received in the course of the employment, and still have no causal connection with it, so that it can be said to arise out of the employment.¹⁸ But it is difficult, if not impossible, to conceive of an injury arising out of and not also in the course of the employment.¹⁹ The importance of distinguishing between these terms arises from the fact that each represents an element essential to, but not authorizing, recovery of compensation without the presence of the element represented, by the other. In other words, even though the injury occurred "in the course of" the employment, if it did not arise "out of the employment," there can be no recovery; and even though it arose "out of the employment," if it did not arise "in the course of the employment," there

ed the New York Act were familiar with the English Act, and that the words "arising out of and in the course of the employment" were taken from that Act, the decisions of the English courts in construing this phrase should be given due consideration in New York. *De Filippis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. Supp. 761; *Newman v. Newman*, 169 App. Div. 745, 155 N. Y. Supp. 665.

¹⁸ *State ex rel. Duluth Brewing & Malting Co. v. District Court*, 129 Minn. 176, 151 N. W. 912; *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *In re Employers' Liability Assur. Corp.*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; *Barnes v. Nunnery Colliery Co., Ltd.* (1912) App. C. 44 (Eng.); *Plumb v. Cobden Flour Mills Co., Ltd.* (1914) App. C. 62 (Eng.).

¹⁹ "Many accidents occur in the course of, but not out of, the employment; but I am unable to think of any that could arise out of, and not also in the course of, the employment." *Farwell, L. J.*, in *Leach v. Oakley, Street & Co.* (1911) 4 B. W. C. C. at p. 98. "I think it is impossible to have an accident arising out of, which is not also in the course of, the employment; but the converse of this is quite possible, as, for instance, if a workman were shot by a lunatic, or struck by lightning, while at the moment engaged in his work. In a great many cases, however, the two phases do not admit of separate consideration, and the present is one of those cases. If this accident took place in the course of the workman's employment, it also indubitably arose out of that employment; if not, not." Lord President, in *McLauchlan v. Anderson* (1911) 4 B. W. C. C. at p. 379.

can be no recovery.²⁰ Yet in the words of an English jurist: "If you find that the accident arose in the course of the employment,

²⁰ *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *In re Employers' Liability Assur. Corp.*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306.

It is essential to a right to recover compensation that the accident not only be received in the course of, but shall arise out of, the employment. *Bayer v. Bayer* (Mich.) 158 N. W. 109.

The words "arising out of and in the course of his employment," in the Workmen's Compensation Act (P. L. 1911, p. 134), are conjunctive, and recovery can only be had under that act when the given injury arose, not only "in the course of," but also "out of," the employment. *Hulley v. Moosbrugger*, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203.

The use of the conjunction "and" indicates that the accidental injury must arise both out of and in the course of the employment. An accidental injury sustained during the course of the employment, but not arising out of the employment, as well as such injury arising out of the employment, but not sustained during the course of the employment, does not fall within the provisions of the compensation law. *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620. The words "arising out of and in the course of employment" are conjunctive, and relief can be had under the Act only when the accident arose both "out of" and "in the course of" employment. *In re Heitz*, 218 N. Y. 148, 112 N. E. 750, affirming (Sup.) 155 N. Y. Supp. 1112.

It is not enough to say the accident would not have happened if the servant had not been engaged in the work at the time, or had not been in that place. It must appear that it resulted from something he was doing in the course of his work or from some peculiar danger to which the work exposed him. *Amys v. Barton*, 5 B. W. C. C. 117; *Archibald v. Ott* (W. Va.) 87 S. E. 791.

In *Fitzgerald v. W. G. Clarke & Son*, L. R. 1908, 2 King's Bench, 796, it was held: "An employer is not liable under the Workmen's Compensation Act, 1906, to pay compensation for injury caused to a workman while engaged at his work by the tortious act of a fellow workman which had no relation to the employment. The words 'out of and in the course of the employment,' in section 1, subsec. I. of the Act, are used conjunctively, and are not to be used as meaning out of; that is to say, in the course of. The words 'out of' point to the origin or cause of the accident; the words 'in the course of' to the time, place, and circumstances under which the accident takes place." *Walther v. American Paper Co.* (N. J.) 98 Atl. 264, quoting *Buckley, L. J.*, in *Fitzgerald v. Clark & Sons*. Instances of injuries deemed not to have arisen out of the employment, although sustained in the course thereof, are found in the reported cases. An injury intentionally inflicted upon one workman by another, by a blow from a piece of iron thrown in

you may have gone a certain way towards finding that it arose out of the employment, but you have not gone the whole way.”²¹ The words “out of” point to the origin and cause of the accident or injury; the words “in the course of” to the time, place, and circumstances under which the accident or injury takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words “out of” involves the idea that the accident is in some sense due to the employment. It must result from a risk reasonably incident to the employment.²²

anger, or by an assault and battery, is of that kind. Such, also, is the character of an injury resulting from an assault upon a workman by a stranger, and of one sustained in the course of recreation or diversion at the place of work. In some of these cases an agency wholly independent of the work, foreign to it and unanticipated, intervenes, or there is a turning aside from the employment, for the time being, to engage in a transaction on the workman's own account and for his own purposes. It is quite easy to perceive that violence of a fellow workman or a stranger arises, not out of the work, but out of the vicious or irritable disposition of the assailant, and that play or diversion on the premises is a step outside of the employment, and a thing done for the employé himself, and not for the employer. In none of these instances is the occasion of the injury an incident of the work. *Archibald v. Ott*, supra.

Judge Case, of the superior court, said, in affirming *Dorrance v. New England Pin Co.*, 1 Conn. Comp. Dec. 24: “The words ‘arising out of’ are restrictive of the construction of the later words ‘in the course of.’ A personal injury suffered by a workman while pursuing his duties gives him in itself no claim for compensation under the Act; some essential relation and connection between the employment and the injury must appear.”

The mere fact of injury, though sustained in the course of the employment, is insufficient, unless injury has resulted from accident arising out of the employment. *McDonald v. Dunn*, 2 Cal. I. A. C. Dec. 71. The words “arising out of and in the course of employment” are conjunctive, and not disjunctive. They mean distinct things; hence compensation is restricted to such injuries as both arise out of and are in the course of employment. *Rep. Nev. Indus. Com.* 1913-14, p. 25.

²¹ *McLaren v. Caledonian Railway Co.*, [1911] S. C. 1077.

²² *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *Buckley, L. J.*, in *Fitzgerald v. Clarke & Son*, [1908] 2 K. B. 796, 77 L. J. K. B. 1018. Where the

accident is the result of a risk reasonably incident to the employment, it is an accident arising out of the employment. *Hulley v. Moosbrugger*, 87 N. J. Law, 103, 93 Atl. 79; *Zabriskie v. Erie R. Co.*, 85 N. J. Law, 157, 88 Atl. 824, affirmed on appeal, 86 N. J. Law, 266, 92 Atl. 385, L. R. A. 1916A, 315; *Terlecki v. Strauss*, 85 N. J. Law, 454, 89 Atl. 1023, affirmed on appeal. An accident arises "out of" the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it. *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458. This case finds support in *Armitage v. Lancashire & Yorkshire Ry. Co.*, [1902] 2 K. B. 178; *Collins v. Collins* (1907) 2 I. R. 104, *Murphy v. Berwick* (1909) 43 Ir. I. T. R. 126, and *Blake v. Head* (1912) 106 L. T. R. 822, in each of which recovery was denied because the act of the third party was not a risk reasonably to be contemplated by the employé in undertaking the employment. The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employé's work or to the risks to which the employer's business exposes the employé. *Fitzgerald v. Clarke & Son*, [1908] 2 K. B. 796; 77 L. J. K. B. 1018; *Coronado Beach Co. v. Pillsbury* (Cal. 1916) 158 Pac. 212.

The two phrases, "in the course of employment" and "resulting from employment," are not synonymous. The former relates to the time, place, and circumstances of the injury, and the latter to the origin. *McNicol's Case*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; *Archibald v. Ott* (W. Va.) 87 S. E. 791. An injury is received "in the course of" employment when it comes while the workman is doing the duty which he is employed to perform. It arises "out of" the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person, familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. In re *Employers' Liability Assur. Corporation*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; *McNicol's Case*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306.

It is well settled that, to justify an award, the accident must have arisen "out of," as well as "in the course of," the employment, and the two are

An employé doing what he was employed to do, and doing it in the way he was expected to do it, when the accident happened, is injured by accident arising out of and in the course of the employment.²³ It is not essential, however, that the injury shall have been anticipated,²⁴ and it is immaterial whether the precise physical

separate questions, to be determined by different tests, for cases often arise where both requirements are not satisfied. An employé may suffer an accident while engaged at his work, or in the course of his employment, which in no sense is attributable to the nature of, or risks involved in, such employment, and therefore cannot be said to arise out of it. An accident arising out of an employment almost necessarily occurs in the course of it, but the converse does not follow. *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310. The words "out of" are descriptive of the character or quality of the accident. The words "in the course of" relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident, as conveyed by the words "out of," involves the idea that the accident is in some sense due to the employment. *Rayner v. Sligh Furniture Co.*, 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386. The language of the Michigan Compensation Act is adopted from the English and Scotch Acts on the same subject, and, in harmony with their interpretation, has been construed as meaning that the words "out of" refer to the origin or cause of the accident, and the words "in the course of" to the time, place, and circumstances under which it occurred. *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243; *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310.

²³ *Boody v. K. & C. Mfg. Co.*, 77 N. H. 208, 90 Atl. 860, L. R. A. 1916A, 10, Ann. Cas. 1914D, 1280; *De Fazio v. Goldsmith Detinning Co.* (N. J. Sup.) 88 Atl. 705; *Zabriskie v. Erie R. Co.*, 85 N. J. Law, 157, 88 Atl. 824.

An injury arises out of and in the course of employment where at the time and place of its occurrence the workman is doing what he might reasonably then do. *Scott v. Payne Bros.*, 85 N. J. Law, 446, 89 Atl. 927.

An injury arises "in the course of employment" if it occurs while the employé is doing what one so employed may reasonably do within the time during which he is employed, and at a place where he may reasonably be during that time. *Biddinger v. Champion Iron Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 70. (Gen. St. 1913, § 8203.)

²⁴ *State ex rel. People's Coal & Ice Co. v. District Court*, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344; *Federal Rubber Co. v. Havolic*, 162 Wis. 341, 156 N. W. 143; *Commissioner Lyon in Putnam v. Murray*, The Bulletin, N. Y., vol. 1, No. 4, p. 9.

harm was the natural and probable or the abnormal and inconceivable consequence of the employment.²⁵ It seems to be agreed that the words "arising out of and in the course of his employment" do not make the employer an insurer against all the risks of the business, but include only those injuries arising from the risks of the business which are suffered while the employé is acting within the scope of his employment.²⁶

The fact that under the Washington Act the employer, being required to make reports of accidents, is directed to state whether the accident "arose out of or in the course of the injured person's employment," is not determinative that compensation shall be limited to injuries received under such circumstances, in view of other more liberal terms of the Act.²⁷ It is essential in order to entitle a workman to compensation under section 5 of this Act that he be in the course of employment only in case the injury occurs away from the employer's plant.²⁸

§ 102. Employments

The accident causing the injury must arise out of work or business being done for the master either by direct or implied authority.²⁹ The employé carries with him, during the working period, whether it be day or night, all the privileges conferred by the Compensation Acts.³⁰ The word "employment" will not be given a

²⁵ (St. 1911, c. 751, pt. 2, § 1) *In re Sponatski*, 220 Mass. 526, 108 N. E. 406, L. R. A. 1916A, 333; *In re Employers' Liab. Assur. Corp.*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306.

²⁶ *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368.

²⁷ *Stertz v. Industrial Insurance Commission of Washington* (Wash.) 158 Pac. 256.

²⁸ *Id.*

²⁹ *State ex rel. Duluth Brewing & Malting Co. v. District Court*, 129 Minn. 176, 151 N. W. 912.

³⁰ *Benson v. Lancashire & Yorkshire Railway Co.* (1904) 6 W. C. C. 20, C. A. (Acts of 1897).

narrow or restricted construction.³¹ It is not confined to actual work. It extends to all things which the contract of employment expressly or impliedly entitles the workman to do. Thus he is entitled to pass to and from the premises and to take his meals on the premises. But he is not entitled, and therefore he is not employed, to do things which are unreasonable or expressly forbidden.³² Although an office is an "employment," it does not follow that every employment by the public is an office. A man may be employed by the government under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if the duty be a continuing service defined by rules prescribed by the government, and not by contract, and an individual appointed by government enters on the continuing duties appertaining to his station, without any contract defining them, it is very difficult to distinguish such a charge or employment from an office.³³

Some of the Acts are limited in their operation to those employers having five or more employes,³⁴ excluding members of the employer's family³⁵ and casual employes from the count.³⁶ Any per-

³¹ *Winters v. Mellen Lumber Co.*, Bul. Wis. Indus. Com., vol. 1, p. 89.

³² *Brice v. Lloyd, Ltd.*, [1909] 2 K. B. 809.

³³ Chief Justice Marshall in *U. S. v. Maurice*, 2 Brock. 96, 102, 103, Fed. Cas. No. 15,747; *Blynn v. City of Pontiac*, 185 Mich. 35, 151 N. W. 681.

³⁴ The statutes of some states limit the law to those employers having five or more employes, but the Iowa Act does not contain such a provision, and therefore applies to employers having one or more employes. Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 6.

The original Connecticut Act applied to all employers, regardless of the number of employes. *Bayou v. Beckley*, 89 Conn. 154, 93 Atl. 139, 8 N. C. C. A. 588.

³⁵ The Connecticut Act as amended excludes members of the family from the definition of employes, and in *Young v. Holcomb*, 1 Conn. Comp. Dec. 482, it was held that, there not being five persons outside the family employed by the respondent, and he having not accepted the Act under § 2 of part B, he was not under the terms of the Act.

³⁶ *Clements v. Columbus Sawmill Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 161.

son engaged in manual or mechanical labor in any shop, mill, factory, or other place, by whatever name known, in which shop, mill, factory, or place power-driven machinery is used and five or more persons are employed, is engaged in an employment within the New Hampshire Act, and entitled to its benefits if he is injured by accident arising out of and in the course of the employment.³⁷ An employer may be said to employ "four or more employés in a common employment" within a provision of the Wisconsin Act that every employer of four or more employés in a common employment shall be deemed to have elected to accept the compensatory provisions of an Act, where he usually employs such number or does so most of the time so that such employment becomes the rule, and not the exception. The operation of such a provision as to the employer is limited to the usual rather than the unusual condition of a business, trade, or occupation. Thus a farmer who does not regularly employ four or more men to run his farm was not an "employer" within the Act merely because he temporarily employed four or more men in threshing time and occasionally in tobacco work.³⁸

§ 103. — Hazardous employments

Many of the Acts predicate the right to recover compensation on the employment having been hazardous or extrahazardous.³⁹

³⁷ *Boody v. K. & C. Mfg. Co.*, 77 N. H. 208, 90 Atl. 860, L. R. A. 1916A, 10, Ann. Cas. 1914D, 1280.

³⁸ (Wk. Comp. Act, St. 1915, § 2394—5, subsec. 2) *Kelly v. Haylock* (Wis.) 157 N. W. 1094.

³⁹ The manifest intent of the law is not to cover and compensate for accidents generally, but to cover accidents occurring in those employments or occupations which are specifically classed as, or which may be found by the commission to be, extrahazardous. *Guerrieri v. Industrial Insurance Commission*, 84 Wash. 266, 146 Pac. 608. Under the provisions of the Washington Act abolishing the jurisdiction of the courts over personal injury claims, only those in the relation of employer and employé in "extrahazardous" occupations are affected. (Workmen's Compensation Act Wash. § 1) *Rulings Wash. Indus. Ins. Com.* 1915, p. 3.

This limitation is not essential, however, to the validity of a Compensation Act.⁴⁰ Statutory specifications of those employments which shall be deemed hazardous have not entirely prevented controversy in respect thereto,⁴¹ though it is apparently not disputed that the language of such specifications should not be extended by unnecessary implication⁴² to employments not enumerated.⁴³ In the construction and application of these provisions, it has been held that the term "hazardous employment" does not include the

⁴⁰ The legislative power to impose the liability upon an employer who is without fault does not, in the view of the courts which have dealt with the subject, rest upon the consideration that the particular employer is conducting an industry in which injury is more likely to result than in some other. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398.

⁴¹ In *Smith v. Price*, 168 App. Div. 421, 153 N. Y. Supp. 221, the court said: "Group 41, when read with subdivision 1 of section 3 of the Act, was evidently intended to apply to persons operating trucks, or the other vehicles or appliances mentioned in the Act, for profit, when operated otherwise than upon tracks. The provision is plain when we read group 1, which includes the operation of all kinds of cars upon railways and inclined railways. The provisions of group 1 fairly cover all vehicles operated for profit upon tracks, and it is a fair inference that group 41 was intended to cover all other vehicles operated for profit. The clause 'otherwise than on tracks' was inserted in group 41 to distinguish that group clearly from group 1. The words 'on streets, highways or elsewhere' are evidently surplusage. While the expression is perhaps unfortunate, it was evidently intended to make certain that the group covered all cars and trucks except those operated upon tracks, covered by group 1."

⁴² The rule of *ejusdem generis* would prevent any general language to be extended beyond the special language used. *People ex rel. Kinney v. White*, 64 App. Div. 390, 392, 72 N. Y. Supp. 91; *Lantry v. Mede*, 127 App. Div. 557, 560, 111 N. Y. Supp. 833.

⁴³ The express mention of the matters embraced in the several groups necessarily excludes those not mentioned. *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57, 57 N. E. 168, 79 Am. St. Rep. 565. While the New York Act is remedial, and should be given a liberal construction, the courts will not give the language of the Act a strained or unusual construction in order to bring within the Act an employment not declared by it to be hazardous. *Tomassi v. Christensen*, 171 App. Div. 284, 156 N. Y. Supp. 905; *De La Gardelle v. Hampton Co.*, 167 App. Div. 617, 153 N. Y. Supp. 162.

work of a janitor,⁴⁴ or of a person rendering services chiefly of a domestic and nonhazardous character,⁴⁵ the business of running threshing machines,⁴⁶ the business of dry goods and clothing,⁴⁷ or the work of one engaged in harvesting ice, such employments not being enumerated,⁴⁸ but includes a street car company,⁴⁹ the case of an employé standing on a scaffold while painting a sign of a building,⁵⁰ an employé of a brewery,⁵¹ a teamster hauling sand,⁵²

⁴⁴ The work of a janitor is not within the enumerated hazardous employment, though he be injured while working on a flagpole on top of a building. *Gleisner v. Gross & Hebenner*, 170 App. Div. 37, 155 N. Y. Supp. 946.

Workmen's Compensation Act, § 2, provides that the Act shall apply to all inherently hazardous employments, including workshops where machinery is used. Section 3 defines a workshop as a place where power-driven machinery and manual labor is used. Where a janitor in an office building was injured in scrubbing down the walls and floors of an elevator shaft beneath the cage, his rights were not governed by the Act. *Remsnider v. Union Savings & Trust Co.*, 89 Wash. 87, 154 Pac. 135.

⁴⁵ See next section.

⁴⁶ *Benton v. Wilson*, Bulletin No. 1, Ill., p. 54.

⁴⁷ *Christianson v. Barber*, Bulletin No. 1, Ill., p. 71.

⁴⁸ (Wk. Comp. Act, Consol. Laws, c. 67, § 2, subd. 33) *Aylesworth v. Phoenix Cheese Co.*, 170 App. Div. 34, 155 N. Y. Supp. 916.

Note.—Harvesting of ice was made a hazardous employment by the amendment of 1916 (Laws 1916, c. 622), which added this occupation to group 25.

⁴⁹ A street car company, engaged in the carrying of passengers, is an extrahazardous employer of labor within the meaning of clause 3, par. B, of section 3; it is a business of carriage by land or water, and loading or unloading in connection therewith. *Chicago Savings Bank & Trust Co. v. Chicago Rys. Co.*, Bulletin No. 1, Ill., p. 104.

⁵⁰ An employé standing on a scaffold, from which he fell and was killed, while he was painting a sign on the side of a building, was engaged in a "hazardous employment." (Laws N. Y. 1914, § 3) *In re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598.

⁵¹ (Wk. Comp. Law, § 2, group 27) *In re Heitz*, 218 N. Y. 148, 112 N. E. 750, affirming (Sup.) 155 N. Y. Supp. 1112.

⁵² (Wk. Comp. Act, § 2, groups 19, 41) *Dale v. Saunders Bros.*, 171 App. Div. 528, 157 N. Y. Supp. 1062.

a department store employé,⁵³ the business of maintaining, repairing, and upkeep of the wires of a telephone company,⁵⁴ and the work of an express company's stable employé on whom a horse falls.⁵⁵ The driver of a horse-drawn vehicle is covered by the provisions of the Maryland Act and is engaged in an extrahazardous employment.⁵⁶

An employer who comes under the provisions of the Illinois Act either by election or operation of law brings with him all his employés in any wise connected with his business, and not part only.⁵⁷

The business of owning and operating a loft building is not a hazardous employment under the New York Act;⁵⁸ nor is the business of owning and operating apartment houses.⁵⁹ In New York it has been held that a wholesale grocery employé engaged in storing goods in a warehouse maintained by his employer merely for the storing of its own goods was not engaged in the "employment" of "warehousing,"⁶⁰ that an employé injured while en route

⁵³ A department store comes within the Act by reason of paragraph (b) of section 3. *Stevens v. Hillman's Department Store*, Bulletin No. 1, Ill., p. 17.

⁵⁴ (Wk. Comp. Act, § 3, par. "b") *Anderson v. Ashmore Mut. Tel. Co.*, Bulletin No. 1, Ill., p. 132.

⁵⁵ *Costello v. Taylor*, 217 N. Y. 179, 111 N. E. 755, affirming 169 App. Div. 905, 153 N. Y. Supp. 1111.

⁵⁶ (Wk. Comp. Act, § 32) *American Ice Co. v. Fitzhugh*, 128 Md. 382, 97 Atl. 909.

⁵⁷ *Gylfe v. Suburban Ice Co.*, Bulletin No. 1, Ill., p. 167.

An employé doing simply barn work for an express company that comes under the Act, who is injured, is entitled to compensation, as the Act brings in all of the employés or none. *Zorcic v. Adams Express Co.*, Bulletin No. 1, Ill., p. 55.

⁵⁸ *Chappelle v. 412 Broadway Co.* (N. Y.) 112 N. E. 569, reversing (Sup.) 155 N. Y. Supp. 858.

⁵⁹ *Sheridan v. P. J. Grool Construction Co.* (N. Y.) 112 N. E. 568, reversing (Sup.) 155 N. Y. Supp. 859.

⁶⁰ The claimant was not engaged in the "employment" of "warehousing" at the time he sustained his injuries, where his employer was not carrying

to collect bills for produce and incidentally to sell produce, if opportunity arose, was doing nothing in connection with the storing or warehousing of his employer's goods,⁶¹ and that a carpenter engaged in repairing a building in which his employer manufactured macaroni was not engaged in the hazardous employment of structural carpentry or repair of buildings; the reason assigned in both cases being a statutory provision that "employment includes employment only in a trade, business, or occupation carried on by the employer for pecuniary gain."⁶² An employé injured while working for the state upon a state highway cannot recover against the state as his employer, since the maintenance of the highways is not

on the business of warehousing for pecuniary gain. (Wk. Comp. Law, § 3, subd. 5) *Mihm v. Hussey*, 169 App. Div. 742, 155 N. Y. Supp. 860. (The 1916 amendment [Laws 1916, c. 622] changed this group to "storage of all kinds and storage for hire." Hence the distinction drawn in this case is no longer applicable.)

An employé of a wholesale grocery company, which maintained a storage warehouse, was not engaged in warehousing while placing barrels of vinegar therein. *Id.*

⁶¹ *Canton v. Bender*, *The Bulletin*, N. Y., vol. 1, No. 8, p. 12.

⁶² If the employer in the hazardous employment uses his regular employés in doing something which may not be a hazardous employment in itself, but the work is a part of his general employment, and incident to it, the employé may be said to have received the injury while engaged in a hazardous employment. But, where a man engages a carpenter by the hour to do some work upon his premises in the way of improvements, he is not engaged in the hazardous employment of structural carpentry or repair of buildings, as contemplated by group 42 of the law. *Lehmann v. Ramo Films, Inc.* (Sup.) 155 N. Y. Supp. 1032. A deceased carpenter, who was employed casually to repair the building of one engaged in the macaroni and saloon business, his employment being not under contract, was not in the employ of a company engaged in a hazardous business. (Consol. Laws, c. 67) *Id.* An employer is not liable for the death of one while engaged in repairing for him a building in which he manufactured macaroni. (Workmen's Compensation Act, § 3, subd. 5) *Id.* A carpenter, killed while repairing a macaroni factory, was not an employé of company engaged in a hazardous employment, although the making of macaroni is designated by the statute as dangerous. *Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410, 113 N. E. 407, affirming 170 App. Div. 103, 155 N. Y. Supp. 1076.

a "trade, business, or occupation carried on for pecuniary gain."⁶³ Farming is not a hazardous occupation, nor, where the farmer engages a painter to paint his buildings, is the painting an occupation carried on for pecuniary gain.⁶⁴ The business of selling glassware is not a hazardous employment under the New York Act.⁶⁵

The test of liability is the actual work or occupation in which the employé is engaged, rather than the business of the employer.⁶⁶ In other words, it is the fact of being engaged in the hazardous employment which gives a right to compensation, not the fact that the employer is "carrying on or conducting the same," and that the employé is injured while performing some incidental duty in connection with such employment. Thus a motorman injured from being struck by an automobile on the street after he has quit work for the day, and while on his way to have his watch tested, is not injured while engaged in a hazardous employment, though it is a condition of his employment that his watch be tested.⁶⁷ And where an employé's principal duty is to sell women's clothing, he is not engaged in a "hazardous occupation" merely because he inciden-

⁶³ (Wk. Comp. Act, § 3, subds. 3 and 5) *Allen v. State* (Sup.) 160 N. Y. Supp. 85.

⁶⁴ *McComsey v. Simmons*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 13.

⁶⁵ *Wilson v. C. Dorflinger & Sons*, 218 N. Y. 84, 112 N. E. 567, reversing 170 App. Div. 119, 155 N. Y. Supp. 857.

⁶⁶ *Lyon v. Windsor* (Sup.) 159 N. Y. Supp. 162.

Where the business in which claimant was employed as watchman was a hazardous business, which was sometimes in operation during his hours of labor, and he was called upon at times to perform other duties than those of watchman, and was injured while he was concededly about his regular duties, he was under the Act. *Fogarty v. National Biscuit Co.*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 9. But where the employer's business (conducting a grocery) was not in the enumerated list of hazardous employments, and, though the employé as part of his duties was required to drive a horse in delivering, which would have brought him within the list, he was not fulfilling that part of his duties at the time he was injured, compensation was denied. *Bartz v. Friedlander*, *The Bulletin*, N. Y., vol. 1, No. 11, p. 11.

⁶⁷ *De Voe v. New York State R. Co.*, 169 App. Div. 472, 155 N. Y. Supp. 12.

tally in the course of his duty goes to the factory to obtain garments.⁶⁸ Likewise, where a traveling salesman is injured while riding in a public bus in his regular occupation, and it appears that his perils are not increased nor his safety diminished by the character of his employer's business, he is not engaged in a hazardous business, although his employer's business is hazardous.⁶⁹ Under a provision designating the construction and repair of railways as hazardous employment, and providing compensation for injuries to workmen engaged therein, a dependent cannot recover for the death of his son employed as a process server, claim adjuster, and investigator, since his duties were in no way hazardous, or connected with the dangerous appliances of the work.⁷⁰ But, where an employé is injured while performing an act which is fairly incidental to the prosecution of a hazardous business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed.⁷¹ For example, the fact that an employé of a drug man-

⁶⁸ (Wk. Comp. Act. § 2, group 38) *Lyon v. Windsor* (Sup.) 159 N. Y. Supp. 162.

⁶⁹ (Wk. Comp. Act, § 2, group 32) *Mandle v. A. Steinhardt & Bro., Inc.* (Sup.) 160 N. Y. Supp. 2. *Sickles v. Ballston Refrigerating Storage Co.*, 171 App. Div. 108, 156 N. Y. Supp. 864, is a similar case.

⁷⁰ *In re Brown* (Sup.) 159 N. Y. Supp. 1047.

⁷¹ *In re Larsen*, 218 N. Y. 252, 112 N. E. 725, affirming 169 App. Div. 838, 155 N. Y. Supp. 759.

Where an employé at the time of his injury was unloading lumber to be used in the mill in connection with some new machinery for mixing grain, he was engaged in the hazardous employment of milling, though not actually milling grain at the time of his injury. *Bowne v. S. W. Bowne Co.*, *The Bulletin*, N. Y., vol. 1, No. 12, p. 17. That at the time of the injury applicant was engaged in moving freight with a hand truck did not prevent him from being engaged in common labor in and about dock work. *Wiken v. Superior Stevedores Co.*, *Bul. Wis. Indus. Com.* vol. 1, p. 88.

But an employé, hired to take charge of theater property, see to its storage, bringing to and removing from the stage, and from time to time to

ufacturer was injured while building a shelf for use in the business, and not while engaged in the immediate process of manufacturing drugs and chemicals, did not preclude recovery of compensation where the shelf was necessary to the prosecution of the business.⁷²

Under the express provisions of the New York Act it must be presumed, in the absence of some substantial evidence to the contrary, that the business conducted by the employer was within the provisions of the statute defining hazardous employments.⁷³ If the employé is engaged in employment declared hazardous, but at times may work in a nonhazardous employment, and the employer fails to show all the facts, it is not unreasonable to presume that the injury is within the act.⁷⁴ It will throw further light on the

make articles of furniture as they were needed, who fell through a trapdoor while removing some furniture from the stage, was not entitled to compensation as a structural carpenter or a manufacturer of furniture, that not being the principal business of his employer, the manager of the theater, and he not being engaged in such business at the time of his injury. *Adler v. Thomas Hefsky Theater Co., Inc.*, *The Bulletin*, N. Y., vol. 1, No. 11, p. 13. A wholesale druggist must be presumed to be engaged in the hazardous business of "manufacture of drugs and chemicals." *Larsen v. Paine Drug Co.*, 169 App. Div. 838, 155 N. Y. Supp. 759.

⁷² (Wk. Comp. Act, § 2, group 28) *In re Larsen*, *supra*.

⁷³ (Wk. Comp. Act, § 21) *In re Larsen*, *supra*.

⁷⁴ (Wk. Comp. Act, § 21) *McQueeney v. Sutphen & Hyer*, 167 App. Div. 528, 153 N. Y. Supp. 554. Where deceased, at the time of his injury, was putting meat into an electric chopper and forcing it in with his fingers, and it did not appear what kind of meat he was grinding, or for what purpose it was being ground, and the employer's report gave no further details of the matter, though he knew or had the means of knowing the particular purpose for which the chopper was being used at the time of the accident, the presumption was that the injury did not occur outside the hazardous employment. The employer's failure to disclose matters apparently within the knowledge of him alone raised a presumption that the full particulars would not be to his advantage. (Wk. Comp. Act, § 21) *Kohler v. Frohmann*, 167 App. Div. 533, 153 N. Y. Supp. 559. It has been said that, where one employed in a factory by persons whose business was "polishing plate and window glass, jobbers and manufacturers of mirrors and beveled plates," was injured while raising a large light of plate glass from the cutting table, the presumption was that the injury came within the statute, though it did not appear that

meaning of the terms used in these Acts in enumerating hazardous employments, particularly the terms used in the New York Act, to note that an assistant hotel chef injured from the accidental slipping of a knife while he is distributing meat to cooks is not engaged in the "preparation" of meat products;⁷⁵ that the cutting up and beveling of glass, or making of looking-glasses from it, may be considered a "manufacture of glass products";⁷⁶ that the expression "operation" includes the loading and unloading of a truck, hitching and unhitching of the horses, feeding and caring for the horses, these acts being part of the employment of operating a truck,⁷⁷ and also one engaged in loading a wagon with sand;⁷⁸ that

the glass was being made into looking glasses or beveled glass plates, or even was to be cut into small-sized plates, and for all that appeared he may have been packing glass which had been sold to a customer in the same condition in which it was in when received at the factory. *McQueeney v. Sutphen & Hyer*, 167 App. Div. 528, 153 N. Y. Supp. 554.

⁷⁵ Wk. Comp. Act, § 2, groups 30, 33, provide that the manufacture or preparation of meats or meat products and the canning or preparation of foodstuffs shall be deemed hazardous employments. A butcher or assistant hotel chef, whose duty it was to distribute meat to the cooks as ordered, and whose knife accidentally slipped while he was holding a leg of mutton on the butcher block, in consequence of which an artery was severed, resulting in hemorrhage and death, was not within such Act, since the word "preparation" does not mean ordinary preparation of meat and foodstuffs for cooking purposes, but means a preparation by some mechanical means, or a preparation which either changes the form or the nature so as to render the material suitable for use. *De La Gardella v. Hampton Co.*, 169 App. Div. 905, 153 N. Y. Supp. 1112.

⁷⁶ (Wk. Comp. Act N. Y. § 2, group 20) *McQueeney v. Sutphen & Hyer*, 167 App. Div. 528, 153 N. Y. Supp. 554.

⁷⁷ *Smith v. Price*, 168 App. Div. 421, 153 N. Y. Supp. 221. The operation of a grocery truck on a highway is a hazardous employment, not only as to the driver of the truck, but as to his helper, where both men are necessary either to load or unload the goods or to protect them in transit. (Wk. Comp.

⁷⁸ The loading of a wagon with sand may constitute the "operation" of a vehicle drawn by horses; the operation referred to not being confined merely to moving vehicles. (Wk. Comp. Act, § 2, group 41) *Dale v. Saunders Bros.*, 171 App. Div. 528, 157 N. Y. Supp. 1062, affirmed in 218 N. Y. 59, 112 N. E. 571.

the act of a janitor in removing ashes from a boiler is as much a part of its operation as the splitting of wood with which to fire it;⁷⁹ that where employes of a club were frequently required to cut trees as part of their duties, and one of them was injured by having a tree fall on him, he was subject to the same hazard as men usually are while "lumbering" or "logging";⁸⁰ that the duties of a teamster properly include the loading of his wagon, and are not limited to the driving of the team, and hence one hired out by his master to haul sand for another was still engaged in teaming for his original employer rather than in the operation of a sand pit where he was loading sand into the wagon and a sand bank fell on him;⁸¹ and that a wholesale druggist will be presumed to be engaged in the "manufacture of drugs and chemicals,"⁸² and a

Act, § 2, group 41) *Hendricks v. Seeman Bros.*, 170 App. Div. 133, 155 N. Y. Supp. 638. "It is contended that the helper on such a truck is not one who operates the truck. If the word "operation" is to be restricted to the actual process of driving the truck—that is, steering it and manipulating the brakes and levers—then, of course, the deceased was not engaged in the operation of this truck. But no such narrow construction should be placed upon the expression "operation of trucks." In order to operate this truck, used in the wholesale grocery business, the proprietors of the concern found it necessary to employ two men. There were other duties required of these men beyond the mere matter of driving the truck. Presumably goods were to be loaded and unloaded and delivered; and in driving through the streets of the city it was thought necessary by the employers, very likely, to have one person guard and look after the load, to prevent articles being lost or stolen, while the other person was driving the truck. All these various labors made up the duties of the men and constituted the operation of the truck. Therefore it must be held that the deceased was engaged in the operation of the vehicle." *Id.*

⁷⁹ *Kiernan v. Schermerhorn*, *The Bulletin*, vol. 1, No. 8, p. 12.

⁸⁰ (*Wk. Comp. Act*, § 2, group 14) *Uhl v. The Hartwood Club*, *The Bulletin*, N. Y., vol. 1, No. 11, p. 11.

⁸¹ (*Wk. Comp. Act* § 2, group 19) *Costello v. Tayler*, 217 N. Y. 179, 111 N. E. 755; *In re State Workmen's Compensation Comm'n*, *Dale v. Saunders Bros.*, 218 N. Y. 59, 112 N. E. 571, affirming 171 App. Div. 528, 157 N. Y. Supp. 1062.

⁸² An employer, shown to be a wholesale druggist, will be presumed to be employed in the manufacture of drugs and chemicals; a drug being any

general utility man in his employ will be presumed to have participated in the hazardous work of handling drugs.⁸³ A butcher's assistant injured while going on foot to deliver some meat was not engaged in the hazardous employment either of driving a horse, as he usually did, or in the manufacture or preparation of meat, and, not being engaged in a hazardous employment at the time of the accident, could not recover.⁸⁴ One employed by a gas company in a building as a range handler or helper and required to assist in moving stoves and ranges in the building, and to and from the company's wagon, on which he occasionally rode to buildings occupied by defendant's customers, was not engaged in "longshore work," within a provision defining longshore work as including the loading or unloading of cargoes or parts of cargoes or moving or handling the same on any dock, platform, or place, or in any warehouse or other place or storage, where at the time of his injury he was assisting in removing a stove from a wagon into an elevator, and had stepped on the tailboard for that purpose, when the tailboard gave way, causing him to fall.⁸⁵ In order for an elevator accident to be compensable, it must appear that the elevator was used in one of the employments classified by the Act as hazardous.⁸⁶

substance used for medicine. (Wk. Comp. Act, § 21) *Larsen v. Paine Drug Co.*, 169 App. Div. 838, 155 N. Y. Supp. 759.

⁸³ One employed by a wholesale druggist as a general utility man will be presumed to have participated at times in the hazardous work of hauling drugs, though he was not so engaged at the time of his death. A general utility man, engaged in an establishment where drugs and chemicals are manufactured, must be presumed to participate more or less in the work of the establishment. The deceased was engaged at the instant of the accident in building a shelf, but in order to do this it may have been necessary to handle the drugs and chemicals in the building; that is, move them so as to have room to build the shelf, and after it was built place them upon the shelf. *Larsen v. Paine Drug Co.*, 169 App. Div. 838, 155 N. Y. Supp. 759.

⁸⁴ *Newman v. Newman*, 218 N. Y. 325, 113 N. E. 332, affirming 169 App. Div. 745, 155 N. Y. Supp. 665.

⁸⁵ (Wk. Comp. Act, § 2, group 10) *Gutheil v. Consol. Gas Co. of New York*, 94 Misc. Rep. 690, 158 N. Y. Supp. 622.

⁸⁶ *Wilson v. C. Dorflinger & Sons*, 218 N. Y. 84, 112 N. E. 567.

An elevator which runs up and down is not a "vehicle," within a classification embracing the operation of vehicles otherwise than on tracks.⁸⁷ The University of Illinois, by reason of the fact that it operated a freight elevator in its building, and, in the conduct of its business enterprise, stored, used, or permitted the use of molten metal and explosives, became a hazardous employer of labor.⁸⁸ "Maintenance of a structure," within the Illinois Act, includes maintenance of water mains in connection with a waterworks plant.⁸⁹

Whether a particular occupation is extrahazardous is not always so clear as to preclude controversy. A carpenter employed by a farmer for no particular time, but to continue work on a grain crib until it is fully completed, is not engaged in the occupation of "building" or in what can be considered an extrahazardous business where he is injured by a metal splinter flying from his hammer.⁹⁰ A ragpicker working for a contractor engaged merely in combing refuse for articles of value, and not in the manufacture of drugs or fertilizers, is not in the employment of a "manufacturer of drugs and chemicals, * * * medicines, * * * fertilizers, including garbage disposal plant,"⁹¹ nor, where he is engaged at the time of his injury in picking rags on a dump at the foot of a street from whence refuse is carried to sea in scows, is he engaged in "longshore work" declared by the New York Act to be an extrahazardous occupation.⁹² The operation of a passenger and freight elevator in a mercantile house is not an extrahazardous or inher-

⁸⁷ (Wk. Comp. Act, § 2, group 41) *Wilson v. C. Dorfinger & Sons*, 218 N. Y. 84, 112 N. E. 567, reversing 170 App. Div. 119, 155 N. Y. Supp. 857.

⁸⁸ *North v. University of Illinois*, Bulletin No. 1, Ill., p. 63.

⁸⁹ *Brown v. Decatur* (1914) 188 Ill. App. 147.

⁹⁰ (Wk. Comp. Act, §§ 1, 3b) *Uphoff v. Industrial Board of Ill.*, 271 Ill. 312, 111 N. E. 128.

⁹¹ (Wk. Comp. Act, § 2, group 2S) *Tomassi v. Christensen*, 171 App. Div. 284, 156 N. Y. Supp. 905.

⁹² (Wk. Comp. Act, § 2, group 10) *Id.*

ently dangerous occupation such as is covered by this Act.⁹³ An employé engaged at the time of his death in driving piles on the beach and aiding in driving sheeting is engaged in an extrahazardous occupation.⁹⁴

Where a Washington employer conducts any department of his business as an extrahazardous business, his workmen are entitled to the protection of the Washington Act. It does not matter whether such extrahazardous business is the principal business or the incidental business of the employer.⁹⁵ Thus one assisting in the installation of an electric meter under the direction of his superior was engaged in an extrahazardous employment, though his usual occupation was that of truck driver and storekeeper's helper.⁹⁶ Though this Act authorizes compensation only to persons in hazardous and extrahazardous employments, it is not essential that the injury shall have arisen out of the work.⁹⁷ One who was engaged in managing business buildings, and as a department thereof employed a maintenance force, was liable for payment of premiums to the Washington Industrial Insurance Commission; liability therefor not being determined by the character of the particular business engaged in, but attaching to any department of the business which may be extrahazardous.⁹⁸ Extrahazardous occupations unlisted in this Act will be included in existing classes whenever possible.⁹⁹ "Construction work" on tunnels includes

⁹³ (Wk. Comp. Act, §§ 2, 4, class 5) *Guerrieri v. Industrial Insurance Commission*, 84 Wash. 266, 146 Pac. 608.

⁹⁴ (Wk. Comp. Act, § 2, group 11) *Mazzarisi et al. v. Ward & Tully et al.*, 170 App. Div. 868, 156 N. Y. Supp. 964.

⁹⁵ *Wendt v. Industrial Ins. Com.*, 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790.

⁹⁶ *Replogle v. Seattle School Dist.*, 84 Wash. 581, 147 Pac. 196.

⁹⁷ *Stertz v. Industrial Insurance Commission of Washington (Wash.)* 158 Pac. 256.

⁹⁸ *State v. Business Property Security Co.*, 87 Wash. 627, 152 Pac. 334.

⁹⁹ (Wk. Comp. Act Wash. § 2) *Rulings Wash. Indus. Ins. Com.* 1915, p. 4.

work done in constructing a railroad tunnel, though railroad construction work is given a separate classification.¹ The enumeration of extrahazardous work includes civil engineers in connection with logging, concrete manufacture, quarrying, and mining;² also city, county, and state civil engineers engaged in field work.³ A carpenter was engaged in an extrahazardous business where he was killed in a repair shop while turning on electric power to operate a grindstone and sharpen his chisel.⁴ Such enumeration excludes the business of wholesale and retail handling of inflammable oils.⁵ The occupation of cooks and flunkies is considered nonhazardous.⁶ The construction of a manhole from the surface of a street to underground pipes near a railroad track has been held not extrahazardous work,⁷ as has also the work of one employed as a helper to the driver of an automobile truck.⁸

§ 104. — Federal Act

The persons entitled to compensation under the federal Act of 1908 are artisans and laborers injured in the course of their employment by the United States in any of its manufacturing establishments,⁹ arsenals,¹⁰ or navy yards,¹¹ or in the construction of

¹ *State v. Chicago, M. & P. S. R. Co.*, 80 Wash. 435, 141 Pac. 897.

² (Wk. Comp. Act Wash. § 2) *Rulings Wash. Indus. Ins. Com.* 1915, p. 4.

³ *Id.*

⁴ *Wendt v. Indus. Ins. Com.*, 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790.

⁵ (Wk. Comp. Act Wash. § 2) *Rulings Wash. Indus. Ins. Com.* 1915, p. 4.

⁶ *Id.*

⁷ (Sess. Laws Wash. 1911, p. 345) *Puget Sound Traction, Light & Power Co. v. Schleif*, 220 Fed. 48, 135 C. C. A. 616.

⁸ *Collins v. Terminal Transfer Co.* (Wash.) 157 Pac. 1092.

⁹ The following have been held to be manufacturing establishments: The Government Printing Office, where chiefly skilled and unskilled laborers are employed, and where printing, binding, and bookmaking is done (*In re Blaine*, Dec. 1, 1908, Op. Sol. Dept. of L. p. 117; [Dec. Comp. of Treas.] Op. Sol.

¹⁰ See note 10 on following page.

¹¹ See note 11 on page 343.

Dept. of L. 779); the carpenter shop in the quartermaster's shop at the United States Military Academy, West Point, N. Y. (In re McCreery, Op. Sol. Dept. of L. 134); a lighthouse depot at which a material portion of the work consists in the manufacture and repair of materials, appliances, and vessels (In re Wygant, Op. Sol. Dept. of L. 118); the Bureau of Engraving and Printing, where ink, paper, and other materials are fashioned by workmen into bank notes, treasury certificates, etc., and sometimes bound into book form (In re Clark, Op. Sol. Dept. of L. 120); a sawmill at Ft. Meade, at which lumber is sawed and dressed and shingles are made (In re Herron, Op. Sol. Dept. of L. 124); a blacksmith shop, at which bolts, drills, and other articles and tools used in irrigation work are made and repaired (In re Fenton, Op. Sol. Dept. of L. 127); an electric light and power plant of an executive department, at which ice is also made (In re Pyrah, Op. Sol. Dept. of L. 129); the mail bag repair shop of the Post Office Department, at which a variety of mail equipment is made (In re claim Kennedy, Op. Sol. Dept. of L. 131); the mechanical plant of the Smithsonian Institution, at which steam power and electric light are generated, and cases, cages, and museum furniture are made (In re Strong, Op. Sol. Dept. of L. 132); a carpenter and machine shop connected with an Indian industrial school at which mission furniture is made (In re Clarke, Op. Sol. Dept. of L. 133); and an army quartermaster's depot, at which clothing and tents are made, is a manufacturing establishment (In re Nicholas, Op. Sol. Dept. of L. 125).

The following have been held not manufacturing establishments: The local office of the Weather Bureau at Detroit, though a printing press is there operated (In re McAllister, Op. Sol. Dept. of L. 121); a lighthouse tender, a vessel attached to a lighthouse depot and used in transporting workmen and supplies, and in the placement and upkeep of aids to navigation (In re Lambert, Op. Sol. Dept. of L. 122); the Naval Observatory (In re Lamkin, Op. Sol. Dept. of L. 128); a laboratory used only for making tests of materials (In re Meissner, Op. Sol. Dept. of L. 131); and an aqueduct and filtration plant, the function of which is to collect, purify, and deliver city water (In re Schlosser, Op. Sol. Dept. of L. 133).

It has been further held that hauling and trucking oats from car to dock by laborer in Army Quartermaster's Department is not work in or in connection with a manufacturing establishment (In re Gray, Op. Sol. Dept. of L. 118); that the driving of piles by an employé of the Bureau of Fisheries at work about a lobster pound is not work done in a manufacturing establishment (In re Feltis, Op. Sol. Dept. of L. 123); and that a storekeeper-gauger of the Internal Revenue Service is not employed in a manufacturing establishment (In re Roberts, Op. Sol. Dept. of L. 127).

¹⁰ Neither the Naval Observatory (In re Lamkin, Op. Sol. Dept. of L., 128), nor the Military Academy at West Point, is an arsenal (In re Mackay, Op. Sol. Dept. of L. 136). Carpenter work on an icehouse for Ft. Robinson, a mile distant, is not work in an arsenal. In re Olson, Op. Sol. Dept. of L. 136.

river and harbor or fortification work,¹² or in hazardous employment of construction work in the reclamation of arid land or the

¹¹ The Naval Academy at Annapolis is a navy yard (In re Brown, Op. Sol. Dept. of L. 137), as is also the naval experiment station at Annapolis (In re Bullard, Op. Sol. Dept. of L. 140); but a naval observatory is not (In re Lamkin, Op. Sol. Dept. of L. 128).

An employé at a naval station, also designated a coaling depot, is employed in a navy yard (In re Burke, Op. Sol. Dept. of L. 139), as is also a gardener at a naval training station (In re Pangburn, Op. Sol. Dept. of L. 138); but a laundress at a naval home—an asylum for disabled navy officers, seamen, and marines—is not employed in a navy yard (In re Carey, Op. Sol. Dept. of L. 139).

¹² An artisan repairing cables in the underground electric system at Ft. Adams is engaged in the construction of fortification work, which refers to work authorized by the fortification appropriation acts. In re Buzby, Op. Sol. Dept. of L. c. 141. A machinist working on gun carriages at a seacoast fortification, though under the Ordnance Department rather than the Engineer Department, is engaged in the construction of fortification work. In re Moore, Op. Sol. Dept. of L. 143. Claimant was employed as carpenter in the Quartermaster Department of the War Department at Ft. Clark, Tex., when his eyes were injured by the reflection of the sun from the white rocks and white sand. It was held that the place of employment properly came under the designation of "construction of * * * fortification work." (This opinion alters the former holding on this subject in the cases of James Ryan and W. E. Burgess.) In re Kearney, Op. Sol. Dept. of L. 147. A laborer on the United States dredge Dalecarlia, while engaged in reclamation work in Anacostia river, funds for which were appropriated by Congress, the District of Columbia reimbursing the general government for one-half the expenses of such work, was employed in the construction of river and harbor work within the meaning of the Act. In re Bristow, Op. Sol. Dept. of L. 150. Work or duties performed in an establishment not expressly included in the act, though similar to those performed in an establishment which is expressly included, does not of itself bring the former place within its provisions. Engineer of steamer attached to Key West Barracks, Fla., not entitled to compensation as being engaged in construction of river and harbor or fortification work. In re Jerman, Op. Sol. Dept. of L. 152. The Washington (D. C.) Aqueduct, Great Falls, Md., though under control and supervision of the Office of the Chief of Engineers, War Department, is not comprehended within the term "in the construction of river and harbor or fortification work." In re Rollins, Op. Sol. Dept. of L. 153. A laborer employed at Ft. Huachuca, Ariz., in a rock-crushing plant used to crush rock for the preparation of concrete required in new construction work at that post, is engaged in the con-

management and control of the same,¹³ or in hazardous employment under the Isthmian Canal Commission.¹⁴ As a matter of course, government employés not within the terms of the Act, either specifically or by necessary implication, are not entitled to compensation.¹⁵ Persons rendering services chiefly of a domestic and non-

struction of fortification work. *In re Montes*, Op. Sol. Dept. of L. 153. Carpenter work on an icehouse for Ft. Robinson, a mile distant, is not done in the construction of fortification work; the "construction" of such work does not include the erection of an ice plant. *In re Olson*, Op. Sol. Dept. of L. 141.

¹³ A machine attendant at the ice plant of the Roosevelt Dam is engaged in hazardous employment (*In re Riggs*, Op. Sol. Dept. of L. 155), as is also a ditch rider, required to ride at night and discover and attend to breaks in a canal (*In re Redburn*, Op. Sol. Dept. of L. 154), and one employed in a branch of the forestry service under the Indian Office of the Interior Department (*In re Ives*, March 10, 1915, Op. Sol. Dept. of L. p. 175). But a clerk employed at a soda fountain in a store under the Reclamation Service is not engaged in hazardous employment (*In re Arnold*, Op. Sol. Dept. of L. 158), nor is a cook's helper, working in cooking quarters (*In re Jones*, Op. Sol. Dept. of L. 155).

Work authorized by Act March 1, 1907, to construct a reservoir for storing water for irrigating lands on an Indian reservation is construction work in the reclamation of arid lands (*In re Arnold*, Op. Sol. Dept. of L. 156), as is also work in a quarry to obtain rock for damming the Colorado river to protect a valley and supply water for irrigation (*In re Skill*, Op. Sol. Dept. of L. 157).

¹⁴ The following were engaged in hazardous employment: A policeman employed in the Isthmian Canal Zone (*In re Golden*, Op. Sol. Dept. of L. 159); a laborer with a gang at work clearing ground, using a machete in cutting trees (*In re Pedez*, Dec. 17, 1910, Op. Sol. Dept. of L. 171); a time inspector required to attend men occupied in actual construction work of Isthmian Canal (*In re Van Sittert*, Op. Sol. Dept. of L. 169); a water boy serving water to men employed in actual construction work of Isthmian Canal (*In re Garsia*, Op. Sol. Dept. of L. 166); a hospital orderly in attendance upon persons violently insane (*In re Small*, Oct. 13, 1909, Op. Sol. Dept. of L. 164); a plumber and tinner working on roofs and stacks (*In re Thennard*, Op. Sol. Dept. of L. 167); and an ambulance teamster in the Canal Zone (*In re Thompson*, Op. Sol. Dept. of L. 165).

¹⁵ *In re Fernandez*, Op. Sol. Dept. of L. 187.

A skilled laborer employed in the office of the Supervising Architect of the Treasury Department is not covered by the Act, as that branch of the service

hazardous character are not entitled to compensation.¹⁶ An employé of a manufacturing establishment is entitled to compensation,

was not included, either specifically or by implication. In re Briscoe, Op. Sol. Dept. of L. 776.

Persons not entitled to compensation: A carpenter working on improvements to the water supply system at West Point. In re Mackay, Op. Sol. Dept. of L. 176. A rural mail carrier. In re Morgan, Op. Sol. Dept. of L. 177. A line-man employed by the Signal Corps of the Army. In re Lawrence, Op. Sol. Dept. of L. 178. An elevator conductor in a local federal building. In re Cassidy, Op. Sol. Dept. of L. 180. An electrician's helper employed in an executive department at Washington. In re Fowler, Op. Sol. Dept. of L. 180. A stevedore employed in the army transport service. In re Hogan, Op. Sol. Dept. of L. 180. A laborer in a local custom house. In re Washington, Op. Sol. Dept. of L. 181. A painter employed by an Indian agent at an Indian school. In re Cadwalader, Feb. 15, 1909, Op. Sol. Dept. of L. 182. A laborer employed in painting at an army barracks. In re Posey, Op. Sol. Dept. of L. 183. A launch operator in the Quartermaster's Department of the War Department. In re Eaton, Op. Sol. Dept. of L. 183. A deck hand on a vessel attached to Governor's Island, N. Y. In re Cowan, Op. Sol. Dept. of L. 184. A laborer employed at a national park. In re Johnson, Op. Sol. Dept. of L. 185. A laborer employed in the construction of a power plant in the congressional buildings. In re Smith, Op. Sol. Dept. of L. 186. A powder man employed by the Government Road Commission of Alaska. In re McCormick, Op. Sol. Dept. of L. 186. A quartermaster on a lighthouse tender (law since amended, Dec. 11, 1909, No. 2206). In re Veseth, Op. Sol. Dept. of L. 185. A seaman on a vessel of the Naval Auxiliary Service. In re Evenson, April 30, 1912, Op. Sol. Dept. of L. 187. A laborer employed by the United States in the work of raising the Maine. In re Fernandez, Op. Sol. Dept. of L. 187.

¹⁶ In re Reisinger, Op. Sol. Dept. of L. 161.

Persons not engaged in hazardous employment: A janitor rendering services chiefly of a domestic character. In re Jarvis, Op. Sol. Dept. of L. 174. A cook in a hotel kitchen. In re Reisinger, Op. Sol. Dept. of L. 161. A laborer employed in a mess hall under the Quartermaster's Department, Canal Zone. In re Traviso, Op. Sol. Dept. of L. 161. A scytheman in a grass-cutting gang. In re Migeles, Op. Sol. Dept. of L. 162. A scavenger occupied in collecting garbage and hauling it away in carts. In re Gill, Op. Sol. Dept. of L. 170. A hospital laborer performing the manual service usual about a hospital. In re Renwick, Op. Sol. Dept. of L. 172. A cemetery laborer, wheeling stone in a barrow. In re Carney, Op. Sol. Dept. of L. 173. A laborer on a delivery wagon. In re Palacios, Op. Sol. Dept. of L. 162. A telephone operator. In re Etienne, Op. Sol. Dept. of L. 163. A water boy delivering water to grass-

though at work elsewhere at the time of injury,¹⁷ and not engaged in manufacturing operations.¹⁸ A navy yard employé, though injured while at work on a naval hospital outside the yard, is employed in a navy yard.¹⁹

DIVISION II.—ARISING IN THE COURSE OF EMPLOYMENT

§ 105. In general

It is essential to the right to compensation that the injury shall have been received in the course of the workman's employment; that it shall have been received while he was doing some act reasonably incidental to his work.²⁰ An accident or injury is so received where it occurs while he is doing what a man in like employment may reasonably do within a time during which he is so employed, and at a place where he may reasonably be during that time.²¹ "Course of employment" includes acts in which the em-

cutting gangs at work about various commission properties. *In re Price*, Op. Sol. Dept. of L. 163. A storeroom clerk. *In re Inmiss*, Op. Sol. Dept. of L. 160.

¹⁷ *In re Melling*, Op. Sol. Dept. of L. 129.

¹⁸ *In re Nicolas*, Op. Sol. Dept. of L. 125.

¹⁹ *In re Blount*, Op. Sol. Dept. of L. 137.

²⁰ *Edgley v. Firth*, 1 Cal. I. A. C. Dec. 651; *Gallup v. City of Pomona*, 1 Cal. I. A. C. Dec. 242; *Moor v. Manchester Liners, Ltd.* (1910) 3 B. W. C. C. 529.

Under the provisions of section 21 of article 20 of the Constitution, it is only injuries incurred by an employé "in the course of" the employment, that the Legislature may commit to a state Industrial Accident Board the power to redress. *McCay v. Bruce*, 2 Cal. I. A. C. Dec. 975.

²¹ *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458.

An injury occurs in the course of the employment, when it occurs within the period of employment at a place where the employé may reasonably be, and while he is fulfilling the duties of his employment, or engaged in doing something incidental to it. *Larke v. John Hancock Mut. Life Ins. Co.*, 90 Conn. 303, 97 Atl. 320.

"In the course of" points to the place and circumstances under which the

accident takes place and the time when it occurred. *Fitzgerald v. Manchester Liners, Ltd.*, [1910] A. C. 498, 500; *McNicol's Case*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458, 460; *Larke v. John Hancock Mut. Life Ins. Co.*, 90 Conn. 303, 97 Atl. 320.

A park caretaker was acting within the scope of his employment, where he was mowing grass on the street outside the park area, according to custom and under directions of the park commissioners, and it appeared that the work was within the scope of the work authorized by a city ordinance. *Superior v. Indus. Com.*, 160 Wis. 541, 152 N. W. 151, 8 N. C. C. A. 960.

Accidents and injuries held to have been in the course of employment: Where an employé who had gained permission to ride in his employer's elevator was thrown against the opposite wall of a hall in getting off, which accident caused a strangulated hernia. *Herrick v. Employers' Liability Assurance Co., Ltd.*, 2 Mass. Wk. Comp. Cases, 122 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct., 217 Mass. 111, 104 N. E. 432). Where the employé, a chocolate packer, was obliged by her employer to work in a packing room where the temperature ranged from 60° to 65° Fahr. and facial paralysis, developing gradually, resulted from the employment conditions. *Dalton v. Employers' Liability Assur. Corp. Ltd.*, 2 Mass. Wk. Comp. Cases, 231 (decision of Com. of Arb.). Where the employé received a fatal injury while cranking a coal delivery wagon, the strain of his effort in turning the crank causing a small blood vessel to break in the pia membrane of the brain. *Farrell v. Casualty Co. of America*, 2 Mass. Wk. Comp. Cases, 423 (decision of Com. of Arb.). *Michigan*. Where a section foreman was run over by a train. *Papinaw v. Grand Trunk Ry. Co.* (Mich.) 155 N. W. 545. *Minnesota*. Where a teamster employed to deliver furniture was driving along the street with a load of furniture, and was killed by a heavy load of steel beams which broke the hoisting apparatus on a building under construction and fell upon him. *Mahowald v. Thompson-Starrett Co.* (Minn.) 158 N. W. 913. *New York*. Where an employé worked continuously for 21 hours, except 1½ hours off for meals, during which time he had to climb 216 steps three different times, besides being on his feet most of the time, and was found dead in his chair in a saloon a half hour after quitting, death being due to angina pectoris. *McMurray v. J. J. Little & Ives Co.*, 3 N. Y. St. Dep. Rep. 395. *New Jersey*. Where a workman with two others was pulling a hand chain connected with a block operating a mechanism which caused a lifting chain to pass through the block and lift a steel girder, and the lifting chain became clogged, and, being forced through, split the block, and the workman was struck and injured. *Scott v. Payne Bros. Inc.*, 85 N. J. Law, 446, 89 Atl. 927. *California*. Where a bowling alley has the pins set up in its alleys by boys, who work irregularly as they may happen to be present and needed, and who receive as pay 25 per cent. of the sum collected from the games which they respectively serve, and such boys are injured while setting pins. *Weaver v. Eyster & Stone*, 1 Cal. I. A. C. Dec. 563. Where a night watchman, while making his rounds through the premises, fell through an opening in the floor

to the floor below, and was killed. *Carter v. Hume-Bennett Lumber Co.*, 2 Cal. I. A. C. Dec. 42. Where an employé was directed to polish brass rails in the engine room of a vessel, and went inside the railing the better to perform his task, although going inside the rail was attended by some danger, and was injured by falling into the machinery. *Rose v. North Pacific Steamship Co.*, 2 Cal. I. A. C. Dec. 57. Where a physician, hired to give medical treatment to incapacitated employés of a manufacturing concern, was injured while returning from a visit to an ailing person who he had been led to believe was an employé of such concern, but who, in fact, had not yet been put upon the pay roll, though assigned to a job. *Getzlaff v. Enloe*, 3 Cal. I. A. C. Dec. 18. Where a janitor, without specific instructions, puts up shelves for his greater convenience, and in preparing the shelving uses a band saw and sustains injuries, consisting in the loss of a thumb and finger; such service being one which any employé might reasonably perform, even in the absence of specific instructions, and the performance of it being incidental to his duties. *Meadows v. Smith Bros.*, 2 Cal. I. A. C. Dec. 344. Where a "spieler," whose duties were to attract and persuade the crowd to attend his employers' amusement show, was bitten and poisoned by a "Gila monster" he was exhibiting. *Merritt v. Clark & Snow, Inc.*, 2 Cal. I. A. C. Dec. 983. Where the employé engaged by a corporation to inspect the work of a general contractor in the construction of a tunnel, upon the lights going out, went into the transformer house to ascertain what the trouble was, it appearing that, although he had no knowledge of electricity, his duties required him to report any unusual condition he might find, and was accidentally killed by unprotected wires. *Duden v. City and County of San Francisco*, 2 Cal. I. A. C. Dec. 1067.

Illinois. Where an employé, engaged as a wagon washer, had cranked automobiles at the instance of the machinist, and a number of times in the presence of the foreman, without objection, and was injured while so cranking the machine. *Cromowy v. Sulzberger & Sons Co.*, Bulletin No. 1, Ill., p. 37. Where a miner working in the mines inhales poisonous gases which cause his death. *Giacobbia v. Kerno-Domewald Coal Co.*, Bulletin No. 1, Ill., p. 196. Where an employé, whose duty and custom it was to do whatever was found necessary to be done in a shop, was injured in the performance of his work. *Whaley v. Hudson*, Bulletin No. 1, Ill., p. 186.

Connecticut. Where the claimant's husband, an insurance collector and agent, was run down and killed by an automobile when about to board a car for the purpose of keeping an appointment and making a collection, after having just left another house where he collected. *McKay v. Metropolitan Life Insurance Co.*, 1 Conn. Comp. Dec. 380. Where a watchman aggravated the pain in a frozen toe by stubbing it, and, becoming unconscious, fell on the stone floor, sustaining bruises of the back which developed into an abscess, causing disability. *Dorrance v. New England Pin Co.*, 1 Conn. Comp. Dec. 24 (affirmed by superior court on appeal). Where a church sexton, part of whose admitted duties was to preserve order on the church premises, was injured by stumbling over a wheelbarrow while going to stop a fight between two boys on the grounds. *Loveland v. Parish*

ployer has acquiesced, though they are not done in a strict performance of the employé's duties.²² An employé is not, like a part of a

of St. Thomas Church, 1 Conn. Comp. Dec. 14. Where an iron bar fell on the workman's foot while he was taking an inventory for his employer on a holiday. *Reese v. Yale & Towne Mfg. Co.*, 1 Conn. Comp. Dec. 154. *Ohio*. Where a father and his son were employed by a land company, the father's duty being to care for a small barn and the horses stabled therein, to feed and clean them and hitch them up for the farm foreman, milk the cows, mow the lawns, and do other work as he was directed to do by the officers or foreman of the land company, and the son's duty being to take care of a large barn, in which were stabled about 36 horses and a Jersey bull, it being the son's duty to feed and care for the stock, clean the stable, and do anything he was directed to do by the officers of the land company or its foreman, and in the performance of their respective duties the father and son occasionally assisted each other with the knowledge and acquiescence of the land company and its officers, and the father was found unconscious and fatally injured in the barn of which the son had supervision, his ribs being broken and breast crushed. *White v. Scioto Land Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. *Federal*. Where the employé, with others, was furnished living quarters on a boat by the government, and fellow employés who had been on shore were returning for the night, and decedent started to get them in a small boat, and was drowned. *In re House*, Jan. 1914, Op. Sol. Dept. of L. 325. *England*. Where a ship's watchman was found drowned in the dock, the ambit of his employment covering both the ship and the quay. *Richardson v. Ship Avonmore (Owners of)*, (1912) 5 B. W. C. C. 34, C. A.

Accidents not in course of employment: Where the members of a partnership entered into a contract with a person to install certain machinery at his own expense and one of the partners living at the place of business aiding in unloading a wagon containing machinery, billed to the contractor, and was accidentally injured while so doing. *Anderson v. Perew*, 2 Cal. I. A. C. Dec. 736. Where an employé, after receiving a slight injury, to which bandages soaked in turpentine were applied, accidentally set fire to the bandages while lighting his pipe. *Isaacson v. White Lumber Co.*, 2 Cal. I. A. C. Dec. 819. Where the claimant had a blister form on his index finger while about his employment, and subsequently, while mending a pair of shoes at home, the awl which he was using slipped and penetrated the finger, and blood poisoning resulted. *Palmeri v. Greist Mfg. Co.*, 1 Conn. Comp. Dec. 669. Where the medical evidence, though conflicting, tended strongly to show that indigestion and gastritis, from which the claimant was suffering, were probably never due to muscular strain, as claimed by the workman and his physician. *Graves v. Connecticut Mills Co.*, 1 Conn. Comp. Dec. 657.

²² Where an employé of a "scenic railway" in an amusement park goes up on a framework to look for a hat lost by a passenger, it being the proprie-

machine operated by him, fixed to precisely the mechanical movements he must perform in order to discharge his industrial function. He may do whatever a human being may reasonably do while in the performance of his duty without such acts placing him outside of the course of his employment.²³ When an injury arising from a risk of the business is suffered while the employé, though not strictly in the line of his obligatory duty, is still doing something incidental to the performance of his work, in going to or from the work or in the necessary intervals of a discontinuous employment, he will ordinarily be entitled to compensation.²⁴ Other necessary

for's custom to allow such practices for the accommodation of patrons and so that his employés may secure rewards, and while so doing the employé is accidentally struck by a car and killed, the accident happened in the course of his employment. *Lane v. Joyland Co., Inc.*, 2 Cal. I. A. C. Dec. 872. Where a stableman required to act as watchman and protect his employer's property against intruders, it being situated where trouble might occur, although the employer had neither authorized nor forbidden him to carry or use a pistol for that purpose, was accidentally shot while cleaning a pistol which he had procured for his own protection in the performance of his duties, the accident arose in the course of the employment. *Benson v. Hutchinson C.*, 2 Cal. I. A. C. Dec. 901.

²³ *Bode v. Shreve & Co.*, 1 Cal. I. A. C. Dec. 6.

Where a workman's hand was crushed when he attempted, while engaged in operating a triphammer, to remove a tin can placed on the lower die by a bystander, his injury arose in the course of his employment, though the bystander placed the can on the die for fun, in which the injured workman took no part. (*Workmen's Compensation Act*, § 1) *Knopp v. American Car & Foundry Co.*, 186 Ill. App. 605.

²⁴ *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368; (*St.* 1911, § 2394—10) *International Harvester Co. v. Industrial Commission*, 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330.

Where a workman employed on a subway almost continually for eight months was told by his foreman, on appearing ready for work on a certain morning, that he need not work that day, the foreman thinking him to be intoxicated and in a condition unfit for work, and where he tripped and fell while leaving the subway, he was a regular employé, in the performance of his duties, and entitled to compensation. *Kiernan v. Priestedt Underpinning Co.*, 171 App. Div. 539, 157 N. Y. Supp. 900.

Physician injured.—Where a physician, under contract to attend the incapacitated employés of a manufacturing concern, is injured while return-

conditions being present, an injury is compensable when received by the employé while guarding or protecting the employer's property,²⁵ enforcing his authority as foreman,²⁶ taking care of horses

ing from a visit to such an employé, the injury is sustained in the course of the employment, although he intended to and did avail himself of the same trip as a convenient occasion to treat a private patient, since the trip derived its character from its main purpose of treating a contract patient. *Getzlaff v. Enloe*, 3 Cal. I. A. C. Dec. 18.

²⁵ *Accidents were in the course of the employment*: Where a mill superintendent, in pursuance of his general duties of ordering trespassers off the premises and in executing special instructions to the same effect, was shot and killed by a trespasser. *In re Reithel*, 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A, 304. Where a night watchman was injured during working hours, at a place where he was accustomed to go in performing his duties, from being shot by officers who mistook him for a robber. *In re Harbroe*, 223 Mass. 139, 111 N. E. 709. Where a night watchman is murdered by burglars whom he has surprised on the premises of his employer. *Mason v. Western Metal Supply Co.*, 1 Cal. I. A. C. Dec. 284. Where a city marshal was murdered by persons whom he is seeking to arrest as suspicious characters.

Colson v. City of Burbank, 2 Cal. I. A. C. Dec. 127. Where a bartender is shot dead upon his refusal to throw up his hands at the order of two hold-up men attempting to rob a saloon at midnight, and while the bartender was trying to reach the adjoining room to get a revolver. *Henning v. Henning*, 2 Cal. I. A. C. Dec. 733. Where a night watchman, while in the discharge of his duties, was shot by a burglar and died. *In re Margaret Evans*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 55.

²⁶ An injury received by a railroad section foreman in an altercation with one of a gang of men over which he had supervision, which grew out of his justifiable efforts to maintain his authority as foreman and to protect the property of his employer intrusted to his care, is an injury in the course of employment within the meaning of the Boynton Act. *Western Indemnity Co. v. Pillsbury*, 2 Cal. I. A. C. Dec. 454, 170 Cal. 686, 151 Pac. 398. Where a foreman is threatened with assault by a turbulent and unruly workman, it is not a defense to his application for compensation for injury sustained by such assault that he did not apply to the police power of the state prior to the attack to establish his authority and protect him. The maintenance of discipline by every foreman of a gang is an issue of personality. The foreman who cannot maintain order and discipline among his men and secure obedience to his directions soon ceases to be a foreman. He is therefore not taken out of the course of his employment by standing his ground, instead

used in his work,²⁷ or doing his employer's work at home.²⁸ It does not preclude an injury from having been received in the course of the employment that the employé was injured by fellow work-

of going to a police officer for protection and reinforcement. *Rudder v. Ocean Shore Railroad Co.*, 1 Cal. I. A. C. Dec. 209.

Where an assistant foreman was assaulted by two workmen whom he had just reprimanded for not doing their work properly, the accident arose in the course of his employment. *Yume v. Knickerbocker Portland Cement Co.*, 3 N. Y. St. Dep. Rep. 353 (affirmed in 169 App. Div. 905, 153 N. Y. Supp. 1151).

A foreman whose duty in part was to enforce discipline, injured while going to stop a fight between two of his men, was injured in the course of employment. *In re Warton*, Op. Sol. Dept. of L. 315.

²⁷ Where a driver in the employ of a brewery was injured from being struck by a coemployé while he was unharnessing and caring for his horses, he was injured in the course of his employment. *In re Heitz*, 218 N. Y. 148, 112 N. E. 750, affirming 155 N. Y. Supp. 1112. Where a teamster was injured while putting his horse in its stall after having unhitched it from the truck, he was injured in the course of his employment. *Smith v. Price*, 168 App. 421, 153 N. Y. Supp. 221. Where one engaged as teamster, whose special duty was to care for his team, feed same, and make deliveries to customers of the employer, after his day's work took his team to the stable, and while unharnessing and feeding the team, passed behind the team of a fellow employé and was kicked by one of the horses, the injury arose in the course of his employment, and he was entitled to compensation. *Gylfe v. Suburban Ice Co.*, Bulletin No. 1, Ill., p. 167.

An employé's duty was to drive a light delivery wagon and when not so employed to work in the shop of the employer. It was also a part of his duty to take care of the horses which he drove and to take the horse and wagon to his home in the suburbs on Saturday afternoon, in order to give the horse Sunday pasture and to drive him back to the city on Monday morning. He was injured on a Monday morning, while caring for the horse, preparatory to driving to the city. The Commission held that the injury was received in the course of employment (*In re James Chase*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 53), as it was, also, where a driver's helper, a part of whose duty was to care for horses used in the business, was injured while taking care of such horses (*In re Eva I. Craig*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 38).

²⁸ Where claimant worked by the day for a merchant tailor, doing the work in his own home, and being injured there, he was injured "in the course of his employment away from the plant of his employer," and entitled to compensation. (Wk. Comp. Act, § 2, group 38; section 3, subd. 4) *Fiocca v. Dillon*, The Bulletin, N. Y., vol. 1, No. 6, p. 13.

man,²⁹ or bitten by a dog,³⁰ or was attempting to escape from a danger of which he has been warned.³¹

§ 106. Term of employment

The term of employment is not necessarily identical with the time during which services are being performed for the employer. But where, by the terms of the employment, an employé is to be ready at any hour of the day or night to perform certain duties, it does not follow that every accidental injury which he may receive during the course of the twenty-four hours is compensable. To have all the requisites for compensation present, it is essential that

²⁹ Where an employé, known to be ticklish, is carrying a bucket up a stairway, and a passing fellow employé playfully gives him a poke in the ribs with a newspaper, causing him to turn around and accidentally slip and fall down the steps, such accident happened in the course of employment. *Flint v. Coronado Beach Co.*, 2 Cal. I. A. C. Dec. 395.

The injury was received in the course of the employment: Where the decedent, while at work on one of the lower floors of a building in the course of erection, was killed by the falling of a piece of plank from one of the upper stories, presumably caused by one of the workmen of the principal contractor, who was working on the same building. *Biddinger v. Champion Iron Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 70. Where an employé, while engaged in performing work he was employed to perform, was assaulted and killed by a fellow employé. *In re Margaret M. Clark*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 125. Where a stenographer was feloniously shot and killed by a fellow employé while she was taking shorthand notes dictated by her employer. *In re Anna Schwenlein*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 136. Where a foreman, while in the discharge of his regular duties, was shot by an employé whom he had discharged. *In re Chas. F. Roll*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 63.

An employé whose arm was broken, without negligence or misconduct on his part, by being struck by an angry foreman, was injured in the course of his employment. *In re Flemmings*, Op. Sol. Dept. of L. 225.

³⁰ Where a workman was bitten by a dog while he was engaged in the work he was employed to perform, he was injured in the "course of employment" (*In re Wm. Miller*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 46), as also was a workman bitten by a mad dog while attending to his duties (*In re Bailey*, Op. Sol. Dept. of L. 297).

³¹ *Bode v. Shreve & Co.*, 1 Cal. I. A. C. Dec. 6.

he be, in fact, discharging some duty in the course of his employment.³² The term of employment includes time spent in traveling on the employer's business,³³ and a reasonable latitude of acts not in furtherance of the business, but done during working time.³⁴ A

³² Gallup v. City of Pomona, 1 Cal. I. A. C. Dec. 242.

³³ Where the frost-bite which produced a lesion causing erysipelas and death was received by the employé while he was performing his duties of soliciting insurance and collecting premiums, such duties requiring him to make long rides without regard to weather conditions, the injury arose in the course of his employment. Larke v. John Hancock Mut. Life Ins. Co., 90 Conn. 303, 97 Atl. 320.

While a salesman is actually engaged in traveling in his employer's business and in the line of duty, the risks incident to the various modes of conveyance he may take are incidental to the employment, without regard to the hour of the day when the risks are incurred. Travelers' Insurance Co. v. Spaulding & Bros., 1 Cal. I. A. C. Dec. 575. Where a moving picture actress was sent out from the studio with the other members of the company to produce a scene a half mile away, and was injured while returning to the studio on horseback to put on her street clothes, such injury was received in the course of her employment. Jansen v. Balboa Amusement Producing Co., 1 Cal. I. A. C. Dec. 477. Where it was the duty of an employé of a water company to inspect the distributing system of the company, and remedy defects found by or reported to him, immediately or when needed, in his own judgment, regardless of the hours of service, and he had received a report of trouble in the company's pipe lines and had started to search for the defect, but was injured by an automobile accident, while on the way, the injury was received in the course of his employment. Phillips v. Chanslor-Canfield Midway Oil Co., 1 Cal. I. A. C. Dec. 580. Where a civil engineer, sent from San Francisco to Eureka to survey a quarry and bring his notes back to the home office for inspection and consultation, was drowned on the wrecking of the steamship Hanalei, while he was returning to San Francisco, the accident arose in the course of his employment and is compensable. Hutchinson v. Pacific Engineering & Construction Co., 2 Cal. I. A. C. Dec. 600.

³⁴ Where a peach cutter in a cannery stepped momentarily from her place of work to talk to a fellow employé, and while doing so was injured by unguarded machinery, the accident occurred while the employé was in the course of her employment. The industrial orbit of the work being done must include such reasonable latitude as is consistent with common practice, common sense, and the work to be done. London & Lancashire Guarantee & Accident Co. v. Romberger, 2 Cal. I. A. C. Dec. 38. Where a man, hired at a fixed salary to make the regular collections of rentals and premiums due to an established

workman is injured in the course of employment where she has finished one kind of work upstairs and is going downstairs to begin work for which she is paid in a different way, and is injured on the stairs while in transit.³⁵ Where it is the duty of an employé to go from one job to another³⁶ or to places away from the employer's office and then to return thereto to make a report, he is, at all such times, acting in the course of his employment.³⁷ The same is true of a delivery boy injured from being thrown from a bicycle furnished by his employer after he has called at his home and taken lunch, and while he is on his way to make a delivery.³⁸ "Course

real estate and insurance agent, had his working hours fixed from 8 a. m. to 6 p. m., but did not require all of the time for making collections, and, though the employer controlled his whole working day, he allowed him to solicit new business in the time not required for the regular collecting, and paid him for such soliciting a percentage of the profit therefrom, while soliciting new business he was an employé and acting in the course of his employment, and was entitled to the benefits of the act when injured. *Trobitz v. Cameron*, 1 Cal. I. A. C. Dec. 550.

The employé was engaged by a government official on one day to proceed to a certain point on the following day, carrying with him for a distance of eight miles certain tools and equipment of the government which were necessary for the work to be done. Before reaching the destination the employé was injured by one of the tools he was carrying. He was injured in the course of his employment, which began when he started on the journey with the tools. In *re Connor*, Op. Sol. Dept. of L. 330.

³⁵ *Wheeler v. Contoocook Mills Corp.*, 77 N. H. 551, 94 Atl. 265.

³⁶ Where a workman was hired to go around trimming trees, and had on his person at the time of the injury a list of places to go, one after the other, and was run down by an automobile while going from one job to another, the accident arose in the course of his employment. *Kunze v. Detroit Shade Tree Co.* (Mich.) 158 N. W. 851.

A workman, taking a trip on a barge furnished by his employer, in order that he might be ready to assist in unloading the cargo when it arrived at the destination, was injured in the course of his employment where he fell off the barge and was drowned, even though he had no duties to perform during the voyage. *W. R. Rideout Co. v. Pillsbury* (Cal.) 159 Pac. 435.

³⁷ *Turgeon v. Fox Co.*, 1 Cal. I. A. C. Dec. 68.

³⁸ (Wk. Comp. Act, pt. 2, § 1) *Beaudry v. Watkins* (Mich.) 158 N. W. 16.

of employment" may include a case where an employé returns for his pay³⁹ or tools,⁴⁰ or is working overtime, or endeavoring to save his master's property,⁴¹ but not where an employé, after being suspended or discharged, goes to the place of the accident, in violation of orders,⁴² or in his own interests, and not the interests of his employer,⁴³ or returns to the place of employment after discharge

³⁹ Employés going to get their wages, or returning from getting them, have been held to have been injured in the course of their employment in cases where a collier, who was knocked down and injured by an engine on his employer's premises when he went for his wages, at 12:30 p. m. which was the proper time, he having quit work at 5 a. m. (*Lowry v. Sheffield Coal Co., Ltd.* [1909] 1 B. W. C. C. 1, C. A.); where a mill worker, whose contract of service ended on Wednesday, went to the mill on Friday to get her pay, as was the custom in the trade, and met with an accident while leaving (*Riley v. Holland & Sons, Ltd.* [1911] 4 B. W. C. C. 155, C. A.); and where a workman who was required by his employers to go to a certain place in order to get his wages, and paid for the time spent in going and returning, got on a wrong tram car on his way back, and was struck while getting off by a passing car (*Nelson v. Belfast Corporation* [1909] 1 B. W. C. C. 158, C. A.).

⁴⁰ A miner, who was injured while going down the mine, with permission, to fetch his tools, several days after his employment had ceased, was injured in the course of his employment. *Molloy v. South Wales Anthracite Colliery Co.* (1911) 4 B. W. C. C. 65, C. A.

⁴¹ *Munn v. Industrial Board*, 274 Ill. 70, 113 N. E. 110. The fact that at the time of the accident the workman's service for the day, according to the terms of his employment, had ended, did not require a reversal of a finding that the accident was received in the course of his employment. *Id.*

⁴² A collier, who had been suspended, and instead of going to the pit bottom remained, contrary to orders, in a "pass-by," and two hours later met with an accident there, was not injured in the course of his employment. *Smith v. South Normanton Colliery Co., Ltd.* (1903) 5 W. C. C. 14, C. A. (Act of 1897).

⁴³ Where a collier was dissatisfied with his pay note on Saturday, and, after resolving not to resume work until the note was altered, returned on Monday to see the undermanager, who refused to yield, and was knocked down by a wagon and killed when he was about to leave the premises, he was not within the course of his employment, having gone to the mine in his own interests, and not in those of his employer. *Phillips v. Williams*, 4 B. W. C. C. 143.

seeking reinstatement.⁴⁴ Nor does it ordinarily include the time after hiring and before beginning work.⁴⁵ The captain of a lighter may fairly be said to be engaged in its "operation" continuously within the New York Act from the beginning to the end of the round trip, including the loading and unloading of the craft, so long as he works upon it.⁴⁶

The federal Act does not follow a man after he has voluntarily severed the relation of employer and employé so as to give him the benefits of the Act in case he should afterwards become incapacitated,⁴⁷ except in certain special cases where his claim is based on an injury received while in the service, it appearing that he knew nothing of the Compensation Act and quit because he was unable to continue work.⁴⁸ An employé who after an injury resumes work pursuant to orders, being assigned to lighter duties, and is again

⁴⁴ Where an employé residing in Eureka was discharged by his employer, and thereafter came by boat to San Francisco to plead for reinstatement, his coming not being at the request of the employer, and was drowned in the wreck of the ship upon which he had taken passage, his death did not occur in the course of his employment, and his widow is not entitled to a death benefit therefor. *Merritt v. North Pacific Steamship Co.*, 2 Cal. I. A. C. Dec. 237.

The employé, a longshoreman, had finished his work for the subscriber at 7 o'clock on the night before the fatal injury occurred, and, after making an unsuccessful application for work the next day, was killed by a passing train while crossing the railroad tracks. It was held not to be an injury in the course of the employment, and the widow was not entitled to compensation. *Ganley v. Employers' Liability Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 159 (decision of Com. of Arb.).

⁴⁵ An employé, injured between the time of entering into a contract of employment and actually beginning the work for which he was employed, the injury being in no wise occasioned by the work to be performed, is not injured in the course of his employment. *In re John Tucker*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 86.

⁴⁶ *Edwardson v. Jarvis Lighterage Co.*, 168 App. Div. 368, 153 N. Y. Supp. 391.

⁴⁷ *In re Howley*, Nov. 11, 1909, Op. Sol. Dept. of L. 686.

⁴⁸ *In re Watson*, Op. Sol. Dept. of L. 730, 733.

injured, the injury resulting in immediate incapacity, established a new claim.⁴⁹

§ 107. Going to work

While there is a difference between the beginning of employment and the beginning of work,⁵⁰ or going to work on the employer's time,⁵¹ an accident to a workman on the way to work is not ordinarily in the course of employment.⁵² Exceptions have been noted

⁴⁹ In re Fletcher, Op. Sol. Dept. of L. 744.

⁵⁰ Holmes v. Great Northern Railway Co. (1900) 2 W. C. C. 19, C. A.

⁵¹ Where the evidence shows that the employé was allowed to ride to and from work on the time of his employer, he is entitled to compensation for an accident occurring while riding to work. Hiserman v. Garside, 1 Cal. I. A. C. Dec. 516.

⁵² Hills v. Blair, 182 Mich. 20, 148 N. W. 243.

Accidents not arising in course of employment: Where a baggage solicitor, whose only duty was to solicit on incoming trains, and whose employment each morning began when he arrived at the station and boarded the train, fractured an arm by falling on the sidewalk while hurrying to the depot to catch an outgoing train. Lawton v. Los Angeles Transfer Co., 2 Cal. I. A. C. Dec. 1063. Where a boy, employed in a general retail store and accustomed to buy vegetables each morning for his employer at a market on the direct route from his home to the store, was accidentally injured by a street car, while on his way to work and before reaching the market. Tenant v. Ives, 2 Cal. I. A. C. Dec. 862. Where a woodsman, having gone to town from the lumber mill and logging camp, was to return to work again at 6 a. m., and while returning from the mill to the camp at midnight, along the track of a railway on the premises which was operated by the employer, slipped and fell on a trestle and fractured his leg, it appearing that, although this was not an unusual way for men to get to the camp, it was not a necessary way, as the company ran a regular train in the early morning to convey workmen to the camp. Hutchinson v. Elk River Mill & Lumber Co., 2 Cal. I. A. C. Dec. 816. Where a building superintendent requested permission to go with the contractor in the employer's automobile to the work 20 miles away, because his own automobile was out of repair, and took an employé with him, and the automobile turned over and killed the employé. Upton v. Stahlhuth, 2 Cal. I. A. C. 539. Where a workman was injured while stepping off a car on his way to work, about 200 feet from where his work was, and before time for him to begin work. McWilliams v. Haskins, 1 Conn. Comp. Dec. 324. Where a workman was injured on a highway on his

to this rule in cases where the accident occurred while the employé was on the employer's premises,⁵³ or after reporting for duty.⁵⁴ A reasonable margin is to be allowed him to get on to the premises and to get to the place where he is to do his work, and if dur-

way to work. In *re Gilkey*, Op. Sol. Dept. of L. 288. Where a workman who was hired to renovate the interior of a church found the door locked, and in climbing over some railings to get into the churchyard, and thence into the church through a window, injured his foot, with fatal consequences. *Sheriff v. Wilson* (1901) 3 F. 661, Ct. of Sess. (Act of 1897). Where an engine driver, before time for him to begin work at the engine shed, went for his own purposes in an opposite direction along the line to a signal box, and was run over and killed after leaving it. *Benson v. Lancashire & Yorkshire Railway Co.* (1904) 6 W. C. C. 20, C. A. (Act of 1897). Where a workman, who by arrangement between his employers and a railway company, for whom they had contracted to work, was permitted to cross the line to reach his work on a siding, was run over on a foggy morning and killed. *Holness v. Mackay and Davis* (1899) 1 W. C. C. 13, C. A. Where a miner slipped on some steps about a mile away from his work, in a short cut from one point in the public road to another, which had been provided by the employers for the workmen's convenience, and there being evidence to show that they knew the steps were not safe. *Walters v. Staveley Coal and Iron Co., Ltd.* (1911) 4 B. W. C. C. 303, H. L. Where a workman who was directed to report for work on board a ship in dock at 7 a. m., from which time his wages would start, was given a return railway ticket to the nearest station, and on his return next morning missed the gangway because of fog, and fell between the ship and the dock wall. *Nolan v. Parter & Sons* (1910) 2 B. W. C. C. 106. Where a workman, who had been engaged to load a van, was promised employment in unloading it if he were on the spot when the van arrived, and met with an accident while cycling to the place. *Perry v. Anglo-American Decorating Co.* (1910) 3 B. W. C. C. 310.

⁵³ See § 109, post.

⁵⁴ Where a workman was injured from falling on the sidewalk while walking to his place of work after reporting to his foreman and receiving his instructions for the day, he was injured in the course of his employment. *Milwaukee v. Althoff*, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A, 327.

Where a motorman of a street car company is required to report at the car barn five minutes before taking his car out, and has to walk several blocks from the barn to the place where he is to take his car, and is injured by a street accident while walking to his car, there being no evidence to show that he was going out of the way upon any business of his own, such employé is injured while in the course of his employment. *Ketron v. United Railroads of San Francisco*, 1 Cal. I. A. C. Dec. 528.

ing that time he is doing something which is for the benefit of the employer as well as himself, such as getting necessary refreshment, he is engaged in his employment. * As said by Collins, M. R.: "It is clear that you cannot look at the moment when he begins his work as the moment when he gets into the employment."⁵⁵ The

⁵⁵ Sharp v. Johnson & Co., Ltd. (1905) 7 W. C. C., at page 30, C. A.

Where the engineer of a fishing boat went to work in the dark of early morning, crossing from the wharf over two other larger vessels to where he had left his boat moored alongside another vessel because of stormy weather the preceding night, and on his arrival found his boat had been changed in the night to its usual berth alongside a pier near by, the captain calling out in the dark for him to "come over here," the falling of the engineer into the water and drowning while proceeding to return over the other two vessels was an accident in the course of his employment. *Slattery v. Ocean Accident & Guarantee Co.*, 2 Cal. I. A. C. Dec. 522.

A night foreman was required to report at his place of employment for duty at 5 o'clock p. m. The premises consisted of several acres of land, the factory building in which the foreman was employed being located near the center of the tract. A cinder roadway, leading from a public street through the grounds on which the factory building was located to the factory building itself, was entirely upon the premises of the employer, and was used for both vehicles and pedestrians in traveling from the public street to the factory building. While going to work, about 30 minutes before time to report for duty, and traveling along the cinder roadway toward the factory, the foreman was run down and killed by an automobile truck owned and operated by the American Express Company. The Commission held that the injury occurred while the foreman was in the course of his employment. In *re Mary McCarthy*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 190.

Workmen arrived by train at 6:10 a. m., 20 minutes before time to begin work, and the employers knew that they arrived early and provided facilities for them to obtain refreshment before beginning work, and required them to deposit tickets within 3 minutes after 6:30 a. m., but allowed them to do so before, and one of them was injured by accident while on the employer's premises at such time; the injury was in the course of the employment. *Sharp v. Johnson & Co., Ltd.* (1905) 7 W. C. C. 28, C. A. (Act of 1897). It was likewise where a lighterman was told to pump the water out of a barge, and, arriving before the tide had receded far enough for him to work, was injured while getting into a small boat to sit down and wait. *May v. Ison* (1914) 7 B. W. C. C. 148, C. A. Where a herder who had to visit stock on two farms, distant from each other was setting out after tea on a bicycle from his home, on one farm, and a dog on his own property upset him, causing his death, the accident, though not out of, was in the course of, the employment. *Greene v. Shaw* (1912) 5 B. W. C. C. 573, C. A.

preparation necessary for beginning work after the employer's premises are reached is a part of the employment.⁵⁶ No break in the employment is caused because the workman is running to punch the time clock,⁵⁷ unless he has previously abandoned his work to seek his own pleasure.⁵⁸ A person returning to his place of work from lunch enters upon the course of his employment only when he reaches the place where his first duties are to be performed.⁵⁹

⁵⁶ *Terlecki v. Strauss*, 85 N. J. Law, 454, 89 Atl. 1023.

Where the employé, who fell from the fifth story of a building under construction on which he had been working, was on the premises on the morning after a rain in the expectation of beginning work later in the day, and had gone to the fifth story to make ready for work, the accident arose in the course of his employment. *Campanella v. Frank Stola Constr. & Bldg. Co.*, *The Bulletin*, N. Y., vol. 1, No. 12, p. 17. A roadmaster of a railroad requested an interpreter to get ten men, such as he had secured before, and bring them to a certain siding for the purpose of going to work, at the same time giving him a pass for himself and ten men, from the place where they were to be secured to the place of work. After arriving at the place of work, one of the men, while removing his baggage, was struck by a train and killed. The evidence was held by the Board to be sufficient to justify the conclusion that the deceased was in the employ of the railroad company, and that the injury arose in the course of the employment. *Patterson v. Bloomington, D. & C. R. Co.*, *Bulletin* No. 1, Ill., p. 101.

⁵⁷ (Pub. Acts Mich. [Ex. Sess.] 1912, No. 10). In *Rayner v. Sligh Furniture Co.*, 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386. the court said: "We are well satisfied that the accident was an industrial accident within the meaning of the Compensation Act, and arose 'out of and in the course of his employment.' * * * At the time of the accident Rayner was in the performance of a duty imposed upon him by his employer. When the noon whistle blew, it was obligatory upon him, before leaving the place of his employment, to punch the time clock. The performance of this duty, if not the proximate cause, was a concurring cause, of his injury."

⁵⁸ An employé, running with others to ring the time clock at the noon hour, after having been playing ball, was not injured in the course of his employment. In *re Kramer*, Op. Sol. Dept. of L. 322.

⁵⁹ Where an employé, returning from lunch to the place where he is employed, or to some other place to get necessary papers to use at the place where he is employed, is struck by an automobile while crossing the street, he is not acting in the course of his employment at the time of such acci-

Where the work of a collector and superintendent of drivers, who starts at 7 o'clock in the morning with instructing drivers, and later makes collections at the residences of customers without returning to the employer's premises, commences at the employer's offices at 7 o'clock in the morning, but is later to be performed outside of the employer's premises, the protection of the Compensation Act follows him until he reaches his home at night, but does not cover him while on his way to the employer's premises in the morning, in the absence of tasks to be performed by him before reaching such premises.⁶⁰ Where an employé called out on emergency gets wet and exhausted from wading through wet snowdrifts on his way to his place of employment, and is compelled to begin and continue work without any chance of removing his clothes, contracting pneumonia thereby, it does not bar recovery that his clothes got wet while he was on his way to work, instead of after work began.⁶¹

§ 108. Returning from work

Although a man is not, as a rule, doing the work for which he was employed when he has left off work and is returning home,⁶²

dent (*Gallup v. City of Pomona*, 1 Cal. I. A. C. Dec. 242); nor is an employé who is ordered to come back after supper for overtime work, the time consumed in eating supper to be included in his pay for overtime, and is killed accidentally by a train on railroad tracks outside the premises when returning (*Leite v. Paraffine Paint Co.*, 2 Cal. I. A. C. Dec. 1022).

⁶⁰ *Zbinden v. Union Oil Co. of California*, 2 Cal. I. A. C. Dec. 616.

⁶¹ *Linnane v. Aetna Brewing Co.*, 1 Conn. Comp. Dec. 677 (appeal pending in superior court).

⁶² *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243; *Poulton v. Kelsall* (1912) 5 B. W. C. C. 318, C. A.

Where an employé was killed in a railroad yard forming no part of the employer's plant, while he was returning home, and the contract of employment did not provide for transportation, compensation was not recoverable. (*St. 1911, c. 751, pt. 2, § 1*) *Leveroni v. Travelers' Ins. Co.* (*Fumicello's Case*), 219 Mass. 488, 107 N. E. 349.

Where a newspaper reporter, whose duties required the gathering of news in the town in which he lived and in the town two miles away where the

there is a margin both of time and of place allowed to the workman after his day's work is over before it can be said that anything that happens to him is no longer a happening arising in the course of his employment.⁶³ The employment covers not only the time during which the workman is engaged in his ordinary labor, but

paper was published, was injured while returning at the close of his day's work to his home on the usual and best bicycle route, on a bicycle furnished by his employer, his leg being crushed by a passing automobile, he was not performing a service as reporter at the time of injury and therefore not entitled to compensation. *State Compensation Insurance Fund v. Lemon*, 2 Cal. I. A. C. Dec. 507.

In *Atkins v. Scranton*, 1 Conn. Comp. Dec. 34, it was held that where a workman after his day's work cutting ice put up his tools, and started home by a short cut across the pond instead of by the public highway, and while crossing the pond slipped and fell, that his injury did not arise in the course of the employment.

An employé, injured while on his way from his place of employment to a railroad station, where he expected to take a car for home, is not entitled to compensation on account of the injury. In *re Herbert W. Anderson*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 90. A policeman who was required to be on duty during certain hours of each day, and who was subject to call at any time, day or night, was run down and killed by a train while walking along the right of way of a railroad company. At the time he was killed he had been on duty the number of hours specified by the rules of the department and had left police headquarters to go home. The reason for his presence on the right of way of the railroad company was not satisfactorily explained by the evidence. The Commission held that the conclusion that he was killed while in the course of his employment was not justified. In *re Frances E. Lyman*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 182.

⁶³ *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243; *Graham v. Barr* (1913) 6 B. W. C. C. 412.

"It is a fallacy to assume that the 'employment' ceases necessarily when actual work ceases. It includes going from the place of work." *Riley v. Holland & Sons, Ltd.* (1911) 4 B. W. C. C. 155, C. A.

Where a driver for a creamery is accustomed daily to take a wagon load of butter in the afternoon from the creamery to his home in another town, delivering a portion of the butter on his way and storing the rest at his house overnight, to be delivered the following day, and is killed by the overturning of his automobile after he has made his last delivery for the afternoon and is on his way home to store the butter overnight, such accident occurs in the course of his employment and while he is performing a service growing out of his employment. *Golden v. Delta Creamery Co.*, 2 Cal. I. A. C. Dec. 744.

also a later time during which he is passing from the surroundings of his employment into surroundings unrelated thereto.⁶⁴ In the

⁶⁴ *Hills v. Pere Marquette R. R.*, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 32. Applicant's decedent, an employé of respondent, was struck and killed by one of respondent's trains while on his way home to dinner. There were two ways of leaving the freight yard, one by way of a public highway, known as Mill street, and the other through respondent's yard. The highway was not in good condition for travel, so it was the custom of the men, which was tacitly acquiesced in by respondent, to leave by way of the yard, and decedent, leaving by that way, was killed. Respondent contends that, inasmuch as decedent had quit work for the forenoon, the relation of master and servant did not exist at the time of the occurrence of the accident, and further that decedent should have left by way of Mill street. The Commission held that an employé is still his master's servant while leaving his place of employment, or doing such acts as are incident to or connected with such leaving. Id.

An employé was injured while attempting to leave his employer's premises, through a gate provided for the entrance and exit of employés, which was temporarily closed on account of an excavation immediately outside the gate. Another means of exit had been provided for the use of employés when leaving the employer's premises. The injury consisted of a broken wrist, occasioned by the employé falling into the excavation immediately outside the gate through which he attempted to pass. It was held that the injury was sustained in the course of his employment. In re M. H. Sutter, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 147. An employé, after completing his day's work, and while still on his employer's premises, was injured while going from the locality where he was working to the office of the paymaster to obtain his pay, the traversing of that portion of the premises on which the injury occurred not being forbidden by the rules or direction of the employer, and injury not purposely self-inflicted. The injury was sustained in the "course of employment" and the injured employé is entitled to compensation. In re R. V. Phillips, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 49. An employé who, after suspending work for the day and while preparing to leave his employer's premises, negligently walked over a pile of spindles to the place where his coat and hat were hanging to get them, and was injured by one of the spindles turning and spraining his ankle, was injured in the course of his employment, and is entitled to compensation. In re Earl W. Schroeb, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 132.

The accident occurred in the course of employment: Where a laborer on a river barge, on which he ate and slept, was, after the close of his day's work, proceeding from the shore to the evening meal on the boat, and fell off the boat and was drowned. *Valente v. Fay*, 2 Cal. I. A. C. Dec. 514. Where the applicant employé caught her right hand in the swinging door of the main entrance to the building, the fourth floor of which was occupied by the busi-

case of one working at a machine the benefit of the statute is not limited to the time he is actually employed thereat. He must have time to reach his machine and get away from his employer's premises. The preparation necessary for leaving the employer's premises when the work is over is a part of the employment. A workman is none the less in the course of employment because he is changing his working clothes for his street clothes.⁶⁵ If the employé is still engaged in the performance of his duties, he is in the course of his employment, though he is returning home.⁶⁶ How-

ness of her employer, while she was leaving the building after the close of her day's work. *Chaboya v. Becker*, 2 Cal. I. A. C. Dec. 958. Where an accident happened while fire fighters, after extinguishing the fire, were preparing to leave the premises, without undue lingering or loafing. *Mazzini v. Pacific Coast Ry.*, 2 Cal. I. A. C. Dec. 962.

The injuries were received in the course of the employment where a workman was injured by a fall while in act of leaving his shop at the close of the day's work (*In re Fabey*, Op. Sol. Dept. of L. 283); where a watchman returning from work was injured after alighting from a labor train, while walking on the adjoining track, which was the only way of reaching the highway leading to his home (*In re Forde*, Op. Sol. Dept. of L. 309); and where a workman employed in an arsenal was injured while "ringing out" at a time clock at the close of the day's work (*In re Rugan*, Op. Sol. Dept. of L. 285).

⁶⁵ *Terlecki v. Strauss*, 85 N. J. Law, 454, 89 Atl. 1023. Where a factory employé quit work at her machine shortly before noon, and was, in accordance with custom, combing particles of wool out of her hair preparatory to going home, at a point away from her machine, when her hair was caught in other machinery and she was injured, the accident arose out of and in the course of her employment. *Id.* This case cites *Gare v. Vorton Hill Colliery Co.* [1909] 2 K. B. 539, holding that, where a collier was injured while leaving his work and crossing lines of rail controlled by his employers, the accident arose out of and in the course of the employment, though he had three ways to go home, the way used being the shortest and one commonly used by workmen with the knowledge and consent of the employers.

An employé suspended work about a minute before time to quit for lunch and proceeded to a locker on the premises of his employer. A fellow employé, who was in the locker room, rolled up a pair of overalls, and in a spirit of fun threw them at him, striking him in the face and injuring his eye. The injury was sustained while in the course of employment. *In re Thomas Mack*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 120.

⁶⁶ Where an employé of an irrigation company, whose duties are to supervise the distribution of water, is injured while returning to his home after

ever, where a laundry driver is accustomed, after putting up his team for the night, to gather or leave laundry while riding home on his bicycle, but was not in fact so doing on the evening when he was struck by an automobile, the accident cannot be said to have been received while acting in the course of his employment.⁶⁷ And where claimant was accustomed to mail letters at the post office on her direct route home after her day's work, such duty not altering her course from the plant of her employer to her home, an injury received after posting the letters and continuing toward home does not arise in the course of her employment.⁶⁸ It is a question of fact up to what point of time the employment can be said to continue after the workman has ceased working. As already said, while he is leaving the place where he is employed, his employment would still continue. But, though his employment may continue for an interval after he has actually ceased working, yet there must come a time when he can no longer be said to be engaged in his employment in such a way that an accident happening to him can be said to have arisen out of and in the course of his employment.

his early morning rounds, incidentally for his breakfast, but partly to receive telephoned orders, complaints, and the like, he is injured in the course of his employment. *Matney v. Azusa Irrigating Co.*, 2 Cal. I. A. C. Dec. 898. Where it was the duty of an employé of a gas company to read meters, shut off the gas when patrons of the company moved, collect accounts, and deliver orders, his employment not ending at any particular hour or place, but being continuous, he was at all times, except when at home, under the protection of the Compensation Act, and is entitled to compensation for disability for accidental injury by collision of his motorcycle with an automobile, in a public street, while on his way home, although not actually engaged in the performance of a service of his employment at the specific time and place of the accident. (Harris Weinstock, Commissioner, dissented on the ground that the employé was not, at the time of the accident, performing service growing out of and incidental to his employment, and was not acting within the course of his employment as such employé, as provided in section 12(a) (2) of the Workmen's Compensation, Insurance, and Safety Act.) *Fergusson v. Royal Indemnity Co.*, 1 Cal. I. A. C. Dec. 11.

⁶⁷ *Ogilvie v. Egan*, 1 Cal. I. A. C. Dec. 79.

⁶⁸ *Pogue v. Nassau Light & Power Co.*, 1 N. Y. St. Dep. Rep. 429.

There must be a line beyond which the liability of the employer cannot continue, and the question where that line is to be drawn in each case is a question of fact.⁶⁹ Where an engine driver when going off duty has to report himself at the station which can only be reached by walking for some distance down the line, and while so doing is killed by a down train which to his knowledge has been signaled, after passing by a few yards the first available egress from the line, a footpath leading to a gate not always unlocked, he is killed in the course of his employment.⁷⁰

In an English case the court held that, although there might be cases where the employment of a workman ceased so soon as he left his work, yet a commercial traveler was on a different footing, his business being to travel, and that from the time he left his home on his employers' business, and whilst engaged therein and until he returned to his home he was serving in their employment.⁷¹ In a Massachusetts case the employé, a traveling salesman, was a passenger on a Boston elevated car on the day of the injury, and intended to meet a customer at a certain point. He abandoned this intention, however, and decided to go home. After passing the point where he at first intended to leave the car and meet the customer, and before he arrived home, he was injured. Suit was first brought against the Boston Elevated Railway Company and a decision filed against the claimant. While the case was pending, on

⁶⁹ *Smith v. South Normantown Colliery Co., Ltd.* (1903) 5 W. C. C. 14, C. A. (Act of 1897).

Where an engineer, after leaving his engine and turning in his time slip, went on down the tracks for several hundred feet, and across a public highway, and was then struck by a train and killed, the accident did not occur in the course of his employment. *Ames v. New York Central R. R. Co.*, *The Bulletin*, N. Y., vol. 1, No. 12, p. 17.

⁷⁰ *Todd v. Caledonian Railway Co.* (1899) 1 F. 1047, Ct. of Sess. (Act of 1897).

⁷¹ *Dickinson v. Barmak, Ltd.* (1908) L. T. Jo. 403, C. A. A commercial traveler, out canvassing, who, intending to return home, missed his way to the railway station in the dark, fell into a canal, and drowned, sustained an accident in the course of his employment. *Id.*

exceptions, the employé claimed compensation under the statute. His expenses, from the time of leaving home until he returned thereto, were paid by his employer. The Commission held that he was not entitled to compensation.⁷²

§ 109. Premises of employer

In applying the rule that the employment is not limited by the exact time when the workman reaches the scene of his labor and begins it nor when he ceases, but includes a reasonable time, space, and opportunity before and after, while he is at or near his place of employment, one of the tests is whether the workman is still on the premises of his employer. This, while often a helpful consideration, is by no means conclusive. A workman might be on the premises of another than his employer, or in a public place, and yet be so close to the scene of his labors, within its zone, environments, and hazards, as to be in effect at the place and under the protection of the act, while, on the other hand, as in case of a railway stretching endless miles across the country, he might be on the premises of his employer, and yet be far removed from where his contract of labor called him. The protection of the law does not extend, except by special contract, beyond the locality, or vicinity, of the place of labor.⁷³ There are many cases where an accident

⁷² *Muir v. Ocean Acc. & Guarantee Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 172 (decision of Com. of Arb.).

⁷³ *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243; *Hoskins v. Lancaster*, 3 B. W. C. C. 476.

In *Caton v. Summerlee & M. I. & S. Co.*, 39 Scotch L. R. 762, it was held that the injury did not arise out of and in the course of the employment of a laborer who, at the conclusion of his day's work, was knocked down and killed by a passing engine 230 yards from where he had been working, while walking home along a private railway track belonging to his employer, which many of the men employed at the same place were in the habit of using in going to and from their work. The court there said: "The deceased at the time of the accident had ceased his work, had left the place where he did it, and was on his way home. He had at the time no duty to fulfill to his master, and the master had no duty to fulfill towards him. The relation of mas-

may arise while a man is on the master's premises, but not engaged in active work, and whether he is there going about the premises in pursuance of the necessities of life, such as eating, drinking, respiration, and other things that need not be mentioned, and is not doing anything that is either wrong or against his contract or outside his employment, in such a case, no doubt, the accident must be treated as one arising out of his employment. It has been so held in cases in both Scotland and England. But, on the other hand, if a man is doing something unlawful, or if his accident is due to something that is being transacted between him and other people with which the master has nothing to do, such facts might

ter and servant had ended for the day, he having fulfilled his work and left the place where his work was being done."

An employé, injured while on his employer's premises, may be entitled to compensation, though he was not actually engaged in the performance of the work he was employed to do. In *re Katharina Schatz*, Vol. I, No. 7, *Bul. Ohio Indus. Com.* p. 60.

In *Barnard v. H. Garber & Co.*, 1 Conn. Comp. Dec. 572, where an aged workman fell on the steps of his employer's establishment when entering to begin work in the morning, on account of their slippery condition, it was held the injury arose in the course of the employment. In *Penfield v. Town of Glastonbury*, 1 Conn. Comp. Dec. 637, where a janitor was injured by slipping on the ice while passing from the coal shed to the schoolhouse, which his duties required him to heat, while on the premises for the purpose of rebuilding a fire, the injury was held to have arisen in the course of his employment.

An employé of a railroad company, who entered his employer's premises at a station $2\frac{1}{2}$ miles from where his gang was working, and who was killed while on his way down the tracks to join them, was not killed in the course of his employment. *Dowling v. New York Central & H. R. R. R. Co.*, *The Bulletin*, N. Y., vol. 1, No. 10, p. 17.

Where a miner, at the end of his day's work, changed his clothes, and, still carrying a miner's lamp, started towards the bottom of the shaft with the intention of ascending to the top of the mine, and about 200 feet from the room where he had been at work and about one-half mile from the bottom of the shaft one of his eyes was put out by coming in contact with a piece of slate hanging from the roof, it was held his duties had not ended until he left the mine, and that the accident arose in the course of his employment. *Sedlock v. Carr Coal Mining & Mfg. Co.* 98 Kan. 680, 159 Pac. 9.

raise an exception.⁷⁴ It must not be assumed that the protection of the Compensation Acts extends to workmen on any part of the employers' land, whatever the distance away from the workman's actual work; each case must depend upon its own facts as to the reasonable interval of time and space during which the employment lasts.⁷⁵ If a man goes from his working place to another

⁷⁴ *Mackinnon v. Miller* (1910) 2 B. W. C. C. 70.

The employé on her way to luncheon was injured while going down a flight of stairs leading from the third floor to the second floor of the building in which she worked, there being no other way by which she could reach the street, except down the stairway on which she was injured. It was held that, since it was a necessary incident of her employment to use the flight of stairs upon which the injury occurred, the injury arose in the course of her employment. *Sundine v. London Guarantee & Accident Co., Ltd.*, 2 Mass. Wk. Comp. Cases, 833 (decision of Indus. Acc. Bd., affirmed by Sup. Jud. Ct., 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318).

⁷⁵ *Graham v. Barr and Thornton* (1913) 6 B. W. C. C. 412, Ct. of Sess.; *Hoskins v. Lancaster* (1910) 3 B. W. C. C. 476, C. A.

An employé comes under the protection of the Workmen's Compensation, Insurance and Safety Act when he enters the premises of his employer, and leaves such protection when he leaves such premises. This is true, even though the accident occur outside of working hours, since the employé must necessarily arrive shortly before the time of commencing work, and depart shortly after the hour for quitting. *Oldham v. Southwestern Surety Insurance Co.*, 1 Cal. A. C. Dec. 258. While, as a general rule, an employé accidentally injured when on the way to and from the place of employment cannot claim compensation, on entering or leaving by the usual route and means provided by the employer, is entitled to compensation for accidental injury, except when he has loitered on the premises, or has not left the premises by the usual means and route. *Gardiner v. State of California Printing Office*, 1 Cal. I. A. C. Dec. 21. An employé comes under the protection of the Compensation Act at the time that he reaches his employer's premises in the morning, and remains thereunder until he leaves them at the close of his day's work, but his risks in going and coming are the risks of the commonalty, and not of his employment. In this case an injury sustained by the applicant by a collision with a street car while he was going to work in the morning and before reaching his employer's premises is held not to be compensable. *Zbinden v. Union Oil Co. of California*, 2 Cal. I. A. C. Dec. 616. Where a teamster, who reported for duty each morning at the stables of the defendants on the exposition grounds, was accidentally injured one morning after he had entered through the exposition gate and into the grounds, but before

place in the works, he must get back to his work, and if in going back he meets with an accident, that is an accident arising in the

reporting for duty at the stables, the employé was not at the time of the accident in the course of his employment. *McInerney v. Palmer & McBryde*, 2 Cal. I. A. C. Dec. 655. Where an employé is given home work to be performed at her residence, and on returning to her place of employment on the following day with a bundle of work stumbles upon a public sidewalk not upon the premises of the employer, sustaining serious injury and disability, such accident does not arise in the course of her employment. *Malott v. Healey*, 2 Cal. I. A. C. Dec. 103.

An employé, who lost his life in a burning building in which he was employed, was killed "in the course of his employment," and his dependents are entitled to compensation. In *re Harriet Horn*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 35. An employé killed while operating a derrick on the premises of his employer, which was a part of the duties under his contract of employment, was killed "in the course of his employment." In *re Anna King*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 37.

Federal Act.—The following have been held to have been injured in the course of their employment: A fireman employed in the Canal Zone, injured while performing service outside territory under control of the United States. In *re Nellis*, Op. Sol. Dept. of L. 286. A workman in the Canal Zone, injured while following a customary path on his way to work, on the premises of his employer or in the immediate vicinity thereof. In *re Chambers*, Op. Sol. Dept. of L. 291. An employé walking along railroad track of Reclamation Service when going to his work, who was struck by a train of that service and killed. In *re Gonzales*, Op. Sol. Dept. of L. 333. A workman who fell and was injured while going through the main gate of a navy yard. In *re Guerin*, Op. Sol. Dept. of L. 324. A workman who was on his way home after working hours, and was injured while still on the government premises. In *re Bernard*, Dec. 12, 1913, Op. Sol. Dept. of L. 323. But an employé who was a cook in the river and harbor work, and who was drowned while going to work, crossing the river in a launch of a private party, was not in the course of employment. In *re Ware*, Op. Sol. Dept. of L. 335.

It was held that the injury was received in the course of the employment where a miner was on his way to the doorway of a horizontal passage which led into the mine, and slipped and broke his leg on rails on the premises leading thereto (*Mackenzie v. Coltness Iron Co., Ltd.* [1904] 6 F. S. Ct. of Sess. [Act of 1897]), and where a collier was injured when passing through an iron gate on the employer's premises seeking to reach a lamp room 150 yards away, where he was to start work (*Hoskins v. Lancaster* [1910] 3 B. W. C. C. 476, C. A.). But the holdings were to the contrary where a workman while on his way to work was crossing some vacant land owned by his employers, and slipped on some ice a quarter of a mile from the place of his work (*Gil-*

course of his employment, just as in the case of an accident happening after he has entered the works in the morning and while he is proceeding to his own place in the works.⁷⁶ If the employé remains after hours for some legitimate purpose connected with the employment, he may still be within the course of his employment,⁷⁷

mour v. Dorman, Long & Co., Ltd. [1911] 4 B. W. C. C. 279, C. A.); where a miner was knocked down by an engine and killed at a place 400 yards from the mouth of the shaft and 280 yards from the office of the colliery, while going home along a track along a branch railway which belonged to the colliery (*Graham v. Barr and Thornton* [1913] 6 B. W. C. C. 412, Ct. of Sess.); where a collier was killed after his day's work, while going home along a private railway belonging to his employers and used for conveying things to and from the colliery (*McNicol v. Summerlee & Mossend Iron & Steel Co., Ltd.* [1902] 4 F. 989); and where a workman fell while returning home along a public footpath over his employer's land, because of the rough nature of the path (*Williams v. Smith* [1913] 6 B. W. C. C. 102, C. A.). When a riveter, who was working on a ship in dock, came on deck expecting to go ashore for breakfast, he found that the vessel was being moved, and, the gangway having been taken away, a rope between the ship and the quay was the only possible way of reaching shore. The rope gave way when he slipped down, and he was injured. It was held that his action was reasonable, and that the accident arose out of the employment. *Keyser v. Burdick & Co.* (1911) 4 B. W. C. C. 87, C. A. A miner whose duties began in a lamp cabin, and who was injured on the employer's premises, but 360 yards from the cabin and 20 minutes before time to begin work, was not injured in the course of his employment. *Anderson v. Fife Coal Co., Ltd.* (1910) 3 B. W. C. C. 539, Ct. of Sess. If a man goes from his working place to another place in the works, he must get back to his work, and, if in going back he meets with an accident, that is an accident arising in the course of his employment, just as in the case of an accident happening after he has entered the works in the morning and while he is proceeding to his own place in the works.

⁷⁶ *Thomson v. Flemington Coal Co., Ltd.* (1911) 4 B. W. C. C., at page 408.

⁷⁷ Where a moving picture actress remains in the studio after hours to arrange her wardrobe, and accidentally falls over the doorsill of the room of another actress, where she had stopped for a moment, suffering an injury to her shoulder, such injury happens in the course of the employment while preparing herself for her work, and is compensable. *Bolles v. New York Motion Picture Corp.*, 2 Cal. I. A. C. Dec. 501. Where the quitting time varied somewhat with the requirements of the work, and the employé was injured a few minutes after the regular hour for quitting, while on the premises of the employer, doing work of the character he was employed to perform and believing

but not, however, if he remains for purposes of his own.⁷⁸ An employé is under the protection of the Compensation Act even after his discharge, providing he be injured upon the premises of the employer while remaining there for reasons connected with his former employment.⁷⁹ A workman whose employment requires him to occupy sleeping and living quarters furnished by the employer, injured after hours, but at such quarters, is injured in course of employment,⁸⁰ but it is otherwise where the employé is living on the premises merely for his own convenience. The California Com-

in good faith that such services were required of him, he was entitled to compensation for disability as the result of the injury suffered by him. *Gordon v. Eby*, 1 Cal. I. A. C. Dec. 16. Where an employé who has remained about his place of employment after the hour for closing is injured by robbers seeking his employers' property which he defended, such injury is received in the course of his employment. *Johnston v. Mountain Commercial Co.*, 1 Cal. I. A. C. Dec. 100.

⁷⁸ An employé who remained upon the premises after quitting work, instead of leaving by the usual means of egress, went to a part remote from the part where he was employed to see an employé of another department on some personal matter of interest to himself, and while so doing was injured. He was not injured "in the course of employment." In *re A. V. Mitchell*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 56.

A workman off duty, but on premises of employment, who volunteered to do a piece of work and met with an accident resulting in his death, was not injured in the course of employment. In *re Simpson*, Op. Sol. Dept. of L. 316.

⁷⁹ *Goering v. Brooklyn Mining Co.*, 2 Cal. I. A. C. Dec. 141. Where an employé in a few minutes after being discharged, while cleaning up his work and preparing to leave the premises, is injured by accident, such accident occurs in the course of his employment, and he is entitled to compensation therefor. *Booth v. Burnett*, 2 Cal. I. A. C. Dec. 125.

⁸⁰ In *re Hott*, Op. Sol. Dept. of L. 302. An employé who had living quarters on a government boat while off duty, at about 5:30 a. m., left his bedroom for some unknown reason, fell overboard, and was drowned. The accident was held to have been in the course of the employment. In *re Jenkins*, Op. Sol. Dept. of L. 334.

Where an engineer, employed to install machinery on a dredger, is required for the benefit of his employers to live on board, and while preparing his breakfast is injured by the explosion of a gas stove, the injury occurred in the course of the employment. *McLean v. Shield*, 2 Cal. I. A. C. Dec. 1046.

mission held that, where an employé is furnished a boarding place and bunk by the employer upon the latter's premises, and is injured after working hours, while going from the cookhouse to the bunkhouse after supper, such injury does not occur in the course of the employment and is not compensable, saying that, while the fact that an accident happening upon the employer's premises is usually taken as an exception to the rule that an accident outside of working hours is not compensable, such exception will not be extended to include accidents about the living quarters of the employé after the day's work has been finished.⁸¹ Where a workman arrives early, and is injured on the premises while waiting to go to work, he is in the course of employment.⁸² That the accident occurred while the workman was taking a short cut across his employer's premises does not prevent it from being in the course of employment.⁸³ Where an employé is injured in going aboard or

⁸¹ *Mahoney v. Sterling Borax Co.*, 2 Cal. I. A. C. Dec. 708.

⁸² "There must be a certain margin of unpunctuality allowed, and if he is on the premises before he has to do his work, and during that time the accident arises, it arises out of and in the course of his employment." *Fitzpatrick v. Hindley Field Colliery Co.* (1902) 4 W. C. C. 7, C. A. An injury to a miner, who had got his lamp and "tallies," and, having arrived at the pit's mouth earlier than necessary, was waiting to descend when the accident occurred, was in the course of his employment. *Id.*

Where a workman who arrived early began work on the premises of his employers a few minutes before the hour of 8 a. m., when his hours began, and sustained an accidental injury while so engaged, such accident arose while he was performing service in the course of his employment. *Findley v. Judah Co.*, 2 Cal. I. A. C. Dec. 760.

A workman, injured by an explosion while on the premises of the government waiting for the time to begin work, is injured in course of his employment. *In re Giovanni*, Op. Sol. Dept. of L. 287.

⁸³ The accident was in the course of the employment: Where a miner, on leaving his work and taking a dangerous short cut across a heap of waste material on the premises of the employer, fell and was fatally injured (*Hendry v. United Collieries, Ltd.* [1910] 3 B. W. C. C. 567, Ct. of Sess.); where some trucks were standing on some railway lines on the premises of a colliery, and a collier, leaving work by his usual route, tried to pass under them, and was injured when they were moved (*Gane v. Norton Hill Colliery Co.* [1910]

leaving his ship by means provided for ingress and egress, he is within the ambit of his employment at the time of such injury, and is entitled to compensation therefor.⁸⁴

One employed as a pipeman and truckman in the fire department of a city was not injured on the premises of his employer where he was injured while using the streets of the city in returning to work after his midday meal. He was merely using the streets the same as any employé of a private employer would do. The streets may constitute the premises of the city in many cases, as, for instance, where a policeman or fireman is injured while on duty in a street or a street employé is injured in the performance of his duty thereon. But where the streets are used solely for the purpose of going to or from an employment carried on at a definite place other than a street, they are not premises, within the meaning of a Compensation Act.⁸⁵

The Washington Act authorizes recovery of compensation where the injured employé is injured on the employer's premises by the act of a third person.⁸⁶

§ 110. Means of conveyance

There have been several decisions in this country and in England as to when and how far an employé can be said to have been

2 B. W. C. C. 42, C. A.) ; also where officials of the railroad knew that a short cut which workmen had been forbidden to use was habitually used by many of them, and a railway goods checker, leaving work by this route, was fatally injured, the accident occurred in the course of the employment (*McKee v. Great Northern R. Co.* [1909] 1 B. W. C. C. 165, C. A.). But in *Haley v. United Collieries, Ltd.* (1907) S. C. 214, Ct. of Sess., a collier who, although there were two provided exits from the colliery, neither of which crossed the railroad, took a short cut across a siding on the premises, a route that was not expressly forbidden and which was sometimes used by the miner, and was run down by a train and injured, was held not to have been injured in the course of his employment.

⁸⁴ *Boucher v. Olson & Mahony Steamship Co.*, 1 Cal. I. A. C. Dec. 248.

⁸⁵ *Hornburg v. Morris* (Wis.) 157 N. W. 556.

⁸⁶ *Stertz v. Industrial Insurance Commission of Washington* (Wash.) 158 Pac. 256.

in the employ of his master while traveling to and from his work in a vehicle or means of conveyance provided by the latter, and how far injuries received in such a conveyance can be said to have arisen out of and in the course of the employment.⁸⁷ The rule has been established in accordance with sound reason that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employé, and is one which the employés are required, or as a matter of right are permitted, to use by virtue of that contract.⁸⁸ Pursuant to this

⁸⁷ Discussed in an article by Prof. Bohlen, in 25 Harvard Law Review, 401 et seq.

⁸⁸ In *re* Donovan, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778; *Davies v. Rhymney Iron Co.*, 16 Times Law Rep. 329; *Holmes v. Great Northern Ry.*, [1900] 2 Q. B. 409; *Whitbread v. Arnold*, 99 L. T. 105; *Cremins v. Gest*, *Keen & Nettlefolds*, [1908] 1 K. B. 469; *Gane v. Norton Hill Colliery Co.*, [1909] 2 K. B. 439; *Hoskins v. J. Lancaster*, 3 B. W. C. C. 476; *Parker v. Pout*, 105 L. T. 493; *Walters v. Staveley Coal & Iron Co.*, 105 L. T. 119, 4 B. W. C. C. 39, 303; *Greene v. Shawe* (1912) 2 Ir. 430, 5 B. W. C. C. 530; *Mole v. Wadworth*, 6 B. W. C. C. 128, 6 B. W. C. C. 511; *Walton v. Tredegar Iron & Coal Co.*, 6 B. W. C. C. 592.

Where a street car motorman is injured while boarding a street car to take him to the place where he is to take his own car, and was neither obliged to report before taking out his car, nor did his time or pay commence until he took charge of his car, and where the car upon which the employé is injured is not furnished by the railway company for the purpose of taking its employés to work, but is used in carrying passengers generally, though employés are allowed use of all cars free of charge, whether going to work or on private business, such injured employé is not acting in the course of his employment at the time of the accident, and is not entitled to compensation. *Crow v. Los Angeles Ry. Corp.*, 1 Cal. I. A. C. Dec. 449.

Where an employé in the claims department of a railroad was on his way on one of the cars of his employer to perform a duty as process server, adjuster, or investigator, and was injured by some one stepping on his toe and so crushing it that gangrene set in, he was under the Act. *Brown v. Richmond Light & R. R. Co.*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 12.

Employés on their way to work in conveyances provided by their employers were injured in the course of their employment, where an engine cleaner

rule, the employé is in the course of employment if he has a right to the transportation,⁸⁹ but not if it is gratuitous, or a mere ac-

working at H. was conveyed free every morning from K. to H., and on his arrival shortly before the hour of beginning work was knocked down and killed by a train while crossing the line to reach his work, there being an implied contract to carry him to his work from King's Cross (*Holmes v. Great Northern Railway Co.* [1900] 2 W. C. C. 19, C. A.); where a collier entitled, but not obliged, to travel to and from his work by train free of charge, the provision of the train being an implied term in the contract of service, was pushed off the platform in the rush for the train and killed (*Cremins v. Keen and Nettlefold* [1909] 1 B. W. C. C. 160, C. A.); where a miner, who traveled to and from his work in a free train which his employers arranged for with the railroad company, and who had indemnified the employers against accident to himself or his property on the journey, was killed getting into the train (*Walton v. Tredgar Iron & Coal Co., Ltd.* [1913] 6 B. W. C. C. 592, C. A.); where a workman was compelled to cross a river to get to his work, and a boat provided by his employer was the only means of access, and he was drowned while so crossing (*Mole v. Wadworth* [1913] 6 B. W. C. C. 129, C. A.); and where a lighterman, while waiting for the tide to ebb sufficiently to allow him to go to work to pump out a barge, went to a small boat about 50 yards from the barge to rest, and in trying to get into the barge was injured (*May v. Ison*, 7 B. W. C. C. 148, 110 L. T. 525).

Where a laborer worked and lived on a farm on an island, and, wishing to see his wife, was taken by his employer across to the mainland in a boat, and, the weather being rough, slipped and fatally injured himself while trying to land, the accident was in the course of the employment; *Evans, P.*, saying: "I am of opinion that it was part of the contract, between the man and his employer, that reasonable facilities should be given him, by means of the boat, for reaching the mainland, in order that he might go home and visit his wife." *Richardson v. Morris* (1914) 7 B. W. C. C. 130, C. A.

⁸⁹ Where an employer undertakes to transport his workmen to and from their homes, or to and from any specific place of arrival and departure for the place of employment, his employés are on the premises of employment when they step into the vehicle of transportation furnished by the employer, and so remain until they step out of it, either going or coming. Where an employing painter is engaged in painting a farmhouse, and furnishes his own wagon to carry his employés to the farmhouse and back before and after working hours, and an accident occurs on the trip back to the city at night, in which one of the employés is injured, the employer or his insurance carrier is liable for compensation for disability due to such injuries. *Oldham v. Southwestern Surety Insurance Co.*, 1 Cal. I. A. C. Dec. 258.

A workman employed in the Canal Zone, injured while riding home from

commodation.⁹⁰ A workman injured while riding to or from his work in the conveyance of a third person is not ordinarily entitled to compensation.⁹¹

work on a labor train, was injured in the course of employment. In *re Gerow*, Op. Sol. Dept. of L. 282.

A plumber's assistant, who was returning from a job and fell from his employer's wagon, upon which he was riding, was injured in the course of his employment. In *re Sanderson's Case* (Mass.) 113 N. E. 355.

⁹⁰ The injury of an employé, while going home on his employer's vehicle, if his presence there is purely gratuitous and only an accommodation to him, is no ground for compensation, for the passenger is a mere licensee, though carried repeatedly. *Henson v. Standard Oil Co.*, 1 Cal. I. A. C. Dec. 383. Transportation to or from work must be included in the contract of employment to bring the employé, while so transported, under the protection of the Act. In this case the transportation was no part of the contract of employment, and compensation was denied to the injured employé. *Id.*

Where a lineman is accustomed to ride to and from work in a truck provided by the company to accompany its workmen from place to place, but the contract of employment with the employer does not provide for the furnishing of transportation, and no change was made in the wages of the men, whether they used it or not, the use of the truck by the men being a mere accommodation or gratuity, then an employé injured while riding home on such truck is not entitled to compensation. An employé on his way to and from work and off the premises of the employer is under the same risk of accident as of the commonalty, unless the accident occurs upon a conveyance furnished by the employer as a part of the payment for services rendered. *Cook v. Home Telephone & Telegraph Co.*, 2 Cal. I. A. C. Dec. 120.

The absence of any right to conveyance under the contract of employment led to a decision that the accident did not arise in the course of the employment, where employers provided a train free as a gratuitous convenience, but were under no contract to do so, and a collier, who was entitled to ride on the train from his work, was injured (*Davies v. Rhymney Iron Co., Ltd.* [1900] 2 W. C. C. 22, C. A.); where a shepherd, who was being conveyed (as is the general custom among farmers) to the home of a farmer who had hired him, in a wagon sent by the farmer, was thrown out of the wagon and killed (*Whitebread v. Arnold* [1909] 1 B. W. C. C. 317, C. A.); and where a workman was run down by a motor lorry and killed, while cycling home after his day's work, on a bicycle provided by his employers with which to make visiting rounds (*Edwards v. Wingham Agricultural Implements Co., Ltd.* [1913] 6 B. W. C. C. 511, C. A.).

⁹¹ Where a laborer on a highway was brought to his place of employment by a passing automobile as a friendly act, and while in the act of alighting,

§ 111. Leisure periods—Attendance on personal comforts and necessities

It cannot be said that the employment is broken by mere intervals of leisure such as those taken for a meal. If an accident happened at such a time, there would be no break in the employment,⁹² even though the workman is paid by the hour for the time he is

and before he had presented himself ready for work, lost his balance and fell, the injury did not happen in the course of his employment. *Beatty v. County of Los Angeles*, 2 Cal. I. A. C. Dec. 1958.

An employé of a contractor engaged in road construction fell off of one of his employer's wagons, on which he was riding, and died as the result of injuries thereby sustained. The employer did not furnish transportation to its employés to and from their work. The employé had not reported for work at the time he received the injury which resulted in his death, the place where the injury was sustained being a mile or two from his place of employment. The injury was not sustained in the course of employment. In *re Mrs. C. Schmitt*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 81. An employé, injured by falling off of a conveyance on which he was riding from his place of employment toward his home, said conveyance not being provided by his employer, and the contract of employment being silent in reference to means of conveyance to and from work, though the employé is paid by the employer for the time necessarily consumed in going to and from his work, is not injured while in the course of his employment. In *re Herbert W. Anderson*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 90.

⁹² *Brice v. Lloyd, Ltd.* (1910) 2 B. W. C. C. 26.

Injuries received by an employé on stairs which she necessarily used in going from the room in which she worked to get her lunch arose out of and in the course of her employment, though the stairs were not under her employer's control. (St. 1911, c. 751, pt. 2, § 1) In *re Sundine*, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318.

In *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, an engineer, who had prepared his engine for a trip, had left it to go to his boarding house, a short distance away, and was run over and killed while crossing a track en route to his house, was held to be in the employ of the company; the court saying: "There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

actually at work,⁹³ especially where the accident occurs on the employer's premises,⁹⁴ or about his property,⁹⁵ unless the workman is

⁹³ Where a bricklayer was paid by the hour for the time he was actually working, and a wall fell on him while he was eating dinner on the works, the accident was in the course of the employment. *Blovelt v. Sawyer* (1904) 6 W. C. C. 16, C. A. (Act of 1897).

⁹⁴ "A workman's employment is not confined to the actual work upon which he is engaged, but extends to those actions which by the terms of his employment he is entitled to take, or where by the terms of his employment he is taking his meals on the employer's premises." *Farwell, L. J.*, in *Brice v. Lloyd, Ltd.* (1910) 2 B. W. C. C. 26.

The rule that the workman does not cease to be such while eating his lunch on his employer's premises at a place where he may safely do so, and not at an especially forbidden place or a place of obvious danger, does not apply to cases where the employé leaves the premises of his employer to eat his lunch during the time set apart for this purpose. *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243.

In *Barrett v. Shartenberg & Robinson Co.*, 1 Conn. Comp. Dec. 305, where the claimant fell as she was stepping from the step of her employer's building to the sidewalk, when leaving at noon to go home to lunch, and fractured her arm, compensation was awarded.

Where a laborer on a railroad culvert was fatally injured while crossing the track to go to his dinner in the bunk car at the call of his foreman, the accident arose in the course of his employment. *Carini v. Nickel Plate R. R. Co.*, 4 N. Y. St. Dep. Rep. 423.

Where an employé was bitten by a spider during the noon hour, the fact that the accident did not occur while she was directly engaged in performing a service in the course of her employment would not prevent an award allowing compensation, if there were evidence to show that she were exposed to any special risk of being so bitten by reason of the character of the premises or nature of the work being done. *Sterling v. Inderredian Co.*, 2 Cal. I. A. C. Dec. 172. Accidents occurring on the employer's premises during such intervals have been held to be in the course of the employment, where a workman employed by the week was injured on his way to lunch, at the noon hour, having left the workroom, and being in the act of descending the stairway, which is in control of the owner of the building, but which the employer and his employés have the right to use as the only means available for going to and from the workman's place of employment (*Sundine's Case*, 218 Mass.

⁹⁵ Where a girl who was employed on the top of a threshing machine was partaking of refreshments given her by her employer, and was injured, the accident was in the course of the employment. *Carinduff v. Gilmore* (1914) 7 B. W. C. C. 981, C. A.

doing something wholly foreign to his employment.⁹⁶ Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the Workmen's Compensation Acts,⁹⁷ though they

1, 105 N. E. 433, L. R. A. 1916A, 318); where a piece of mortar fell from the ceiling in a servant's bedroom into her eye, the dangerous condition of the ceiling being known to the employer (*Alderidge v. Merry* [1913] 6 B. W. C. C. 450, C. A.); where a teamsman, eating his dinner in his employer's stable, which was his proper place, was bitten by the stable cat (*Rowland v. Wright* [1909] 1 B. W. C. C. 192, C. A.); and where a railway guard was waiting at a station in accordance with his instructions in an interval of duty, and sitting down upon a buffer stop (not an unsafe place), fell from it onto the line and was fatally injured (*Sheehy v. Great Southern and Western Railway Co.* [1913] 6 B. W. C. C. 927, C. A.).

⁹⁶ In *Socquet v. Connecticut Mills Co.*, 1 Conn. Comp. Dec. 653, where the claimant was injured while giving a co-employé a ride on a truck used for carrying beams, during the noon hour and after she had finished her lunch, being allowed to eat lunch on the premises by her employer, the injury did not arise in the course of her employment. In *Cavagnero v. American Mills Co.*, 1 Conn. Comp. Dec. 163, it was held, where the breaking of the claimant's leg was due to moving toward a fellow employé in order to better hear some remarks on politics or religion, unconnected with the employment, while on the premises during his noonday lunch hour, that the injury was not sustained in the course of the employment. In *Varine v. Sargeant*, 1 Conn. Comp. Dec. 194, it was held that where an employé, boarding at his employer's shanty until more work could be begun, was injured while splitting kindling wood for the cook, who was sick, it being customary for those living in the shanty to help do chores and necessary duties, he was not in the course of his employment.

⁹⁷ *Archibald v. Ott* (W. Va.) 87 S. E. 791.

An employé in the course of his employment may do any act of a personal nature that a person might reasonably do, not in conflict with specific instructions given, without passing beyond the protection of the Compensation Act. *Espy v. Crossman*, 2 Cal. I. A. C. Dec. 328.

Where a school-teacher, after dismissing her school for the day, remains upon the school premises to finish her work, and, going to the telephone for a moment to send a message upon private business, is injured by tripping over the telephone cord and falling, the accident occurs in the course of her employment. *Rieff v. City of Sacramento*, 2 Cal. I. A. C. Dec. 223.

are only indirectly conducive to the purpose of the employment.⁹⁸ Consequently no break in the employment is caused by the mere fact that the workman is ministering to his personal comforts or necessities,⁹⁹ as by warming himself,¹ or seeking shelter,² or by

⁹⁸ (Laws 1913, c. 10; Code 1913, c. 15P, §§ 1-55 [secs. 657-711]) *Archibald v. Ott* (W. Va.) 87 S. E. 791.

⁹⁹ *Id.*

Chief Justice Winslow, of the Supreme Court of Wisconsin, says in a recent case (*Northwestern Iron Co. v. Industrial Commission*, 160 Wis. 633, 152 N. W. 416): "The only question is: Does it show at the time of the accident the claimant was not performing service growing out of or incidental to his employment? We think not. The man's duties involved periods of leisure during which apparently he was expected to kill time as best he might, with no specific direction as to what he should do or where he should wait. The night was cold, and he put off dumping the car until he could warm himself from its heated contents. To say that in so doing he had left his master's employment, was pursuing his own private purposes, and doing something foreign to the work he was employed to do, is illogical to a degree. To protect himself from undue and unnecessary exposure to the cold was a duty he owed his master as well as himself, and it does not follow that he left his master's employment because he negligently allowed the second car to run into him while he was warming himself."

Workmen temporarily pursuing their own purposes were injured in the course of their employment: Where a cook went out upon a porch attached

¹ That a workman put off dumping a car until he could warm himself from its heated contents did not show that he was doing something foreign to his employment; it being a duty owed to his master as well as to himself to protect himself from undue and unnecessary exposure and cold. *Northwestern Iron Co. v. Indus. Com.*, 160 Wis. 633, 152 N. W. 416.

Where an engine driver left his engine and crossed four or five sets of rails to ask an official a question about his work, and then crossed two further sets to talk to a fellow employé for his own pleasure, and was killed while recrossing the last-mentioned set of rails, the accident was nevertheless in the course of the employment. *Goodlet v. Caledonian Ry. Co.* (1902) 4 F. 986 (Act of 1897).

² Where a lineman, while engaged in erecting a new line, was forced by a violent rainstorm to seek shelter with others under cars standing on a switch, no other shelter having been provided by his employer, and was injured from these cars being unexpectedly moved, the injury arose in the course of the employment. (*Workmen's Compensation Law*, § 10) *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620.

leaving his work to relieve nature,³ or to procure drink,⁴ refresh-

to the kitchen where he was employed, to smoke a pipe, and fell down the basement stairs on his return, and suffered a fracture of the wrist (*Espy v. Crossman*, 2 Cal. I. A. C. Dec. 328); where a housekeeper of a hotel, in which she resided, who was required to be available at all hours, but who commenced her active work at 8 o'clock a. m., was injured at 7 a. m. while going for hot water for toilet purposes (*Leonard v. Fremont Hotel*, 2 Cal. I. A. C. Dec. 998); where a workman riding on a wagon dropped his pipe, and on getting down to pick it up fell under the wheels and was fatally injured (*McLauchlan v. Anderson* [1911] 4 B. W. C. C. 376); and where a fence on which a carter was resting while his cart was emptied gave way, and he was fatally injured by the fall (*Henderson v. Glasgow Corporation* [1900] 2 F. 1127 [Act of 1897]).

³ Where an employer failed to furnish proper toilet facilities for his workmen, but knew and consented to a custom of using another building across a public street for such purpose, and a workman crossing the street during working hours on his way to the toilet in question was struck by a passing vehicle and killed, the accident arose in the course of his employment. *Zabriskie v. Erie R. Co.*, 86 N. J. Law, 266, 92 Atl. 385, L. R. A. 1916A, 315.

Injury to the eye was received in the course of the employment, where the employé, while in the toilet, felt something strike her arm, and looked through a crack to see where the article had come from, whereupon a girl in the adjoining toilet thrust some scissors through the crack into her eye. *De Fillipis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. Supp. 761.

A collier in a mine, injured after leaving his work to relieve nature, was injured in the course of his employment. *Cook v. Manvers Main Collieries, Ltd.* (1914) 7 B. W. C. C. 696, C. A.

⁴ A workman may, without taking himself outside of the course of employment, do those things which any reasonable person might do, although not strictly in the line of duty or course of his employment. He may go for a drink, and if, while going or returning, he slips and falls, injuring himself, it would be proper to regard the injury as arising out of the employment. *Koch v. Oakland Brewing & Malting Co.*, 1 Cal. I. A. C. Dec. 373.

Where an employé's death was due to his being poisoned by drinking from a bottle a poisonous fluid having the appearance of water, under the impression that it was drinking water, while he was at work on premises at which workmen supplied themselves with drinking water from a neighboring well by means of buckets and bottles, on account of the unsanitary condition of the city water furnished in the building by means of pipes, the injury arose in the course of his employment. *Archibald v. Ott* (W. Va.) 87 S. E. 791.

Where a miner left his work to get a drink of water, and was killed by a runaway hutch, the accident was in the course of the employment. *Keenan v. Flemington Coal Co., Ltd.* (1903) 5 F. 164, Ct. of Sess.

ments,⁵ food,⁶ or fresh air,⁷ or to rest in the shade.⁸ Nor is a break caused because the workman is giving assistance personal to a fel-

⁵ Leaving the work to procure refreshments did not take the accident out of the course of the employment, where a drayman who was employed on the public streets all day, without any interval for refreshment, went into a public house for a glass of beer, and was killed while crossing the road to rejoin his dray (*Martin v. Lovibond & Sons, Ltd.* [1914] 7 B. W. C. C. 243, C. A.); where a workman, employed for 25 hours to watch vessels, went to a public house for refreshment, and on returning, while descending a ladder at the quay side to get on one of the vessels, fell and was drowned (*Jackson v. General Steam Fishing Co., Ltd.* [1910] 2 B. W. C. C. 56, H. L., Ct. of Sess.); and where a shipmaster, returning from paying a laborer's wages at a public house ashore, at which he had remained two hours, although he was quite sober, fell from the dock and was drowned (*Jones v. Owners of Ship Alice and Eliza* [1910] 3 B. W. C. C. 495, C. A.).

⁶ Claimant's decedent was employed as a carpenter by defendant, and on the day of his injury was working about 20 feet from the ground on the flat roof of a large building which was being constructed. The weather being very cold, the men were called down from the roof by the foreman at about 9 o'clock in the forenoon for a hot coffee lunch, which it was usual to serve to the men to mitigate the effects of the cold. They generally descended by an extension ladder, but decedent chose to descend by means of a rope, and in some manner lost his hold of the rope and was killed. The Board held that the act of coming down from the roof for coffee lunch at the foreman's call was in the course of deceased's employment. *Clem v. Chalmers Motor Car Co., Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 40.*

Where, by an arrangement between a railway company and certain employés, they were allowed to go to a cabin on the railway company's premises for certain meals, and one of such employés, when returning from the cabin after having a meal there, was knocked down by a car which was being shunted on one of the company's tracks, it was held that the injury arose in the course of the employment. *Earnshaw v. Lancashire & Y. Ry. Co.*, 115 L. T. Jour. 89, 5 B. W. C. C. 28. A shanty into which a night watchman had gone to cook food fell and injured him. Although he had no business in the shanty, or to make a fire there at night, the injury was held to have been sustained in the course of his employment. *Morris v. Lambeth Borough Council* (1906) 8 W. C. C. 1, C. A. (Act of 1897).

⁷ *In re Von Ette* (Mass.) 111 N. E. 697.

⁸ An employé is within the course of his employment, even though at the time of the accident he is resting for a short time in the shade during working hours. An employé is under the protection of the Compensation Act while

low workman,⁹ or is learning a new phase of his employer's business after his day's work,¹⁰ or has formed an unexecuted intent to abandon his employment.¹¹ However, when he has entirely left his employment and place of work in the evening or at any other hour, from that time until he arrives next morning at the place where his field of employment is he is in the same position as any other member of the public. He carries with him into such period of leisure no insurance from his employers.¹² Acts during leisure

doing any act which a person may reasonably do during working hours, regardless of whether he is actually at work at the time of the accident. *Goering v. Brooklyn Mining Co.*, 2 Cal. I. A. C. Dec. 141.

⁹ A carter, who while arranging a seat in order to give a fellow workman a lift, was thrown forward by the horse starting up, and killed, was killed in the course of his employment. *Evans v. Holloway* (1914) 7 B. W. C. C. 248, C. A.

¹⁰ Where a night watchman is allowed to study the firing of his employer's locomotive after hours, so as to qualify him to serve as fireman when a vacancy occurs, but is not paid anything for the extra time, thinking to benefit himself because it is the employer's policy to advance men whenever possible within its own labor force and to have experienced men available, and the employé is accidentally injured while so studying on a locomotive operated by the employer, he is injured while acting in the course of his employment. *Smith v. Atchison, Topeka & Santa Fé Ry. Co.*, 2 Cal. I. A. C. Dec. 851.

¹¹ Where plaintiff's intestate was killed when a horse which he was taking to water, in the proper performance of his duties, ran away, the fact that he intended to later use the horse for his own purposes did not take the accident out of the course of his employment. *Pigeon v. Employers' Liability Assur. Corporation*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737.

¹² *Benson v. Lancashire & Yorkshire Ry. Co.* (1904) 6 W. C. C. 20, C. A. (Act of 1897); *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243.

The accident was not in the course of employment where a miner unnecessarily left his working place to ask the time and was killed on his way back by the fall of a roof (*Warren v. Hedley's Colliery Co., Ltd.* [1913] 6 B. W. C. C. 136, C. A.); nor where a workman, whose employer had agreed to compensate him for any injury by strikers, was assaulted in the market place while going home to dinner, and killed, by strikers (*Poulton v. Kelsall* [1912] 5 B. W. C. C. 318, C. A.).

periods, which are done at home or are wholly unconnected with the employment, are not in the course of the employment.¹³

¹³ When the employé dies at his post of duty, a presumption may reasonably be entertained that he was then performing his duty and engaged in the work for which he was employed, from which a causal relation between his employment and the accident may be inferred; but it is shown here that deceased left the locality and sphere of his employment at a time when work was suspended, that he was doing nothing within the scope of his employment, was not under the direction or control of his employer, and went away for purposes of his own, going where and as he pleased. *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243.

Where a man whose duties were to run a pump and watch pipe lines was injured, while at his home, by the explosion of a dynamite cap, set off by a match which he lit, either to ignite his pipe or to start a fire to heat water, even though the house where he lives is furnished by the employer, the accident cannot be held to be one in the course of his employment. *Edgley v. Firth*, 1 Cal. I. A. C. Dec. 651. Where a traveling salesman, while talking sociably in the lobby of a hotel at which he is stopping on a business trip, during a leisure period when not selling goods or performing any other duties, falls, fracturing his leg, not because of anything peculiar to the hotel building, the injury does not occur while the employé is performing a service in the course of his employment. *Gaskill v. Voochies Co.*, 2 Cal. I. A. C. Dec. 1020.

Three employés engaged in a race during the noon hour, the claimant falling and receiving an injury which incapacitated her for work. The injury was not in the course of the employment. *Thompson v. Employers' Liability Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 145 (decision of Com. of Arb.). The employé received a personal injury while he was in the building which his employer had contracted to construct; but he was not in the employ at that time, having visited the building for purposes of his own, and not being engaged in the work of his employer. Held, that the injury did not arise in the course of his employment. *Lynn v. Employers' Liability Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 507 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

The working hours of a section foreman on a railroad ended at 5 o'clock p. m. on Saturday evening and did not begin again until the following Monday at 6 a. m. On Sunday, at 11:30 a. m., while walking across a trestle of the road, he fell to the ground below and was fatally injured. The regular duties of the foreman related to track work only, the repair of bridges and trestles being done by another gang, and it did not appear that the foreman had been ordered to perform any duty in connection with the trestle by any one having authority over him; nor did it appear that there were any circumstances to justify the foreman's voluntarily going on duty at a time not

The leisure of a sailor on board the vessel is as much in the course of his employment as active work.¹⁴ A seaman going ashore without leave is not doing what he might reasonably do. He simply has left his employment for a time. It is otherwise if he goes ashore with a leave, for the employment is continuous and implies leisure as well as labor.¹⁵ Death did not occur in the course of

usually required by his employer. It was held that the foreman did not lose his life in the course of his employment. *In re Julia A. Watkins*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 135. The services of an employé regularly employed by a corporation were loaned to one of the officers and directors thereof to perform temporary service in the private business of the director. While performing such service the workman was on the premises of such director and officer, and the work was done under his direction and supervision. While performing such service the employé was injured. The Commission held that the injury was not in the course of employment. (*Page & A. Gen. Code*, §§ 1465-59) *In re Wm. A. Jones*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 57.

A laborer who, having had his fingers frozen in course of employment, later burned his fingers at home by accidentally setting fire to the bandages, was not injured as to the burn in the course of employment. *In re Rockwell*, *Op. Sol. Dept. of L.* 307. Where a laborer, employed by the United States in the construction of river and harbor work, while off duty went upon a bin to talk with the man emptying gravel about going home the following Sunday, and in the act of leaving, voluntarily and with no emergency for immediate action, attempted to empty a box of gravel, and in so doing fell overboard and was drowned, the accident is deemed not to have arisen within the course of his employment, and compensation therefor is unauthorized under Act May 30, 1908, c. 236, 35 Stat. 556 (*U. S. Comp. St.* 1913, §§ 8923-8929). *In re H. G. Simpson* (*Op. Atty. Gen.*) *Op. Sol. Dept. of L.* 319.

¹⁴ *Marshall v. Owners of Wild Rose* (1910) 3 B. W. C. C., at page 79.

Where a deck hand on a freight steamer proceeding on its journey, having just finished his evening meal and not having any duties to perform, accidentally falls overboard while going forward and is drowned, the accident arose while performing a service growing out of and incidental to his employment. *Olsen v. Hale*, 2 Cal. I. A. C. Dec. 607.

¹⁵ *Moore v. Manchester Liners, Ltd.* (1910) 3 B. W. C. C. 527, H. L., and 2 B. W. C. C. 87, C. A.

The accident was in the course of the employment, where a gangway connecting a seaman's ship with another vessel lying between it and the quay slipped while he was crossing it in returning after a leave of absence ashore for his own purposes, and he was thrown off into the water and drowned (*Leach v. Oakley, Street & Co.* [1911] 4 B. W. C. C. 91, C. A.); where a sea-

employment where an employé was furnished quarters on a boat for living purposes, and after working hours left the boat to visit a neighboring town, and upon returning, and before reaching the boat, was drowned,¹⁶ nor where an employé who lived on a dredge went ashore for his own purposes, and on returning in an intoxicated condition fell from a dock not owned by his master, before the arrival of a boat to take him to the dredge.¹⁷ This latter case is distinguishable from the case where a seaman goes ashore to obtain from himself necessities not provided by the owners of the ship, and on returning falls from a ladder which is the only means of access from the dock to the ship.¹⁸

§ 112. Negligence and recklessness

That a man takes a wrong way to do his work does not show that he is not, at the time, in the course of doing it. That a man is not at any given time in the course of his employment means that he has for the time ceased his work to do something else.¹⁹ A clear distinction exists in cases under the Workman's Compensation Acts between doing recklessly or negligently a thing which the workman is employed to do and doing a thing altogether outside and unconnected with the employment. A peril which arises from the negligent or reckless manner in which he does the work which

man fell from the quay and was drowned, when he was returning from a leave of absence ashore (*Craig v. Owners of S. S. Calabria* [1914] 7 B. W. C. C. 932, Ct. of Sess.); and where ship's steward, who went ashore with leave, returned by the cargo skid, which the crew often used, though they were forbidden to, instead of by the gangway, and in stepping from the skid he fell into the hold and was fatally injured (*Robertson v. Allan Bros. & Co., Ltd.* [1909] 1 B. W. C. C. 172, C. A.).

¹⁶ *In re Jackson*, Op. Sol. Dept. of L. 320.

¹⁷ *Berg v. Great Lakes Dredge & Dock Co.*, 158 N. Y. Supp. 718.

¹⁸ *Moore v. Manchester Liners*, 3 B. W. C. C. 527; *Berg v. Great Lakes Dredge & Dock Co.*, 158 N. Y. Supp. 718.

¹⁹ *Durham v. Brown Bros. Co., Ltd.* (1899) 1 F. 278, Ct. of Sess. (Act of 1897).

he is employed to do may well, and in most cases rightly, be held to be a risk incidental to the employment.²⁰

²⁰ *Barnes v. Nunnery Colliery Co., Ltd.* (1911) 4 B. W. C. C. 43, C. A. and (1912) 5 B. W. C. C. 195, H. L.

When an injury arising from a risk of the business is suffered while the employé is doing the thing which his employment fairly requires him to do, he will be entitled to compensation (except when the injury is caused by the willful and serious misconduct of the injured employé, or by his intoxication), although he was doing the work in a negligent or unusual way. *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368. But in *Wheatley v. Journal Publishing Co.*, 1 Conn. Comp. Dec. 110, it was held that where a typesetter, working overtime late at night, went out for lunch by an unusual way, over a freight elevator through a rear door used only to admit freight, and on returning stepped into an open space between the elevator and the street, his injury did not arise in the course of his employment.

The accident has been held to be in the course of the employment, in spite of negligence or imprudence, where a workman who, on being instructed by a subforeman to come down off a roof where he was working, for lunch, descended by means of a loose rope extending over the edge of the roof, the end of which he directed a fellow workman to hold for him, instead of using a ladder securely fastened to the side of the building (*Clem v. Chalmers Motor Co.*, 178 Mich. 340, 144 N. W. 848, L. R. A. 1916A, 352); where a workman of an ice company was employed to see that none cut holes in the ice for fishing, but was not given any instructions as to methods, and, the ice breaking while he was near the center of the pond, he was drowned (*Jillson v. Ross* [R. I.] 94 Atl. 717); where an employé, employed by a brewing company to care for and drive a team of horses used in transporting a beer wagon, was injured by falling out of a door in the second story of a building in which the horses were kept, while he was preparing to feed them (In re *Earl Puterbaugh*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 143); where a farm bailiff, who needed something from a cowshed which was locked, and did not want to go home for the key, imprudently got up on the window sill in an effort to reach what he wanted, slipped, and was killed in the fall (*Pepper v. Sayer* [1914] 7 B. W. C. C. 616, C. A.); where a seaman, who was helping to unload fish, swung himself onto the stern of another trawler in order to get off a sloping board, down which fish baskets were slid, so that it might be adjusted, and in so doing fell into the water, and died of the result (*Gallant v. S. S. "Gabir" Owners* of [1913] 6 B. W. C. C. 9, C. A.); where a workman, seeking to find out the cause of a leak from a tank, climbed up to it by an obviously dangerous way, instead of by a perfectly safe way which was provided, and was killed by some machinery which was close (*Durham v. Brown Bros. & Co., Ltd.* [1899] 1 F. 278, Ct. of Sess. [Act of 1897]); where a window cleaner tried to get from the window he had just finished to the next by

§ 113. Disobedience

Disobedience to an order or breach of a rule is not of itself sufficient to disentitle a workman to compensation,²¹ so long as he does not go outside the sphere of his employment.²² There are

crawling along a narrow ledge, instead of going back into the room, and was injured (*Bullworthy v. Glanfield* [1914] 7 B. W. C. C. 191, C. A.); and where an engine driver, on his way down to report at the station after leaving his engine, walked between the rails, although he knew a train on that track had been signaled, and was killed. (*Todd v. Caledonian Ry. Co.* [1899] 1 F. 1047, Ct. of Sess. [Act of 1897]).

²¹ *McWilliam v. Great North of Scotland Railway Co.* (1914) 7 B. W. C. C. 875, Ct. of Sess., and (1914) S. C. 453.

There is no provision in the Illinois Act taking out of the course of his employment one who is injured as a result of a violation of an order or as the result of wilful negligence. *Reynolds v. Mound City Water & Light Co.*, Bulletin No. 1, Ill., p. 123. Where a workman is injured because of an accident that is the result of the violation of some specific order concerning his work, that may occur just before his regular hours of employment or within a reasonable time thereafter, in some way connected or associated with his usual work, and the results therefrom redound to the protection or safety of the property of his employer, or the act is in the interest of his business, such a person is not a volunteer, in the ordinary sense of the word, but an employé injured in the course of his employment. *Casparson v. Munn*, Bulletin No. 1, Ill., p. 151.

The mere fact that an employé is injured by reason of his own disregard of his employer's instructions does not bar compensation, unless the instructions were purposely violated with a wilful intention to injure himself. (Code Supp. 1913, § 2477m1[a]) *Op. Sol. Counsel to Iowa Indus. Com.* (1915) p. 24.

The violation by an employé of a rule of his employer does not necessarily take him out of the course of his employment. *Skinner v. Stratton Fire Clay Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 103, following *Stopyra v. U. S. Coal Co.*, decided August 19, 1914.

²² *Conway v. Pumpherston Oil Co., Ltd.* (1911) 4 B. W. C. C. 392, Ct. of Sess.

Where the employer, after expressing displeasure that a certain job of shingling had not been finished the night before, said it could not be finished because of snow, and told the workman to go to work at another house, but there were circumstances constituting an implied modification of such directions, and which, it appeared, were not definite or positive, an accident receiv-

prohibitions which limit the sphere of employment, and prohibitions which deal only with conduct within such sphere. A trans-

ed while finishing the shingling was received in the course of the employment. *Moell v. Wilson*, *The Bulletin*, N. Y., vol. 1, No. 10, p. 15.

Disobedience to orders or rules did not take the case out of the course of the employment, where a workman grinding tools at a machine-driven grindstone was injured when he attempted in violation of his orders to replace a band which had slipped off (*Whitehead v. Reader* [1901] 3 W. C. C. 40, C. A. [Act of 1897]); where one hired to oil machinery, but strictly forbidden to oil it while it was in motion, did so, and a fatal injury resulted (*Mawdsley v. West Leigh Colliery Co., Ltd.* [1912] 5 B. W. C. C. 80, C. A.); where although it was contrary to the rules for a workman to use any machine but his own, a boy in a boot factory, on being sent downstairs to have a sole remolded, and finding that the person in charge of the molding machine was temporarily absent, was injured in trying to do the work himself (*Tobin v. Hearn* [1910] 2 Ir. R. 639, C. A.); where a workman, with duties both inside and outside an engine shed, was killed in attempting to go out of the shed by a shorter, but more dangerous, way under the shaft, although he had been told not to use this way, and was killed (*McNicholas v. Dawson* [1899] 1 W. C. C. 80, C. A. [Act of 1897]); where a workwoman, hired to clean a part of a machine, proceeded to clean another part from which the guard had been removed, thus rendering it accessible, and was injured while so doing (*Greer v. Thompson, Ltd.* [1912] 5 B. W. C. C. 586, C. A.); and where a miner, who was ordered to abandon a dangerous spot from which he was attacking a particular block of coal, and to attack it from a safer place three yards away, violated his orders and was injured (*Jackson v. Denton Colliery Co., Ltd.* [1914] 7 B. W. C. C. 92, C. A.). Where a collier had been instructed to drill into the top hole of a seam from above in order to draw off gases, the seam in the meantime being marked off as forbidden ground, and asked permission, which was refused, to enter the top hole and see if the drill was running safe, he entered it notwithstanding, and was suffocated, it was held that the injury occurred in the course of the employment. *Harding v. Brynddu Colliery Co., Ltd.* (1911) 4 B. W. C. C. 269, C. A.

Accidents resulting from dangerous acts in violation of prohibitions were likewise held to be in the course of the employment where a commercial traveler, on the business of his employers, in a railway goods yard which he was forbidden to cross during shunting, thought that the shunting had been stopped, and was killed trying to cross (*Sanderson v. Wright, Ltd.* [1914] 7 B. W. C. C. 141, C. A.); where a miner, needing a pick, went with a naked light into a fenced-off place which he knew to be dangerous and forbidden, causing an explosion which resulted in his death (*Conway v. Pumpherston Oil Co., Ltd.* [1911] 4 B. W. C. C. 392, Ct. of Sess.); where, although it was dangerous and contrary to their orders, miners frequently ascended, in the

gression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.²³ Collins, L. J., has said on this subject: "I agree that it is not every breach of a master's order which will determine a workman's employment so as to excuse the master from liability to his servant for injury resulting from breach of the orders. It is necessary to see exactly what is the sphere of the workman's employment, and, in my judgment, it is and must be competent for a master to define and limit what that sphere of employment is. If a workman acting

absence of officials, from lower to higher levels in the mine by means of a sump shaft used for raising ore, and a miner who did this, instead of going up a ladder provided, was killed (*Douglas v. United Mineral Mining Co., Ltd.* [1900] 2 W. C. C. 15, C. A. [Act of 1897]); where a workman, seeking something necessary for his work, ascended to a furnace platform by means of a hoist, which was dangerous and forbidden, although it was not proved that he knew of the prohibition, and was killed (*Logue v. Fullerton, Hodgart and Barclay* [1901] 3 F. 1006, Ct. of Sess. [Act of 1897]); where, some heating being necessary, a ship's engineer during intensely cold weather rigged up a temporary stove, which he was warned would be dangerous to use at night, and was asphyxiated while so using it (*Edmunds v. Owners of S. S. Peterston* [1912] 5 B. W. C. C. 157, C. A.); and where a railway porter, after being reprimanded by the station master for jumping upon the footboards of incoming trains in violation of rules which had been given to him, but not read, was injured in a repetition of such act (*McWilliam v. Great North of Scotland Railway Co.* [1914] 7 B. W. C. C. 875, Ct. of Sess., and [1914] S. C. 453).

²³ *Plumb v. Cobden Flour Mills Co., Ltd.* [1914] 7 B. W. C. C. 6.

Where a workman took an automobile which had been in use by his employers to distribute their newspaper, but which he, just before taking it out, had been ordered not to use, his representative could not recover compensation for his death. *Reimers v. Proctor Pub. Co.*, 85 N. J. Law, 441, 89 Atl. 931; *Barnes v. Nunnery Colliery Co.*, [1912] A. C. 44.

Where an employé, attempting to go to the place of his employment, insists upon riding upon his employer's wagon, contrary to the rules of his employer and the positive orders of the driver of the wagon, and in so doing falls from the wagon, suffering an injury, the accident does not happen in the course of his employment. *Gonzales v. Lee Moor Contracting Co.*, 2 Cal. I. A. C. Dec. 302.

within that sphere violates an order of the master, the master may well be responsible. But if the workman travels out of the sphere as limited by the master, and acts in violation of the master's orders, or if the breach of the master's orders involves the workman's traveling outside the sphere of his limited employment, I do not think that the master would be liable for the consequences of the workman's acts either to the workman or to third persons."²⁴

"Employment" within the meaning of these Acts refers rather to the contract than to the labor done in pursuance of the contract. Hence even the disobedience of a specific order to stop work does not end the employment for the time being.²⁵ The employé's knowledge of a rule and the employer's acquiescence in violations thereof may be material. Where there was a factory rule that workmen must not run to the time clock on their way to dinner, but such rule was not strictly enforced, and its violation was acquiesced in by the employer, and a workman while so running received fatal injuries by colliding with a fellow workman, the mere existence of the rule did not preclude recovery of compensation.²⁶ In another case the injury was held to have arisen in the course of

²⁴ *Whitehead v. Reader* (1901) 3 W. C. C. 40, C. A. (Act of 1897).

The employé's breach of rules carried him outside the sphere of his employment where a collier in a coal mine was ordered to cut coal in the colliery, and left his work and went to cut coal in a part of the mine where it was forbidden by special rule to cut any, and thereby undermined some props, causing a fall which killed him (*Weighill v. South Henton Coal Co.*, 4 B. W. C. C. 141), and where a workman employed to get flints on or near the surface of a quarry, though expressly forbidden to go into a trench 11 feet deep, to take shelter from a rain and also to get more flints, he being paid by the number of flints dug out, went into the trench and was smothered by a fall of earth (*Parker v. Hambrook*, 5 B. W. C. C. 608).

²⁵ (P. L. 1911, p. 134) *Scott v. Payne Bros., Inc.*, 85 N. J. Law, 446, 89 Atl. 927.

²⁶ *Rayner v. Sligh Furniture Co.*, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 22. The infraction of this rule by decedent was not such intentional and willful misconduct as to bar recovery, in view of the fact that it was the general custom of decedent's fellow employés and was tacitly permitted by respondent's foreman. *Id.*

the employment, although there was a special rule forbidding miners to return to a train of powder in less than thirty minutes, which, however, was not properly posted or generally observed, where a miner who had lighted a train to fire a shot returned in six minutes to see why there was no explosion, and, upon the shot then exploding, was injured.²⁷ In an action for death of a miner from riding in a tub in a mine where riding in tubs was forbidden except by permission, but was permitted by the official in charge of other parts of the mine, and was acquiesced in by the official in charge of the workman's part of the mine, it was not proven that the miner knew of the rule, and the court held that he was killed in the course of his employment.²⁸

§ 114. Deviation from original employment

If the employé, though outside the sphere of his original employment, is obeying specific instructions of his employer, he is within the course of his employment. When an injury arising from a risk of the business is suffered while the employé, though not strictly in the line of his obligatory duty, is still doing something incidental to his work, in going to or from the work or in the necessary intervals of a discontinuous employment, he will ordinarily be entitled to compensation.²⁹ The same right to compensation follows

²⁷ *McNicol v. Speirs, Gibb & Co.* (1899) 1 F. 604, Ct. of Sess. (Act of 1897).

²⁸ *Richardson v. Denton Colliery Co., Ltd.* (1913) 6 B. W. C. C. 629, C. A.

²⁹ *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368; *International Harvester Co. v. Industrial Commission*, 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330.

Where a brickmaker requires his teamster to use his team in carting for a neighbor, such service may be treated as an incident to his general employment. *Dale v. Saunders Bros.*, 171 App. Div. 528, 157 N. Y. Supp. 1062. Where a workman sometimes used his motorcycle while on his employer's business, and often repaired it during business hours, the severing of his fingers in the chain guard was an accident in the course of his employment. *Kingsley v. Donovan*, 169 App. Div. 828, 155 N. Y. Supp. 801.

Where a reporter was ordered by his employer to get a first copy of the newspaper off the press to see if it was correctly made up, and was forcibly

when an injury arising from a risk of the business is suffered while the employé is doing something which, although entirely outside of his obligatory duty, is permitted by his employer for their mutual

resisted by the pressman, though repeatedly and properly attempting to carry out his instructions, and then, as he was about to report the matter to his superior, and as a consequence of his efforts, was unexpectedly and without other provocation assaulted. The injury was sustained while performing service in the course of his employment. *Brown v. Berkeley Daily Gazette*, 2 Cal. I. A. C. Dec. 844. Where one is hired as a deck hand, they not being allowed in the engine room, but because of the failure of the engineer to report for duty such deck hand is ordered by the captain to go into the engine room and start the engine, the captain having made reasonable efforts to obtain instructions from his employer before starting the boat upon his own responsibility, and the deck hand is injured by accident while so engaged in accordance with the captain's orders, he is entitled to compensation. *Graham v. Bay Counties Express Co.*, 2 Cal. I. A. C. Dec. 37. Where an employé of a firm dealing in racing motorcycles, in obedience to instructions given him by his employer, took a motorcycle out on a track to test its engine and speed, and, while speeding at 62 miles an hour, crashed into a fence, the resulting injury was in the course of his employment. *Lawson v. Stockton Motorcycle & Supply Co.*, 2 Cal. I. A. C. Dec. 649. Where a trained millman employed to run an edging machine has no other duties, and is instructed never to repair machinery, but to leave all repairing to the millwright, and where, when the conveyor chain for removing sawdust from the pit under the band saw breaks, and the edgerman, without specific instructions, enters the pit to shovel out the sawdust, this being necessary before it can be repaired, such edgerman cannot be said to have gone outside the course of his employment. A trained millman may reasonably lend a hand without instructions in case of a breakdown in expediting repairs in other parts of the mill so long as he does not violate specific instructions given him, without stepping outside the general course of his duties, even though he be employed only to attend a particular machine. *Winter v. Johnson-Pollock Lumber Co.*, 1 Cal. I. A. C. Dec. 387. Where a local agent of a fruit company, handling shipments of growers on commission, accommodated a fruit grower in urgent need of more help by some fruit packers and taking them in his automobile to the ranch, and while so doing was injured in an automobile collision, and it appearing that, although it was not specific duty to render this assistance to the growers, yet it was in the interest of the employer, and it was customary to do everything possible to increase the fruit pack and shipment, and the duties of the agent required him to go in the automobile provided by the employer throughout his field of operations and to town, such injury happened while he was performing service in the course of his employment. *Brown v. Pioneer Fruit Co.*, 2 Cal. I. A. C. Dec. 827. Where a surveyor, laying out a

convenience, such as eating his dinner on the premises or some similar act to the performance of which the employer has assented.³⁰ If a workman depart temporarily from his usual avocation to perform some act necessary to be done by some one for his master he does not cease to be acting in the course of his employment. He is then acting for his master, not for himself.³¹ A rule

wagon road about a mile ahead of the construction work, was requested by the construction foreman to inspect an uncompleted bridge for suggestions, and in doing so was injured, the injury occurred in the course of his employment, although the specific authority of the foreman to make such a request was not proved, since such an inspection was within the general scope of the duties of a surveyor in such circumstances. *Brackins v. Trinity Asbestos Mining Co.*, 3 Cal. I. A. C. Dec. 22.

Where an employé, with a number of other employés, was standing in line before a pay window for the purpose of receiving his pay check, and some of the employés began pushing and shoving in a friendly way, and applicant was pushed out of line and received a fall from which he was injured, the mere scuffling does not take the employé temporarily out of the employment, but he is entitled to compensation for injuries sustained while on the grounds of the employer, for he was to all intents and purposes in the employ of the employer, and the injury arose in the course of his employment. *Carls v. Pekin Cooperage Co.*, Bulletin No. 1, Ill., p. 75. Where an employer engaged in the manufacture of leather goods would occasionally have one of his employés go to his home to do work about the house, and the employé did whatever work was required by the ladies in charge of the household, which had been the practice for a number of years, and the city of Chicago required some improvement to be made upon the alley, which the employé was instructed to do, he stepping on a nail while so engaged, from which he contracted lockjaw and died, the fact that the employé was working at the private residence of the employer, under the foregoing statement of facts, does not affect the relation between the employer and employé, and the employé is entitled to compensation under the Act. *Foreman Bros. Banking Co. v. George Lanz & Co.*, Bulletin No. 1, Ill., p. 81.

³⁰ *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368; *Blovell v. Sawyer* (1904) 20 T. L. R. 105; *Norris v. Lambeth Borough Council* (1905) 8 W. C. C. 3; *Moore v. Manchester Lines, Limited*, 3 B. W. C. C. 527; *McLoughlin v. Anderson*, 4 B. W. C. C. 376; *Emily Sundine Case*, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318; *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *Northwestern Insurance Co. v. Industrial Commission*, 160 Wis. 633, 152 N. W. 416.

³¹ *Hartz v. Hartford Faience Co.* (1916) 90 Conn. 539, 97 Atl. 1020. That a shipping clerk temporarily departed from his usual work to lift a barrel

of law which in such case would put an employé outside his usual course of employment, and so deprive him of his right to compensation for an injury suffered, would punish energy and loyalty and helpfulness and promote sloth and inactivity in employés. It would certainly prove detrimental to industry, and such a spirit of disregard of the master's interest, if carried into all of the work, would in time cripple the industry. Besides, the rule would be impractical. One trade must occasionally overlap another, if the work is to go on expeditiously and productively.³² On the other hand, when the injury, though arising out of a risk of the business, is received while the employé has turned aside from his employment for his own purposes, and is not acting within the scope of his employment, no compensation can be given.³³ As said by Cozens-Hardy, M. R.: "There is a distinction, and really a very

did not prevent him from being in the course of his employment, where in lifting the barrel he was acting for his master, not for himself. *Id.* In *Grandfield v. Bradley Smith Co.*, 1 Conn. Comp. Dec. 479, where a girl, requiring an empty box for her work, which should have been supplied her by a boy hired for that purpose, went to get one from another boy, who supplied another table, and was resisted by him in a spirit of fun, and injured, it was held the injury arose in course of her employment.

Where an employé was injured from attempting to form an unexploded dynamite shell into a key, believing the shell to have been exploded, and he needed such a key to perform his duties, the injury was due to accident in the course of his employment, though he had no particular authority to make the key. *State ex rel. Duluth Brewing & Malting Co. v. Dist. Ct.* (1915) 129 Minn. 176, 151 N. W. 912.

In attempting to turn on an electric current to put in motion a grindstone to sharpen a chisel, a carpenter was acting within the scope of his employment, though he had nothing to do with the maintenance or operation of the power-driven machinery of the shop. *Wendt v. Industrial Ins. Com.*, 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790.

³² *Greer v. Lindsay Thompson, Ltd.*, 5 B. W. C. C. 586, 46 Ir. L. T. 89; *Miner v. Franklin Co. Tel. Co.*, 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195; *Scott v. Payne Bros., Inc.*, 85 N. J. Law, 446, 89 Atl. 927; *Hartz v. Hartford Faience Co.*, 90 Conn. 539, 97 Atl. 1020.

³³ *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368; *Bryce v.*

simple one, between a man who is employed to do a particular thing, and to do it in a particular way, who may obtain compensation, although in the course of doing that work he nevertheless embarks on a dangerous mode contrary to the regulations, and a man being employed at A—A being limited to the sphere of his operations—who goes into B and meets with an accident. In the latter case the employer is not liable; the man has done something which he was not authorized or employed to do. This is a case in which he was doing that which was altogether outside his employment.”³⁴

Edward Lloyd Co., 2 B. W. C. C. 26; Keene v. St. Clements Press, Limited, 7 B. W. C. C. 542; Spooner v. Detroit Saturday Night, 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A, 17.

Where a mill foreman was injured from his hand coming in contact with a revolving fan when he attempted to place in a pipe a coffee or tea bottle to heat same, it appearing that the place where he attempted to heat the bottle was not the customary place, and was not the place which, for the purpose of heating bottles, had been assented to by the employer, he was not injured in the course of his employment. (Laws 1913, c. 138) Mann v. Glastonbury Knitting Co., *supra*. In Stevenson v. Union Metallic Cartridge Co., 1 Conn. Comp. Dec. 621, where the claimant caught her hand in a belt in trying to save herself from falling, while on her way to pass a petition relative to working hours in the factory to another employé, the injury did not arise in the course of her employment. But in Spillane v. State of Connecticut, 1 Conn. Comp. Dec. 505, where an employé of the state was struck by an automobile while attending the transportation of state property along the highway, accompanied by another team carrying his household goods, which, however, did not require any change in his duties or actions, compensation was awarded.

Where the workman had practically left his employment to go on a spree and was thereafter injured, while in an intoxicated condition, the injury did not arise in the course of his employment. Minnaugh v. Brooklyn Union Gas Co., The Bulletin, N. Y., vol. 1, No. 8, p. 10.

The employé received a fatal personal injury, following a quarrel with a fellow employé, which was precipitated by the deceased without cause. The employé struck another employé, the latter clinching with him, and the deceased fell back against the machine, and never regained consciousness. It was held that the injury did not arise in the course of the employment. Malloy v. Fidelity & Casualty Co. of N. Y., 2 Mass. Wk. Comp. Cases, 401 (decision of Com. of Arb.).

³⁴ McCabe v. North & Sons, Ltd. (1913) 6 B. W. C. C. 504, C. A. A laborer, who was hired to clean the ceiling of an arch, after mounting a scaffold

If the accident is due to the man arrogating to himself duties which he was not called on to perform, and which he has no right to perform, then he was acting outside the sphere of his employment, and the injury by accident does not arise in the course of his employment,³⁵ regardless of whether his acts are in the interest of himself,³⁶ or a fellow workman,³⁷ or a third person,³⁸ or in the in-

outside the arch with his pail and brush, then fell from it, sustaining fatal injuries, was injured in the course of his employment, although the reason of his going upon the scaffold was unexplained. *Roberts v. Trollop & Sons and Colls* (1914) 7 B. W. C. C. 679, C. A.

³⁵ *Smith v. Fife Coal Co., Ltd.* (1914) 7 B. W. C. C. 253, H. L., and (1913) 6 B. W. C. C. 435, Ct. of Sess.

Where a chauffeur, waiting in a garage for his master's machine to be repaired, all control and responsibility for the work being out of his hands, nevertheless voluntarily attempts to crank the engine, serving no interest of his employer in so doing, and, attaining no useful purpose, has his arm broken in the attempt, his act is gratuitous and unnecessary, and is not a service growing out of, incidental to, or done within the course of his employment as such. *De Long v. Krebs*, 1 Cal. I. A. C. Dec. 592.

An employé, operating a truck, stopped work and pursued a rat, which ran down an elevator shaft, and while looking down the shaft was injured by the descending elevator. The injury was not sustained in the course of employment. *In re Martin Procknau*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 66. Nor was an injury sustained by an employé while boxing with a fellow employé. *In re John Zelavzmi*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 87.

The employé, living on the premises, while en route from a store thereon to his quarters and while off duty, stepped aside from the usual path of travel to watch the operations of an electric wood saw. While standing there a piece of wood was thrown from the saw, striking and killing him. The injury was held not to have been received in the course of employment. *In re Gilson*, Op. Sol. Dept. of L. 326. A shop boy, employed to work a punching machine, injured, by voluntarily starting a rolling machine while the former machine was idle, was not injured in the course of employment. *In re Morales*, Op. Sol. Dept. of L. 295.

³⁶ Where an employé whose duties as solicitor required his constant use of a motorcycle, which was supplied by his employer, knowing his employer's purpose to buy another motorcycle, but without any authority whatever from his employer, went to a dealer to try out a motorcycle, and was injured while on one which he had selected, the injury did not occur while he was perform-

³⁷ See note 37 on page 402.

³⁸ See note 38 on page 402.

ing a service in the course of his employment. *Phillips v. Pacific Gas & Electric Co.*, 2 Cal. I. A. C. Dec. 789.

The employé, whose occupation was that of turning down laces in boxes, received an injury while operating a box-lacing machine, for purposes of her own, during the noon hour. She was not entitled to compensation, because the accident did not arise in the course of her employment. *St. John v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 376 (decision of Com. of Arb.).

A railroad conductor on an excursion train, run, with permission, by the employés for their own pleasure, was not injured in the course of employment. *In re Fitzpatrick*, Op. Sol. Dept. of L. 306.

Where a messenger boy at a goods station crossed the lines at night and was killed, the accident was not in the course of his employment, and the judge did not believe the one witness who said he had been given permission to go by the foreman. *McGrath v. London & Northwestern Railway Co.* (1913) 6 B. W. C. C. 251, C. A.

Workmen trying to earn additional compensation were not in the course of their employment, where a collier, seeking to increase the quantity of coal to his credit by moving at intervals from his working place and cutting coal at places where cutting was especially forbidden, was killed by a fall of coal in such a place (*Weighill v. South Heaton Coal Co., Ltd.* [1911] 4 B. W. C. C. 141, C. A.); where a quarry worker, employed to dig flints and paid by the quantity dug, went into a trench 11 feet deep, into which he had been forbidden to go, in order to shelter himself from the rain and get more flints, and was killed by a fall of earth (*Parker v. Hambrook* [1912] 5 B. W. C. C. 608, C. A.); and where a carter's duty was to unload bags from his own lorry, and he was injured while unloading a fellow workman's lorry, so that his fellow employés might help stow the bags for the consignee, who paid them for their work (*Sinclair, Ltd., v. Carlton* [1914] 7 B. W. C. C. 937, Ct. of Sess.).

The accident was not in the course of the employment where a carpenter foreman, working on his brother's house, got into an altercation with some men, and his brother, taking charge of the controversy, was succeeding, and he then began to take part in the fight, and was struck by a piece of iron thrown at him (*Clark v. Clark* [Mich.] 155 N. W. 507); where a miner had been expressly forbidden to go into a place from which the timbers had been withdrawn, and was killed by a fall of coal after going in there to get coal (*Tomlinson v. Garratt's, Ltd.* [1913] 6 B. W. C. C. 489, C. A.); where a seaman, not allowed to sleep on board his ship and warned not to return after dark, in returning fell from a vertical ladder giving access to the quay, and died from the accident (*Griggs v. Owners of S. S. Gamecock* [1913] 6 B. W. C. C. 15, C. A.); where a laborer, hired to pick up coal from a roadway of a mine, was killed trying to remove a piece of coal projecting from the side or roof of the mine (*Edwards v. International Coal Co.* [1903] 5 W. C. C. 21 [Act of 1897]); where a collier, being dissatisfied with his pay note on Saturday, decided not to go back to work until it was changed, and after seeing the undermanager, who refused to grant his demand, on Monday, was knocked

down by a wagon and killed when he was leaving the premises (*Phillips v. Williams*, [1911] 4 B. W. C. C. 143, C. A.); where a house surgeon volunteered to allow an X-ray experiment on his arm, and was injured by it (*Curtis v. Talbot and Kidderminster Infirmary Committee* [1912] 5 B. W. C. C. 41, C. A.); and where a collier, after being suspended, met with an accident two hours later in a "pass-by," where he had remained, contrary to orders, instead of going to the pit bottom (*Smith v. South Normanton Colliery Co., Ltd.* [1903] 5 W. C. C. 14, C. A. [Act of 1897]). A fish porter, working at a railway station for a fish stevedore, who walked along the line to reach a shunter's bothy, as fish porters frequently did, so that he might know how many fish boxes were arriving, was seeking useless information, and doing something he was not employed to do, in a place where he had no right to be; consequently he was not injured in the course of his employment. *Hendry v. Caledonian Ry. Co.* (1907) S. C. 732, Ct. of Sess.

Employés seeking their own pleasure, and held to have been killed or injured while not in the course of their employment: A ticket collector, who was killed while boarding an out-going train for the purpose of speaking to a passenger. *Smith v. Lancashire and Yorkshire Railway Co.* (1899) 1 W. C. C. 1, C. A. (Act of 1897). An engine driver, who was run over and fatally injured on his way back from borrowing a book, unconnected with his employment, from the fireman of another engine across the track. *Reed v. Great Western Co.* (1910) 2 B. W. C. C. 109, H. L. A carter, who, after delivering a load of sand, started home by a longer route in order to stop at a public house for a single glass of beer, and while going down the slope from the inn his horse ran away and he was killed. *Everitt v. Eastaff & Co.* (1913) 6 B. W. C. C. 184, C. A. A commercial traveler, who went in a dog cart with a friend to a place not connected with his business, got drunk, and was injured. *Renfrew v. McGraw, Ltd.* (1914) 7 B. W. C. C. 898. A canvasser, for whose work a bicycle was not necessary, and whose employers would have forbidden its use, had they known of it, who was killed by a fall from the bicycle just after calling at his home for a bicycle lamp, which was not used in his business work. *Butt v. Provident Clothing Supply Co., Ltd.* (1913) 6 B. W. C. C. 18, C. A. Where, during an interval of rest, some boys employed in a steel works had been repeatedly warned to let wagons alone, and the wagons moved, fatally injuring one of them, the accident was not in the course of his employment. *Powell v. Lanarkshire Steel Co.* (1904) 6 F. 1039, Ct. of Sess.

Injury at play was not in the course of employment, where a boy in charge of the handle of a machine, although forbidden to touch a pinion wheel, took off its cover and played with it, and was injured. (*Furniss v. Gartside & Co., Ltd.* [1910] 3 B. W. C. C. 411, C. A., and where a boy, cleaning a machine at rest, began larking with another lad, and accidentally started the machinery, injuring himself (*Cole v. Evans, Son, Lescher & Webb, Ltd.* (1911) 4 B. W. C. C. 138, C. A.

37 Where a workman, who was employed to operate an engine and dynamo in the basement of a building, went to an upper floor, where he volunteered as a special favor to other workmen to take them in the elevator to a floor above, and was killed in so doing, his death did not result from injuries arising in the course of his employment. *Spooner v. Detroit Saturday Night Co.*, 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A, 17.

An employé, who left the premises of his employer for the purpose of posting a letter for a fellow employé, and while crossing a railroad on the way was injured by a moving train, was not injured while in the course of his employment. *In re Otho Deavers*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 62.

A workman, injured in going to assistance of a fellow workman, attacked by a third, was not injured in the course of employment (*In re Armistead*, *Op. Sol. Dept. of L.* 305); nor was a laborer or fire patrolman in the Forest Service, who attempted to clean a pistol belonging to a fellow employé while in living quarters furnished by the government (*In re Brown*, *Op. Sol. Dept. of L.* 328). The injury was not in the course of employment where a man, whose duties were concerned with the operation of an engine and dynamo on the bottom floor, was loitering on one of the upper floors, and voluntarily offered to take some fellow workman in the elevator to the floor above, and was killed in the attempt (*Spooner v. Detroit Saturday Night Co.*, 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A, 17); where a road mender broke up the fire in a steam roller, so that the engineman need not come to work so early, and injured his leg when he stepped off the roller (*McAllan v. Perthshire County Council* [1906] 8 F. 783, *Ct. of Sess. [Act of 1897]*); and where a stoker was paid the wages of another man by mistake, and, on going to the other man's engine to pay him the money, attempted to board the other man's engine while it was in motion, fell, and was injured (*Williams v. Wigan Coal & Iron Co., Ltd.* [1910] 3 B. W. C. C. 65, C. A.).

38 Where the driver had taken the employer's automobile to a garage as directed, and without any necessity or advantage, or being requested to do so, undertook to crank the machine merely to render a friendly service to the mechanic, to whose charge the machine had been committed for the purpose of making the necessary repairs, such as burning out the cylinders and grinding the valves, the accident did not occur in the course of the employment. *De Long v. Krebs*, 2 Cal. I. A. C. Dec. 376. Where a garage employé, having a holiday on the day of the automobile races at the exposition, without objection by his employer and for his own pleasure, took out the service car he was accustomed to drive and went to the races to assist a racer, *De Palma*, who had been keeping his racing car at the garage, sustaining a fatal injury while returning to the garage to get some of the supplies for *De Palma*, the accident did not occur while performing service in the course of his employment. *Held v. Lee*, 2 Cal. I. A. C. Dec. 728.

An employé, after delivering a package of hardware for his employer and while returning to his place of employment, stopped to assist a horse, which

terest of his employer,³⁹ or of the state.⁴⁰ But such arrogation of duty must be the cause of the accident in order to take it out of

had been overcome by heat, and, while doing so, it fell upon him and broke his leg. The injury was held not to have been sustained in the course of employment. In *re Henry Verkamp*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 123.

An employé, on the premises during the noon hour, stopped to pick up a baseball from the street to return it to players in the field, when he was struck by an automobile. He was not injured in the course of employment. In *re Schlechter*, Op. Sol. Dept. of L. 331.

³⁹ *Bischoff v. American Car & Foundry Co.* (Mich.) 157 N. W. 34.

These acts may be *cleaning machinery*, as where a boy who was hired to mold balls of clay and hand them to a woman working at a machine near him, and who was expressly forbidden to touch the machinery, attempted to clean the machine while the woman was absent, and was injured (*Lowe v. Pearson* [1899] 1 W. C. C. 5, C. A. [Act of 1897]); where a boy was hired to piece ends of broken yarn, and tried to clean machinery in motion, which was not his duty, and which he had been forbidden to do (*Naylor v. Musgrave Spinning Co., Ltd.* [1911] 4 B. W. C. C. 286, C. A.); where a liftman had been forbidden to oil or clean his lift, and was killed while so doing (*Dougal v. Westbrook* [1913] 6 B. W. C. C. 705, C. A.); where a time to clean machinery in a factory was set, and the wheels were stopped during the time for that purpose, and a workman tried to clean a mangle at another time, while it was in motion, against strict prohibitions (*McDiarmid v. Ogilvy Bros.* [1913] 6 B. W. C. C. 878, Ct. of Sess.); and where a hospital porter was injured while trying to dust the top of a lift, in which he was being taken up to the top floor to do some cleaning, and although he had never been told to dust the lift, he had greased it, but always under the supervision of the head porter (*Whiteman v. Clifden et al.* [1913] 6 B. W. C. C. 49, C. A.).

They may be *starting an engine*, as where in a steam bakery, where it was necessary that an engine be started to mix the dough, a baker, who had frequently started it, although it was not his duty and he had been told not to do so, was fatally injured when he attempted to start it (*Marriott v. Breet & Beney, Ltd.* [1912] 5 B. W. C. C. 145, C. A.), and where a girl's only duty was to pick dirt out of coal passing along a band driven by an engine, and she, against the warning of other girls, although they frequently did this, started the engine while the engine man was temporarily absent, and was injured (*Losh v. Evans & Co., Ltd.* [1912] 5 B. W. C. C. 17, C. A.); or *seeking instruc-*

⁴⁰ Where a lumber company's employé was injured while assisting a fire warden as required by statute, his injury did not arise in the course of his employment, though he was paid his regular wages by his employer, who was reimbursed by the state and county. *Kennelly v. Stearns Salt & Lumber Co.* (Mich.) 157 N. W. 378.

the course of the employment.⁴¹ That it is not essential for the workman to be doing the particular work which he was employed to perform⁴² is illustrated in many English decisions. When a

tions, e. g., where a contractor's carter, whose duty it was to stay with his horse and cart, was sent to a railway station to fetch mortar, but finding that a foreman's permission was necessary before he could remove it, he left his horse and cart and went down the line to seek a foreman, and was killed (*Morris v. Rowbotham* [1915] 8 B. W. C. C. 157, C. A.); or other *miscellaneous acts*, such as where a cleaner in a factory, who was not allowed to use the machinery, needed a handle for his scraper and was injured while trying to make one on a circular saw (*Mulholland v. Hazelton & Co.* [1902] 36 Ir. L. T. 217, C. A.); where a boy was injured seriously when he tried to help a fellow workman remove a piece of soap, which had jammed a soap compressing machine, he having no right whatever to touch the machine (*Davies v. Crown Perfumery Co.* [1913] 6 B. W. C. C. 649, C. A.); where a workwoman injured her hand on a machine 20 yards away from the particular one on which she was engaged, and different from hers, and died of blood poisoning (*Cronin v. Silver* [1911] 4 B. W. C. C. 221, C. A.); where an attendant in a power house had been expressly forbidden to dust the switchboard, and it was not his duty to do so, but he did and was injured (*Jenkinson v. Harrison, Ainslie & Co., Ltd.* [1911] 4 B. W. C. C. 194, C. A.); where a mine worker, instead of sending wood by the accustomed way, tried to use haulage machinery, which he had been forbidden to use and did not understand, and the breaking of a chain resulted in his death (*Burns v. Summerlee Iron Co., Ltd.* [1913] 6 B. W. C. C. 320, C. A.); where a miner was hired to prepare shots for blasting, and firing them was a duty he was neither engaged nor entitled to do, and he attempted to fire a shot during the absence of the shot-firer (*Kerr v. Baird & Co., Ltd.* [1911] 4 B. W. C. C. 397, Ct. of Sess.); and where a boy, who had been instructed to inform the foreman when anything went wrong, tried to correct matters himself and was injured (*McCabe v. Noth & Sons, Ltd.* [1913] 6 B. W. C. C. 504, C. A.).

⁴¹ A miner was permitted by the shot-firer, contrary to regulations, to connect the detonator to the cable, and the shot-firer by mistake fired the shot before the miner had reached a place of safety. The severe injury which he received was in the course of his employment, since the act of the shot-firer was the cause of the accident. *Smith v. Fife Coal Co., Ltd.* (1914) 7 B. W. C. C. 253, H. L., and (1913) 6 B. W. C. C. 435, Ct. of Sess.

⁴² The Act does not say, "when doing the work he was employed to perform," and it is a fair inference that, if it had been intended to limit the right to compensation to accidents occurring while the workman was doing the work which he was employed to do, different language would have been

piece of tin got jammed in her machine, a factory girl reported the fact to the engineer, and was told to see to it herself. A fellow worker started the machine while she was fixing it, and it was held the injury was in the course of employment.⁴³ There was a like holding where a "barrowman" unloading a ship exchanged jobs with a "tipper" who was working for a different employer, and the employer knew that such an exchange of work took place and did not forbid it,⁴⁴ where a boy was told by a fellow workman that a foreman whom it was his duty to obey had said he was to oil a certain machine, and he was injured while so doing,⁴⁵ and where the captain of a steam trawler crossed a space in which he knew German mines had been scattered, and changed his course to warn warships several miles away of the presence of the mines, and his boat struck a mine, resulting in serious injury to the chief engineer.⁴⁶

No break in the employment is caused by the furnishing of assistance to a fellow workman in an emergency or to rescue him from danger,⁴⁷ by a deviation from the original employment

used from that which occurs in the Act. *Menzies v. McQuibban* (1900) 2 F. 732, Ct. of Sess. (Act of 1897).

⁴³ *Geary v. Ginzler & Co., Ltd.* (1913) 6 B. W. C. C. 72, C. A.

⁴⁴ *Henneberry v. Doyle* (1912) 5 B. W. C. C. 580, C. A.

⁴⁵ *Brown v. Scott* (1899) 1 W. C. C. 11, C. A. (Act of 1897).

⁴⁶ *Risdale v. Owners of S. S. Kilmarnock* (1915) 8 B. W. C. C. 7 C. A.

⁴⁷ Instances of accidents in an emergency: Where the deceased workman left his own work of boiling syrup to help a fellow workman, who was having trouble with an elevator commonly used by all the employes, and was fatally injured by the fall of the elevator upon the releasing of the cable, which had been caught. *Martucci v. Hills Bros. Co.*, 171 App. Div. 370, 156 N. Y. Supp. 833. Where a weighing clerk was fatally injured while helping some workmen to carry a heavy frame to the weighing machine, although it was not part of his duty to do so. *Goslan v. Gillies & Co.*, [1907] S. C. 68, Ct. of Sess. Where a laborer who had no duty connected with machinery was fatally injured while trying to help a machineman replace a driving belt which had come off. *Menzies v. McQuibban*, [1900] 2 F. 732, Ct. of Sess. (Act of 1897).

Acts of rescue have been held within the course of the employment where

through mistake,⁴⁸ or through an attempt to protect the employer's interests in an unexpected contingency,⁴⁹ or to save himself

a workman fell into a hole in the floor which could not be seen for escaping steam, while he was running to answer a call for help from a coemployé who had fallen into the hole (*Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 999); where an employé of a contracting company was fatally injured while attempting to rescue from a cave-in a fellow laborer working only a few feet away on the same general undertaking, although for a different employer (*Waters v. William J. Taylor Co.*, 218 N. Y. 248, 112 N. E. 727, affirming 170 App. Div. 942, 154 N. Y. Supp. 1149); where a workman sustained a nervous shock, which produced neurasthenia and incapacity, while assisting to remove an injured fellow workman (*Yates v. South Kirby, Featherstone and Hemworth Collieries, Ltd.* [1910] 3 B. W. C. C. 418, C. A.); where a workman, hired to work on a quay, went into the hold of a ship to rescue a fellow workman overcome by noxious gases, and was himself suffocated (*London & Edinburgh Shipping Co. v. Brown*, [1905] 7 F. 488, Ct. of Sess. [Act of 1897]); and where an ambulance man in a factory had an apoplectic seizure and died while he was excitedly hurrying to summon medical aid for a workman who was doing work for his (the ambulance man's) employer and on their premises, although not in their service (*Aitken v. Finlayson, Bousfield & Co., Ltd.* [1914] 7 B. W. C. C. 918, Ct. of Sess.).

⁴⁸ The accident was in the course of the employment where a miner, descending into the pit by the cage, got out at a higher level than he intended, and while going on foot in the wrong direction was scalded to death by exhaust steam from a pumping engine (*Sneddon v. Greenfield Coal and Brick Co.* [1911] 3 B. W. C. C. 557, Ct. of Sess.); where a workman was required to go to a certain place to draw his wages, and was paid for the time taken to go and come, and on his return journey mounted a wrong tram car, and was struck by a passing car when getting off (*Nelson v. Belfast Corporation* [1909] 1 B. W. C. C. 158, C. A.); and where a boy employed to grease truck wheels, thinking that the points were against an approaching train of trucks, was injured while trying to open them (*Harrison v. Whitaker Bros., Ltd.* [1909] 2 W. C. C. 12, C. A. [Act of 1897]).

⁴⁹ The existence of a real emergency operates to extend the scope of an agent's authority, giving him power to employ assistance where assistance is needed, and the acts done in consequence of such emergency are done with the bona fide intention of protecting and guarding the interests of the employer. *Paul v. Nikkel*, 1 Cal. I. A. C. Dec. 648.

Such accidents occurred where a workman hired as a member of a fire brigade to help protect his employer's property was wet to the skin with water, and inhaled smoke, while fighting a fire within 40 feet of his employer's premises, and died of lobar pneumonia (*In re McPhee*, 222 Mass. 1, 109

or his personal effects from danger.⁵⁰ An injury is not placed outside the course of the employment by the fact that it results from

N. E. 633); where one whose duty it was to protect the load on a grocery truck, on which he was riding, from mischievous boys, was killed when he jumped off the truck to drive away boys whom he had ordered from the rear of the vehicle, even though he may have been impetuous and imprudent (*Hendricks v. Seeman Bros.*, 170 App. Div. 133, 155 N. Y. Supp. 638); where a carter was killed while trying to stop his horse, which had bolted (*Devine v. Caledonian Ry. Co.* [1899] 1 F. 1105 [Act of 1897]); where a miner, whose work was totally unconnected with horses, was killed while he was attempting to stop his employer's horse in a runaway (*Rees v. Thomas* [1899] 1 W. C. C. 9, C. A.); where a workman, left in charge of cages of lions, was killed while trying to drive back one which had escaped, there being no evidence to show how (*Hapelman v. Poole* [1910] 2 B. W. C. C. 48); and where a drawer in a mine wheeled a loaded hutch to a lye, which he found already loaded full, and proceeded to "let down" the loaded hutch in order to make room for his and get out an empty one, following a general practice in so doing and avoiding considerable delay (*Baird & Co., Ltd., v. Robson* [1914] 7 B. W. C. C. 925, Ct. of Sess.). It was held likewise, in a case where a foreman in charge of a squad of miners, after preparing a charge for blasting, told a fireman, seemingly for a joke, that there was no shot ready for him. Later, not being able to find the fireman, the foreman tried to take out the wires and thus make the detonator harmless, and was killed while so doing, and it was held that the accident was in the course (and out) of the employment. *Queen v. Baird & Co., Ltd.* (1904) 6 F. 271, Ct. of Sess.

Where a clerk of the accounting department of the defendant railway, traveling on one of its trains in the course of his employment, upon the stopping of the train after it ran over and injured a man, alighted to be available in case his services were needed, and it appears that, although not requested to do so, nor strictly within his duties, he actually did render assistance, and where in some manner such employé, while attempting to get aboard too late, slipped under the wheels and was killed, he was killed while performing service in the course of employment, and the act of alighting was within his implied duties. *Bowdish v. Northwestern Pacific R. R. Co.*, 2 Cal. I. A. C. Dec. 777.

⁵⁰ Where a cook on a lighter overexerted himself while removing his effects from the sinking ship, and died soon after of heart disease hastened by such overexertion, the accident was one arising in the course of his employment, since any act which would have been reasonable for any one to do, when leaving a sinking ship which was his temporary home, was within the scope of his employment. *In re Brightman*, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321.

Where an employé, in order to save being hurt when the crane which he

the act of an employé of an independent contractor.⁵¹ That one employed to trim trees through which ran the wires of his employer, an electric company, was at the time of his injury trimming a tree through which the wires did not run, did not put him outside the "usual course of the trade, business, profession, or occupation" of the company, where he was acting under the orders of the company's superintendent.⁵²

DIVISION III.—ARISING OUT OF EMPLOYMENT

§ 115. Risks due to employment

The use of the words "arising out of," or words of similar import, makes it a condition precedent to the right to recover compensation that the occurrence shall have resulted from a risk reasonably incident to the employment;⁵³ that there be a causal connection between the conditions under which the employé worked and the resulting injury.⁵⁴ While the occurrence need not have

was operating broke, jumped into a river, and pleurisy and tuberculosis resulted from the wetting received, the accident occurred in the course of his employment. *Rist v. Larkin & Sangster*, 171 App. Div. 71, 156 N. Y. Supp. 875.

⁵¹ Where a bar of metal fell from the upper story of a building under construction, and killed a carpenter, it was in the course of his employment, even though a workman of an independent contractor was responsible for its fall. *Bryant v. Fissel*, 84 N. J. Law, 72, 86 Atl. 458.

⁵² *In re Howard*, 218 Mass. 404, 105 N. E. 636.

⁵³ *Coronado Beach Co. v. Pillsbury* (Cal.) 158 Pac. 212; *Fitzgerald v. Clarke & Son*, [1908] 2 K. B. 796, 77 L. J. K. B. 1018.

⁵⁴ *McNicol's Case*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; *Coronado Beach Co. v. Pillsbury* (Cal.) 158 Pac. 212.

The nature and conditions of the employment must be such that the injury was one likely to happen to one in that employment. There must be a causal connection between the employment and the injury. (Laws 1911, c. 751, as amended by Laws 1912, c. 571) *McNicol's Case*, *supra*.

been foreseen or anticipated,⁵⁵ it must appear after the event to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.⁵⁶ This statutory

⁵⁵ State ex rel. People's Coal & Ice Co. v. District Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344.

⁵⁶ McNicol's Case, 215 Mass. 497, 499, 102 N. E. 697, L. R. A. 1916A, 306; Coronado Beach Co. v. Pillsbury (Cal.) 158 Pac. 212; Federal Rubber Mfg. Co. v. Havolic (Wis.) 156 N. W. 143.

"To satisfy the words of the Act, the occurrence must be one in which there is personal injury by something arising in a manner unexpected and unforeseen from a risk reasonably incidental to the employment. Nothing can come "out of the employment" which has not, in some reasonable sense, its origin, its source, its *causa causans*, in the employment. That the injury must be one resulting in some reasonable sense from a risk incidental to the employment has, I think, been decided over and over again." Cozens-Hardy, in *Mitchinson v. Day Bros.* (1913) 6 B. W. C. C. 191, C. A.

Where an employé worked continuously for 21 hours, except 1½ hours off for meals, during which time he had to climb 216 steps three different times besides being on his feet most of the time, and was found dead in his chair in a saloon a half hour after quitting, death being due to angina pectoris, the accident arose out of his employment and the overexertion it necessitated. *McMurray v. J. J. Little & Ives Co.*, 3 N. Y. St. Dep. Rep. 395.

Where a night watchman on his last round fell to the floor from an apoplectic shock, without any accident occurring, the injury was not one arising out of the employment. *Ledoux v. Employers' Liability Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 493 (decision of Com. of Arb.). Nor could it be held to have so arisen where the evidence showed that the condition of valvular heart trouble from which the employé suffered was not caused by an accumulation of strains in carrying and lifting materials, as claimed (*Nolan v. New England Casualty Co.*, 2 Mass. Wk. Comp. Cases, 417 [decision of Com. of Arb.]); or where a bartender knocked down a customer under provocation of verbal abuse, using excessive force, and in so doing broke a bone in his own hand (*Bisotti v. Behlow Estate Co.*, 2 Cal. I. A. C. Dec. 986); or where a foreman in the employ of defendant owned a horse which he kept with him while at work, occasionally using it in the company's business, but was not required to furnish or use a horse, and the horse was fed and shod at the company's expense, and where, the foreman forgetting to bring it across a certain creek to the camp during working hours, an employé of the company volunteered in the evening to bring it over, and was accidentally drowned while carrying out this errand (*Wood v. Chico Construction Co.*, 1 Cal. I. A. C. Dec. 89). (Commissioner Pillsbury dissented, on the ground that the ownership of the horse was immaterial, so long as it was being used in the com-

requirement should not be narrowly construed, however. An employé must reasonably be allowed some latitude for the exercise of his own judgment as to when and how he can best serve the interests of his employer.⁵⁷ Where these requisite conditions exist, and the injury results from a special risk incident to the employment, and there is a causal connection between the conditions under which the work is required to be performed, the injury "arises out of" the employment,⁵⁸ even when the connection is somewhat

pany's business; that the errand was desired by the foreman, and the employé not in a position to question him as to whether it was within the line of his duties or not; and that it is also immaterial whether deceased volunteered to perform the errand or was instructed to do so, as in either case he was complying with an expressed wish of his foreman.) Where an employé received a slight injury, to which bandages soaked in turpentine were applied, and some days later accidentally set fire to the bandages while lighting his pipe, the burns received in the second accident are not caused by an accident arising out of his employment. *Isaacson v. White Lumber Co.*, 2 Cal. I. A. C. Dec. 819.

⁵⁷ In *Stevenson v. Union Metallic Cartridge Co.*, 1 Conn. Comp. Dec. 621, where the claimant caught her hand in a belt in trying to save herself from falling, while on her way to pass a petition relative to working hours in the factory to another employé, the injury did not arise out of her employment. (Wk. Comp., etc., Act, § 12 [a] [2]) *De Long v. Krebs*, 1 Cal. I. A. C. Dec. 592.

⁵⁸ In *re Harbroe*, 223 Mass. 139, 111 N. E. 709.

An accident resulting from a risk reasonably incident to the employment should be considered as "arising out of the employment." *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N. W. 509, Ann. Rep. Neb. St. Dept. of L. 1915, Bulletin 32, p. 94; *Walther v. American Paper Co.* (N. J. Sup.) 98 Atl. 264.

Where a miner working in the mines inhaled poisonous gases which caused his death, the injury causing death arose out of the employment. *Giacobbia v. Kerno-Domewald Coal Co.*, Bulletin No. 1, Ill., p. 196.

The risk of assault is a risk peculiar to the occupation of a bartender, and one to which he is especially exposed; where he is assaulted by a drunken patron too intoxicated to know what he is doing, the accident arises out of the employment. *State ex rel. Anseth v. District Court* (Minn.) 158 N. W. 713.

A person employed as a traveling salesman, whose duty it is to solicit orders from grocery stores, who slips and falls while walking from one store to another in the course of his employment, is entitled to compensation for disability sustained thereby. The reason for the slipping and falling is im-

material, as long as the presence of some sufficient cause is inferable, and if the accident occurs in the course of the employment. *Block v. Mutual Biscuit Co.*, 2 Cal. I. A. C. Dec. 274. The risk of injury, from a defective or dangerous condition of a building or its contents, is one normally incident to working in that building, for the risk is peculiar to the building, and therefore to the employment therein. Where a floor above is caused to collapse by overloading it with storage, by a third party, and the collapse causes injury to an employé in a restaurant below, although the proprietor and employer of the restaurant has no control of the cause, and bears no blame, nevertheless, the accident is incidental to and arises out of the employment. *Douglas v. Kimbol*, 1 Cal. I. A. C. Dec. 543. Where it was the duty of an employé of a gas company to read meters, shut off the gas when patrons of the company moved, collect accounts, and deliver orders, and his employment did not end at any particular hour or place, his employment was continuous, and he was at all times, except when at home, under the protection of the compensation provisions of the law, and an accidental injury sustained by a collision of his motorcycle with an automobile, in a public street, while on his way home, arises out of his employment. *Fergusson v. Royal Indemnity Co.*, 1 Cal. I. A. C. Dec. 11.

Accidents and injuries held to have arisen out of the employment: Where one engaged as teamster, whose special duty was to care for his team, feed the same, and make deliveries to customers of the employer, after his day's work, took his team to the stable, and while unharnessing and feeding the team, passed behind the team of a fellow employé and was kicked by one of the horses. *Gylfe v. Suburban Ice Co.*, Bulletin No. 1, III., p. 167. *Massachusetts*. Where a workman burst a blood vessel in the pial membrane of the brain in the strain of cranking a coal delivery truck, and fell down unconscious, dying later from a recurrence of the hemorrhage. *Farrell v. Casualty Co. of America*, 2 Mass. Wk. Comp. Cases, 423 (decision of Com. of Arb.). Where the workman's death was due to burns received from the ignition of his clothing by a lantern which he was using while about his work, and which was sometimes used by the employés in performing their duties. *Parker v. American Mutual Liability Insur. Co.*, 2 Mass. Wk. Comp. Cases, 392 (decision of Com. of Arb.). Where the employé was injured in his back and right side in consequence of being thrown to the street when the truck which he was driving in his master's business was struck by an elevated car, and he died several months later. *Cripps v. Aetna Life Ins. Co.*, 2 Mass. Wk. Comp. Cases, 68 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct., 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828). *New Hampshire*. Where an employé in a mill run by water power was drowned while attempting to clean racks which protected the intake flume, such cleaning being part of his duty. *Boody v. K. of C. Mfg. Co.*, 77 N. H. 208, 90 Atl. 860, L. R. A. 1916A, 10, Ann. Cas. 1914D, 1280. *New York*. Where a workman sometimes used his motorcycle while on his employer's business, and often worked on it to repair it during business hours, and while he was so working his fingers were severed in

the chain guard of the machine. *Kingsley v. Donovan*, 169 App. Div. 828, 155 N. Y. Supp. 801. Where a railroad employé was severely burned when his clothes caught fire from ignited waste while he was wiping the tank of a passenger engine. *Sieplenska v. New York Central R. R.*, 4 N. Y. St. Dep. Rep. 395. Where a watchman on construction work who fell from a board into the cellar while making his rounds. *Sorge v. Aldebaran Co.*, 3 N. Y. St. Dep. Rep. 390. In *Cook v. N. Y. C. & H. R.*, *The Bulletin*, N. Y., vol. 1, No. 8, p. 9, which was so close that it probably would not have been reversed on appeal no matter which way decided, it was held that the general presumption in favor of the claimant raised by § 21 made the injury compensable. *Iowa*. Where a workman was required to clean clothing with gasoline, and attempted to light his pipe while his hands were still wet with the gasoline, severely burning his hand. *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 28. *Michigan*. Where a carpenter, working on the roof of a building under construction on a very cold day, was called down for a hot coffee lunch, and descending by a rope, instead of a ladder, was killed by losing hold of the rope. *Clem v. Chalmers Motor Car Co.*, *Op. Mich. Indus. Acc. Bd.*, *Bul. No. 3*, p. 40. *California*. Where a workman was run down by a vehicle, while he was repairing or putting down pavements. *Lera v. Fairchild-Gilmore-Wilton Co.*, 1 Cal. I. A. C. Dec. 44. Where an employé of a water company was hired to inspect the distributing system of the company, and remedy defects as found or reported to him, immediately or as needed in his judgment, regardless of the hours of service, and the evidence showed that after receiving a report of trouble in the company's pipe lines he had started to search for the defect, but was injured by an automobile accident while en route. *Phillips v. Chanslor-Canfield Midway Oil Co.*, 1 Cal. I. A. C. Dec. 580. Where a stableman, who by his duties was required to act as watchman and protect against intruders his employer's property, situated where trouble might occur, although the employer had neither authorized nor forbidden him to carry or use a pistol for that purpose, was accidentally shot while cleaning a pistol which he had procured for his own protection in the performance of his duties. *Benson v. Hutchinson Co.*, 2 Cal. I. A. C. Dec. 901. Where an employé went out upon a porch, attached to the kitchen where he was employed as a cook, to smoke a pipe, and in returning to the kitchen, to continue his work, fell down the basement stairs and suffered a fracture of the wrist. *Espy v. Crossman*, 2 Cal. I. A. C. Dec. 328. Where a school-teacher, after dismissing her school for the day, remained upon the school premises to finish her work, and while at work went to the telephone for a moment to send a message upon private business, and was injured by tripping over the telephone cord and falling. *Rieff v. City of Sacramento*, 2 Cal. I. A. C. Dec. 223. Where a chauffeur had his arm broken while cranking his employer's automobile, even though the car had been taken into the garage for repairs. *De Long v. Krebs*, 1 Cal. I. A. C. Dec. 592. Where a "spieler," whose duties were to attract and persuade the crowd to attend his

employers' amusement show, was bitten and poisoned by a reptile he was exhibiting. *Merritt v. Clark & Snow, Inc.*, 2 Cal. I. A. C. Dec. 983. Where a dislocation of the semilunar cartilage of the knee was caused by quickly rising from a stooping position, required by the nature of the employment. *Giampolini-Lombardi Co. v. Employers' Liability Assur. Co.*, 2 Cal. I. A. C. Dec. 1010. Where a night watchman, while making his rounds through the premises of his employer, was killed by falling through an opening in the floor to the floor below. *Carter v. Hume-Bennett Lumber Co.*, 2 Cal. I. A. C. Dec. 42. Where one employed to fight fire, just after extinguishing a fire and while preparing to leave the premises, was injured from stepping into a hole in the dark. *Mazzini v. Pacific Coast Ry.*, 2 Cal. I. A. C. Dec. 962. *Connecticut*. Where a workman, who had been frequently rebuked for infringing a rule against smoking, was found dead in a sitting posture in a place where he had no occasion to be, with an unlighted cigarette in his hand; it being held that, if death were due to injury (which was doubtful), such injury did not arise out of his employment. *Palama v. Chase Metal Works*, 1 Conn. Comp. Dec. 444. In *Kane v. New Haven Union Co.*, 1 Conn. Comp. Dec. 492, where it was shown that decedent, a young man careless in habits, had been working in an etching room where dust and acid fumes were especially irritating to the lungs, but which was as properly ventilated and lighted as possible, and had died of tuberculosis, it was held the burden of proof to show that the injury arose out of the employment was not discharged. In *Shay v. Christian Feigenspan, Corp.*, 1 Conn. Comp. Dec. 232, where it appeared that decedent's broncho pneumonia might have been caused by exposure due to the employment, but there was insufficient evidence connecting it with the employment to make such finding any more than a surmise, it was held the plaintiff's burden was not discharged. In *Miller v. Libby & Blinn*, 1 Conn. Comp. Dec. 377, where the evidence showed that while it was possible that the claimant's erysipelas was due to his employment, it was equally probable that it was due to other causes wholly unconnected with the employment, it was held the claimant had not established his claim by a preponderance of evidence. In *Wilson v. Cheney Bros.*, 1 Conn. Comp. Dec. 66, where the claimant sought to prove the atrophy of his optic nerve was due to being struck below the eye by a shuttle which flew from the loom where he was working by showing that he had passed the test at Ellis Island, by records of an optician showing a normal condition of his eyes six months before the injury, and by the opinion of an expert, and the employer showed statements of the claimant previous to the injury that he had a cataract coming over the eye, and that it was "no good," that he was practically blind in that eye immediately after the injury (whereas atrophy develops gradually), and the opinion of another expert conflicting with the first, it was held that the claimant had not established his case by a preponderance of evidence, as was necessary to entitle him to an award. In *Morse v. Waterbury Clock Co.*, 1 Conn. Comp. Dec. 138, it was held that where a workman complained to a fellow

workman of pain in his side, which was later found to be due to a slight separation of two ribs, which might have been caused by a strain in lifting, but said workman was much intoxicated the night before, and his condition seemed more likely to have been caused by a blow of some kind, he being unable to set any time when a strain occurred, his burden of proof to establish an injury arising out of his employment was not discharged. Where the medical evidence, though conflicting, tended strongly to show that indigestion and gastritis from which the claimant was suffering, were probably never due to muscular strain as claimed by the workman and his physician. *Graves v. Connecticut Mills Co.*, 1 Conn. Comp. Dec. 657. Where the claimant had a blister form on his index finger while about his employment, and subsequently, while mending a pair of shoes at home, the awl which he was using slipped and penetrated the finger, and blood poisoning resulted thereafter, it was held that the poisoning resulted apparently from the injury by the awl, and that it did not arise out of his employment. *Palmeri v. Greist Mfg. Co.*, 1 Conn. Comp. Dec. 669. In *Konzelski v. Griffin-Neuberger Tobacco Co.*, 1 Conn. Comp. Dec. 50, where it appeared that the workman's injuries, received while picking up stones in a field, were due to the explosion of a dynamite cap, which might have been there from blasting done a year before, though this was extremely doubtful, or might have been dropped by fellow workman who had been playing with caps during the day, the evidence as to how he obtained the cap or how it came there being very indefinite, it was held that the injury was not shown to have arisen out of the employment. *England*. Where an insurance agent fell downstairs while on his rounds, he being on the stair simply and solely for the purpose of his business. *Refuge Assurance Co., Ltd., v. Millar* (1912) 5 B. W. C. C. 522, Ct. of Sess.

Diseases constituting injuries arising out of employment: Where a lead grinder was incapacitated for work by the gradual absorption of lead into his system. (St. 1911, c. 751, as amended by St. 1912, c. 571) *Johnson v. London Guarantee & Accident Co., Ltd.*, 217 Mass. 388, 104 N. E. 735. Where an employé was required as part of his duties to open a hole and look at a fire in a furnace at 15,000° F., in order to see if the fire was properly supplied with coal, and became blind from optic neuritis caused by noxious gases which escaped through the hole. *Hurle v. American Mutual Liability Ins. Co.*, 2 Mass. Wk. Comp. Cases, 79 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct., 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919). Where the room in which the employé, a chocolate packer, worked was necessarily kept at a temperature of 60° to 65° F., and facial paralysis developed gradually because of these working conditions. *Dalton v. Employers' Liability Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 231 (decision of Com. of Arb.). *New York*. Where septicaemia was contracted by an injured workman and caused his death. (Workmen's Compensation Act, § 3, subd. 7) *Rist v. Larkin & Sangster*, 171 App. Div. 71, 156 N. Y. Supp. 875. *Connecticut*. Where a watchman aggravated the pain in a

remote, and when the direct and immediate agency of injury is foreign.⁵⁹ An accident so arises where it is either a usual or normal risk incident to the kind of work being done, or is of extraordinary character, but the nature of the employment peculiarly and specially exposes the employé to such risk.⁶⁰ It is due to the employment not only when the risk incurred is directly involved in the employment itself,⁶¹ but when involved in the general scope of

frozen toe by stubbing it, and, becoming unconscious, fell on the stone floor, sustaining bruises of the back which developed into an abscess, causing disability. *Dorrance v. New England Pin Co.*, 1 Conn. Comp. Dec. 24 (affirmed by superior court on appeal).

⁵⁹ *Archibald v. Ott* (W. Va.) 87 S. E. 791.

⁶⁰ *Bush v. Ickleheimer Bros. Co.*, 1 Cal. I. A. C. Dec. 522.

While it cannot reasonably be said that the risk of being shot by trespassing lawbreakers is incidental to or has its origin in a night watchman's ordinary employment, undoubtedly there are particular incidents where the occupation of a night watchman exposes him to risks substantially beyond the ordinary ones, and where the employment involves and obligates the employé to face such perils. In *re Harbroe*, 223 Mass. 139, 111 N. E. 709.

⁶¹ The injury or accident arose out of the employment where a workman, with two others, was pulling a hand chain connected with a block operating a mechanism which caused a lifting chain to pass through the block and lift a steel girder, and the lifting chain became clogged, and, being forced through, split the rock, striking and injuring the workman (*Scott v. Payne Bros., Inc.*, 85 N. J. Law, 446, 89 Atl. 927); where a workman of an ice company was employed to see that none cut holes in the ice for fishing, but was not given any instructions as to methods, and was drowned, while he was near the center of the pond, when the ice broke (*Jillson v. Ross* [R. I.] 94 Atl. 717); where a girl, whose duty was to stand at the top of a threshing machine, near the opening through which the machine was fed, and who crossed to the other side of the opening and sat down on some sheaves, in the shelter of which she ate some refreshments provided by her employer, her hand being caught in the machine when she arose (*Carinduff v. Gilmore* [1914] 7 B. W. C. C. 981, C. A.); where a sailor was injured by a fall down a half-open hatchway on board a ship, while he was washing his clothes in a dark alleyway (*Cokolon v. Owners of Ship Kentra* [1912] 5 B. W. C. C. 658, C. A.); where a ship's carpenter was wearing oily trousers, and they were ignited from shavings into which a match had been thrown by a shore laborer (*Manson v. Forth & Clyde Steamship Co., Ltd.* [1913] 6 B. W. C. C. 830, Ct. of Sess.); and where an engine driver, standing partly on the engine and partly on the platform, was tightening a nut, and shortly after was seen lying

the employment,⁶² or in an act performed by the employé in the general line of his duty to his employer, as where he attempts to save the life of or rescue a coemployé who is placed in danger while engaged in his employment.⁶³ Death due to being overcome by

on the permanent way between the engine and the platform in such a condition that he died five minutes later, since the accident could not be disconnected from the employment (*Fennah v. Midland Great Western Ry.* [1911] 4 B. W. C. C. 440, C. A.).

The injury did not arise out of the employment, however, where a workman kept a can of condensed milk for his lunch hidden in a dangerous place in a printing machine, so that his fellow workmen would not get it, and injured his hand in putting it back. *Keen v. St. Clement's Press, Ltd.* (1914) 7 B. W. C. C. 542, C. A.

⁶² Where the deceased employé was a cook on a lighter, where his employment required him to live, and overexerted himself while removing his effects from the sinking craft, and died soon thereafter of heart disease accelerated by such overexertion, his death was from an "injury arising out of his employment"; that which would have been reasonable for any one to do on leaving a sinking vessel which was his temporary home, was within the scope of his employment. *In re Brightman*, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321.

Where an employé, engaged as a wagon washer, had cranked automobiles at the instance of the machinist, and a number of times in the presence of the foreman without objection, and was injured while so cranking the machine, his injury arose out of the employment. *Cromowy v. Sulzberger & Sons Co.*, Bulletin No. 1, Ill., p. 37.

⁶³ Where a workman fell into a hole in the floor, which could not be seen for escaping steam, while he was running to answer a call for help from a coemployé who had fallen into the hole, the accident was arising out of his employment, the court (opinion by Carter, J.,) saying: "It is clear that it is the duty of an employer to save the lives of his employés, if possible, when they are in danger while in his employment, when occasion presents itself, to do what he can to save the lives of his fellow employés when all are at the time working in the line of their employment. Any other rule of law would be not only inhuman, but unreasonable and uneconomical, and would, in the end, result in financial loss to employers on account of injuries to their employés. From every point of view it was the duty of the deceased, as a fellow employé, in the line of his duty to his employer, to attempt to save the life of his fellow employé under the circumstances here shown. That he failed in his attempt does not in the slightest degree change the legal situation." *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 999. The reasoning of the following cases tends to support this conclusion: *Rees v. Thomas*, 4 W.

excessive heat to which the workman is exposed by the conditions under which he works is compensable.⁶⁴

In regard to using in a judicial opinion the word "incidental" instead of "arising out of," the words of the statute, Earl Loreburn said: "I do not repent of having myself, as have other judges, in trying to convey my thoughts, spoken of 'risks incidental' to an employment, but that does not mean merely risks which ordinarily occur in it. For the future, however, in order to prevent misapprehension, I shall confine myself to the actual words of the text. The words are 'arising out of.'" ⁶⁵ Under Acts which, deviating from the usual language, provide for liability only where at the time of the accident the employé is performing service growing out of and "incidental to his employment," the effect seems to be the same as though the usual words were used.⁶⁶

§ 116. Risks peculiar to employment

While it is not ordinarily essential, in order that an accident or injury may be one arising out of the employment, that it be peculiar

C. C. 9; *Matthews v. Bedworth*, 1 W. C. C. 124; *London & Edinburgh Shipping Co. v. Brown*, 42 Scottish L. R. 357.

⁶⁴ In *Wajteniak v. Pratt & Cady Co., Inc.*, 1 Conn. Comp. Dec. 545, where the workman died of heat stroke, and it was shown that his duties as a furnace tender subjected him to very great heat, it was held that the heat stroke causing death was due to his employment, and that the injury arose out of that employment. In *McGarva v. Hills*, 1 Conn. Comp. Dec. 533 (affirmed by superior court on appeal), it was held that plaintiff's death from heat exhaustion was due to working under conditions of great heat and want of air.

⁶⁵ *Trim Joint District School v. Kelly* (1914) 7 B. W. C. C. 274, H. L.

⁶⁶ *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, 156 N. W. 143. Where an employé died of typhoid fever contracted from impure drinking water furnished by his employer, the injury sustained was incidental to his employment. *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273.

The risk to a cigar store clerk of injuries in a quarrel between him and a stranger, not a customer, was not incidental to nor a part of his employment. *Treadwell v. Marks*, 3 Cal. I. A. C. Dec. 3.

to the particular employment in which the workman was engaged at the time of the injury,⁶⁷ it must arise out of a risk in some way peculiar to the business in which he was engaged,⁶⁸ and not come from a hazard to which he would have been equally exposed apart from the employment.⁶⁹ The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant.⁷⁰ For example, an injury from a

⁶⁷ To arise out of the employment an accident need not ordinarily be one peculiar to the particular employment in which the injured employé was engaged at the time of the injury. *State ex rel. People's Coal & Ice Co. v. District Court*, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344.

⁶⁸ *Cherry, L. J.*, in *Green v. Shaw* (1912) 5 B. W. C. C. 573, C. A.

⁶⁹ "An injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment," does not arise out of the employment. *McNicol's Case*, 215 Mass. 497, at page 499, 102 N. E. at page 697, L. R. A. 1916A, 306, distinguished in *Re McPhee*, 222 Mass. 1, 109 N. E. 633.

⁷⁰ (St. Wis. 1915, § 2394—3, subd. 2) *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, 156 N. W. 143.

It is essential that there be some special risk incident to the particular employment, a risk which imposes a greater danger upon the employé than upon an ordinary member of the public. *Sheldon v. Needham* (1914) 7 B. W. C. C. 471, C. A. *Fletcher Moulton, L. J.*, says in *Peel v. Lawrence & Sons, Ltd.* (1912) 5 B. W. C. C. 274, C. A.: "There was no risk whatever, other than that to which every other human being is exposed. True, it was done for the purposes of his work. Suppose in an employment part of the terms was that a man should be given lunch, and that he bolted his food and so burst a blood vessel; there is no doubt that he took his refreshment for the purpose of enabling him to do his work, but there was no risk whatever connected with that work. That is not an accident arising out of his employment."

Where an employé, who drove a butcher's delivery wagon and occasionally assisted in the shop, was killed from stumbling over a bucket while he was making a delivery on foot, the injury did not result from a risk incident to his employment, since by making this delivery he was exposed to no greater danger than that to which any other person would have been exposed while walking in the same place. (*Workmen's Compensation Act*, §§ 3, 2, groups 30, 41). *Newman v. Newman*, 155 N. Y. S. 665.

In the case of *Sheldon v. Needham*, 7 B. W. C. C. 471, the English Court

fall while at work, caused by faintness or illness, and not brought on by the labor conditions, does not arise out of the employment.⁷¹

of Appeal held that under the English Workmen's Compensation Act, from which the words of the New York statute, "arising out of and in the course of his employment," were taken, a charwoman in regular employment, who was sent by her employer to post a letter at a post box about 100 yards from the house, and who slipped on a banana skin in the street and fell, breaking her leg, was not entitled to the benefit of the Act, for the reason that the accident, being due to a risk no greater than is run by all members of the public, did not arise out of the employment. In all cases in which the workman has recovered, there has been evidence that the occupation in which he was engaged exposed him to risks over and above those run by other people. The object of the statute was to secure compensation to workmen who are engaged in occupations which exposed the employé to danger from which other occupations are free. But it was as against accidents incidental to the special employment that the benefit of the statute was given. *Falconer v. London & Glasgow Engineering & Iron Shipbuilding Co., Ltd.* (1901) 3 F. 564, Ct. of Sess. (Act of 1897). "If the risk was such that by reason of the work in which he was engaged, in the place where he was engaged, and in the manner in which he was compelled to perform that work, he was more readily exposed to it than the public generally, then it was abnormal and incidental to his employment." *Brown v. City of Decatur*, 188 Ill. App. 147. Where a workman was struck and killed by a train while he was crossing the tracks along a water main upon which he was working, on his way to a hand car where he wished to sit while putting on his boots, preparatory to work, he was injured by an accident arising out of his employment and incidental to it. *Id.* An accident arising out of his employment while doing that which he is directed to do does not entitle a workman to recover compensation, unless you can say that he was exposed to a greater risk than a member of the general public. *Slade v. Taylor* (1915) 8 B. W. C. C. 65, C. A.

From the lack of such risk, the accident did not arise out of the employment where a workman's boot shrank and became too tight, injuring his toe (*White v. Sheepwash* [1910] 3 B. W. C. C. 382, C. A.); where a workman took off his boots and socks, so that he could get around better on the wet floor, and strained his finger in taking them off (*Peel v. Lawrence & Sons, Ltd.* [1912] 5 B. W. C. C. 274, C. A.); where a maid who was sewing before an open window saw a cockchafer, attracted by the electric light, coming in, and, in throw-

⁷¹ *Erickson v. Empire Laundry Co.*, 1 Cal. I. A. C. Dec. 612.

Where the employé, while sweeping dirt and pebbles from the paving, suffered a sudden attack of cardiac syncope, and fell to the pavement, fracturing his skull, with fatal result, the accident did not arise out of his employment. *Collins v. Brooklyn Union Gas Co.*, 171 App. Div. 381, 156 N. Y. Supp. 959.

Nor does an injury so arise where an employé suffers a hemorrhage from natural causes while engaged in his employer's business.⁷² Bites by poisonous insects, reptiles, or animals are industrial accidents only in those instances where the injury arises out of and happens in the course of the employment and the employé is subjected to a special danger of so being bitten by reason of the nature of his employment. In a California case wherein it appeared that an employé working in a cannery was bitten by a spider while eating lunch upon the premises, and it was not shown that the cannery was to any greater degree infested with spiders than other buildings in the same community, the Commission held the evidence insufficient to show that the employment especially exposed the applicant to the danger of such injury.⁷³ If the spider had been concealed in the fruit being handled at the cannery, and had bitten him while sorting or handling the fruit, and it could have been

ing up her hand to drive it away, struck herself in the eye (*Craske v. Wigan* [1910] 2 B. W. C. C. 35, C. A.) ; where a workman was stung by a wasp while driving the engine of a threshing machine, and death resulted (*Amys v. Barton* [1912] 5 B. W. C. C. 117, C. A.) ; and where a workhouse master, who had tubercular trouble, was sitting at the top of some stairs smoking while on duty, and was seized with a fit of coughing, causing him to fall down stairs (*Butler v. Burton-on-Trent Union* [1912] 5 B. W. C. C. 355, C. A.). Likewise, where a maid, after washing her hair, was drying it outside the house, when she was called to watch the baby in its cradle near the fire, and, while continuing to dry her hair before the fire, her loose sleeve caught fire, and she was fatally burned, the injury did not arise out of the employment. *Clifford v. Joy* (1910) 2 B. W. C. C. 32, C. A.

⁷² In re Sanderson's Case (Mass.) 113 N. E. 355.

⁷³ *Sterling v. Inderredian Co.*, 2 Cal. I. A. C. Dec. 172. Where a woman employed in a cannery is bitten by a spider while eating her lunch, such spider bite cannot be considered to be an accident arising out of the employment, in the absence of evidence tending to show that the employment subjected the applicant to more than the ordinary risk of spider bites. In this case the employer's premises were not shown to be to any greater degree infested with spiders than any other building in the community, and the bite was not received while handling fruit in which spiders might be found. *Goodwin v. Libby, McNeil & Libby*, 2 Cal. I. A. C. Dec. 211.

shown that this was a rather common danger incident to handling such fruit, the Commission would probably have reached a different conclusion.⁷⁴

§ 117. — Risks of commonalty

Where there is no natural connection between the risk and the employment, as in case of lightning, sunstroke, assaults, dangerous animals, and the like, it must be shown that the nature of the employment peculiarly exposed the employé to such danger. Otherwise the risk is one incident to the commonalty, and the employer is not liable.⁷⁵ Except when this natural connection exists, risks of the commonalty ordinarily include street risks,⁷⁶ and risks

⁷⁴ *Sterling v. Inderredian Co.*, 2 Cal. I. A. C. Dec. 172.

⁷⁵ *Ketron v. United Railroads of San Francisco*, 1 Cal. I. A. C. Dec. 528.

Where the workman froze the tips of his fingers on a moderately cold day, there being no sudden drop in the temperature and no unusual or unforeseen conditions surrounding the incident, he was exposed to none but ordinary risks of exposure, and could not recover compensation. *Aillo v. Milwaukee Refrigerator Transit & Car Co.*, Rep. Wis. Indus. Com. 1914-15, p. 18.

⁷⁶ In *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310, the court held that where a general engineer, employed to inspect sugar plants located in different cities, slipped on the ice and was fatally injured while about to board a street car after returning to his home town after a trip of inspection, the accident did not arise "out of" his employment; the court saying in an opinion by Judge Steere: "Slipping upon snow-covered ice and falling, while walking or running, is not even what is known as peculiarly a 'street risk'; neither is it a recognized extra hazard of travel, or particularly incidental to the employment of those who are called upon to make journeys between towns on business missions. These distinctions are recognized, and the rule correctly stated, in an opinion of the Michigan Industrial Accident Board, filed in *Worden v. Commonwealth Power Co.*, 20 Det. Leg. News No. 39 (December 27, 1913), as follows: 'It must also appear that the injury arose out of the employment and was a risk reasonably incident to such employment, as distinguished from risks to which the general public is exposed. To illustrate: * * * On the other hand, it may be fairly said that one of the most common risks to which the general public is exposed is that of slipping and falling upon ice. This risk is encountered by people generally, irrespective of employment. * * *' The board also referred to the fact that claimant was upon his own premises as of some force, but appar-

from walking on or along railroad tracks,⁷⁷ when incurred in going to or from work,⁷⁸ and not on the employer's premises.⁷⁹ But the

ently denied an award upon the ground quoted, which is well supported by former decisions. In the late case of *Sheldon v. Needham* (1914) 7 B. W. C. C. 471, C. A., a servant sent to mail a letter slipped in the street, upon a banana peel or some other slippery object, breaking her leg. Citing as controlling several cases involving the same principle, the court held that, although claimant was in the performance of the exact thing ordered done, there could be no award, because the accident was not due to any special or extra risk connected with and incidental to her employment, but was of such a nature as to be equally liable to happen under like circumstances to any one in any employment, and whether employed or not. This unfortunate accident resulted from a risk common to all, and which arose out of no special exposure to dangers of the road from travel and traffic upon it; it was not a hazard peculiarly incidental to or connected with deceased's employment, and there is not shown to have a causal relation with it, or to have arisen out of it." Slipping and falling on ice is one of the most common risks to which the public is exposed, and is encountered by people generally, irrespective of

⁷⁷ Where an employé of a railroad company, doing clerical work in its roundhouse, was injured after he had left his place of employment for his home and had passed out of the gate of the roundhouse yard and had crossed a public street, and was walking along his employer's railroad tracks running diagonally through the next block, these tracks being a short cut to the street car line, his risk after reaching the public street was that of the traveling public in general. *Hodgkinson v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 1039.

⁷⁸ Where on the night preceding a holiday the employer, who was going away on a business trip, requested his department store manager to meet him at the store at 10 o'clock the next morning, and the employé, while hurrying to get there in time, had his wrist fractured at his home while cranking his automobile, which he believed would take him more quickly to the store than the street cars, the case was not an exception to the general rule that in going to and from his place of employment the employé's risks are those of the commonalty. *Graham v. Daly Bros.*, 2 Cal. I. A. C. Dec. 794.

⁷⁹ Where an employé is given home work, and on returning to her place of employment on the following day with a bundle of work stumbles and falls upon a public sidewalk, not upon the premises of the employer, sustaining serious injury and disability, she is not entitled to compensation. Where employés are going to and returning from their places of employment, and are not injured upon the employer's premises, their risks are those of the commonalty, and do not grow out of the employment. *Malott v. Healey*, 2 Cal. I. A. C. Dec. 103.

general rule that, while an employé is on his way to or from his place of employment, his risks are of the commonalty, and not of

their employment, and such an accident does not arise out of the employment. *Worden v. Commonwealth Power Co.*, Mich. Wk. Comp. Cases (1916), 14.

A street railway motorman, injured by an automobile while on his way to have his watch tested, which was required by the employer, but whose time while so doing was not paid for, suffered a general risk not due to his employment, and the accident did not arise out of it. *De Voe v. New York State Rys.*, 218 N. Y. 318, 113 N. E. 256, affirming 169 App. Div. 472, 155 N. Y. Supp. 12. Where the employé went with his employer in the morning to another part of the city to get merchandise for the day's sale, and on the way back stopped at a restaurant for breakfast, as was his usual custom, and slipped and fell on the icy sidewalk in front of the restaurant, the risk was one of the commonalty, and the accident did not arise out of the employment. *Bartz v. Friedlander*, *The Bulletin*, N. Y., vol. 1, No. 11, p. 11.

The accident did not arise out of the employment where a laundry driver, after putting up his team for the night, was riding home on his bicycle and injured by being run into by an automobile (*Ogilvie v. Egan*, 1 Cal. I. A. C. Dec. 79); where a boy, employed in a general retail store and accustomed on going to work each morning to buy vegetables for his employer at a market located on the direct route from his home to the store, was accidentally injured by a collision with a street car, while on his way to work and before reaching the market (*Hummer v. Hennings*, 2 Cal. I. A. C. Dec. 859); where a deputy marshal, immediately preceding the close of his working hours, drove his motorcycle on his usual route homeward to see his wife, and incidental to his purpose intended to inspect an electric light in disrepair on his route, his regular duties requiring such inspection for the purpose of making report, but before reaching such light was seriously injured in a collision with a horse vehicle (*Eastman v. State Compensation Insurance Fund*, 2 Cal. I. A. C. Dec. 390); where a farm laborer, starting out on a bicycle to go to his work, was upset by his own dog and fatally injured (*Greene v. Shaw* [1912] 5 B. W. C. C. 573, C. A.); where a builder's laborer, hurrying across the street during the breakfast hour for a supply of whitening for his master, was knocked down and injured by an electric tram car (*Symmonds v. King* [1915] 8 B. W. C. C. 189, C. A.); or where a branch manager, who was returning on a bicycle from a necessary visit to another branch shop after closing time, having ridden his bicycle at the suggestion of the manager of the other branch, slipped sideways and was injured (*Slade v. Taylor* [1915] 8 B. W. C. C. 65, C. A.); where a newspaper reporter, whose duties required the gathering of news in the town in which he lived and in the town two miles away where the newspaper was published, was injured while returning at the close of a day's work to his home on the usual and best bicycle route, on a bicycle furnished by the employer, his leg being crushed by a passing

the particular employment in which he is engaged, is not a rule of universal application; it applies more to those cases where the employer maintains a plant or place of employment than where the place of employment is changeable.⁸⁰ It is inaccurate to state that under the "risk of commonalty doctrine" the employer is relieved of responsibility if the employé's risk is no greater than the risk of other persons in the community so employed. A clerk cutting his finger while sharpening a pencil in the course of his employment is entitled to compensation if the injury proves serious, notwithstanding the fact that his danger is no greater than that of any person carrying a pocketknife, whether employed or not. This doctrine must therefore be confined to cases where the risk is not naturally incident to the employment.⁸¹

A clearer view of the application of this doctrine may be obtained by noticing further concrete cases wherein it has been illustrated. Where a traveling salesman, while conversing in a social way in a hotel at which he was stopping on a business trip, fell, fracturing his leg, and his fall was not attributable to any defect or peculiarity of construction of the hotel or to the fact that he was a guest thereof, the risk was a risk of the commonalty, and not one inherent in or incidental to his employment.⁸² Where a traveling salesman was asphyxiated by escaping gas in the hotel while asleep, his death was due to an ordinary hazard of living, and did not arise out of his employment.⁸³ But where the engineer of a fishing boat went to work in the dark of early morning, crossing from the wharf over two other larger vessels to where he had left his boat, moored

automobile, his risks were those of the commonalty, the same as any other bicycle rider proceeding along that road, and hence the accident did not arise out of his employment. *State Compensation Insurance Fund v. Lemon*, 2 Cal. I. A. C. Dec. 507.

⁸⁰ *Slattery v. Ocean Accident & Guarantee Co.*, 2 Cal. I. A. C. Dec. 522.

⁸¹ *Ketron v. United Railroads of San Francisco*, 1 Cal. I. A. C. Dec. 528.

⁸² *Gaskill v. Voorhies Co.*, 2 Cal. I. A. C. Dec. 1020.

⁸³ *Reed v. Booth & Platt Co.*, 1 Conn. Comp. Dec. 121.

alongside another vessel because of stormy weather the preceding night, and found that the boat had been changed in the night to its usual berth alongside a pier nearby, the captain calling out in the dark for him to "come over here," the falling of the engineer into the water while proceeding to return over the two other vessels, as necessity required, was an accident growing out of and incidental to his employment.⁸⁴ When he left the public wharf to go to the point where he believed the ship to be, or to return from that point to the ship, his risks were no longer those of the commonalty, but were special risks of his occupation.⁸⁵

§ 118. Risks external to the employment, but special exposure to risk due to the employment

An injury is due to the employment where, though the risk incurred is external to the employment, a special degree of exposure to the risk is caused by the employment.⁸⁶ There have been frequent

⁸⁴ *Slattery v. Ocean Accident & Guarantee Co.*, 2 Cal. I. A. C. Dec. 522.

⁸⁵ *Id.*

⁸⁶ As a general rule injuries which are suffered from so-called "acts of God," such as sunstroke, freezing, lightning, etc., do not arise out of the employment of an injured employé, for the reason that such casualties are risks which the whole citizenry takes. Where, however, the risk of the employé for injuries of this sort is clearly greater than that of the average person in the same community, then such special exposure to the danger causes the accident, if it occurs, to arise out of the employment. *Fensler v. Associated Supply Co.*, 1 Cal. I. A. C. Dec. 447. Where a person is employed in piling and unpling bags of cement in a warehouse which has an iron roof and no windows, and while so employed upon a hot day, a thermometer outside registering 105 degrees in the shade, is overcome by heat, such employé was especially exposed by his employment to the danger of sunstroke, and such accidental injury arose out of his employment. *Id.*

The injury arose out of the employment where a lineman, while engaged in erecting a new line, was forced by a violent rainstorm to seek shelter with others under cars standing on a switch, no other shelter having been provided by his employer, and was injured from these cars being unexpectedly moved (*Workmen's Compensation Law*, § 10; *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620); also where a teamsman was eating his dinner in his employer's stable, which was his proper place, and was bitten

occasions for applying this rule to street accidents.⁸⁷ Injuries received on the street by an employé sent on a special mission are

by the stable cat (*Rowland v. Wright* [1909] 1 B. W. C. C. 192, C. A.). It has been held that injuries received from lightning on a high and unusually exposed scaffold, from a stone thrown by a boy from the top of a bridge at a locomotive passing underneath, and from an attack upon a cashier traveling with a large sum of money, all arose in the course and out of the employment, while the contrary had been held as to injuries resulting from a piece of iron thrown in anger by a boy in the same service, from fright at the incursion of an insect into the room, and from a felonious assault of the employer. In *re Employers' Liability Assur. Corporation*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306—the court referring to *Andrew v. Failsworth Industrial Society*, [1904] 2 K. B. 32, *Challis v. London & Southwestern Ry.*, [1905] 2 K. B. 154, *Nisbet v. Rayne & Burn*, [1910] 2 K. B. 689; *Armitage v. Lancashire & Yorkshire Ry.* [1902] 2 K. B. 178; *Craske v. Wigan*, [1909] 2 K. B. 635; *Blake v. Head*, 106 L. T. Rep. 822.

⁸⁷ A person whose employment requires him to walk along a certain portion of the street several times a day, regardless of weather conditions, is peculiarly exposed by such employment to the danger of street accidents while walking along that portion of the street in question, and is entitled to compensation if he is injured while so doing. *Ketron v. United Railroads of San Francisco*, 1 Cal. I. A. C. Dec. 528.

Where an employé was compelled to travel about the streets in going from one job to another, and was struck by an automobile while en route between jobs, it was not unreasonable to hold that the danger of being struck by street cars, automobiles, and traffic of every description should be taken account of, that the very nature of his occupation itself exposed the workman to the unusual risk of an accident of this nature, and that the accident arose out of his employment. *Kunze v. Detroit Shade Tree Co.* (Mich.) 158 N. W. 851.

In *McKay v. Metropolitan Life Insurance Co.*, 1 Conn. Comp. Dec. 380, where the claimant's husband, an insurance collector and agent, was run down and killed by an automobile when about to board a car for the purpose of keeping an appointment and making a collection, after having just left another house where he collected a bill, he sustained an injury arising out of his employment.

Street accidents due to increased risk arose out of the employment where a canvasser collided with a tram car and was killed, while riding a bicycle on his rounds (*Pierce v. Provident Clothing & Supply Co., Ltd.* [1911] 4 B. W. C. C. 242, C. A.); where a drayman was killed by a motorcar while crossing the road to get to his dray (*Martin v. Lovibond & Sons, Ltd.* [1914] 7 B. W. C. C. 243, C. A.); where a salesman and collector was kicked on the knee

compensable if the mission is the principal factor in such employment, and not merely incidental to the being on the street.⁸⁸ The ordinary risks of travel are naturally incident to travel. An employé injured while using the streets or vehicles of travel on his employer's business is entitled to compensation without proof that he was specially exposed to the risk. It is therefore not necessary that he be employed as traveling salesman, or required to travel more than the average person. The risk arises out of the employment, whether he be obliged to travel upon one occasion only or regularly.⁸⁹ The employment of a teamster on the streets of a large

by a passing horse while cycling on his rounds (*McNeice v. Singer Sewing Machine Co., Ltd.* [1911] 4 B. W. C. C. 351, Ct. of Sess.); and where a railway fireman, returning home from work by train (admittedly in the course of his employment), was last seen standing up putting a basket on the rack just as the train started, and immediately afterward fell out of the carriage and was fatally injured, without any one seeing just how the accident happened (*Pomfret v. Lancashire & Yorkshire Ry. Co.*, [1903] 2 K. B. 718, 5 W. C. C. 22 [Act of 1897]).

Where the employer failed to furnish proper toilet facilities for employés in the building where they were at work, so that they were obliged to and did habitually resort for such facilities to another building of the employer, which lay across a public street, and which custom persisted for a considerable time, and, as the court was entitled to find, was therefore known and assented to by the employer, and where the deceased, while crossing the street in working hours to reach the toilet in question, was struck by a passing vehicle, sustaining injuries which caused his death, the trial court was justified in finding that he came to his death by an accident which arose out of his employment. *Zabriskie v. Erie R. Co.*, 86 N. J. Law, 266, 92 Atl. 385, L. R. A. 1916A, 315. This case cites *Elliott v. Rex* (1904) 6 W. C. C. 27, wherein the court sustained an award in favor of a workman injured while coming from the toilet during the dinner hour, and refused to follow *Pearce v. Southwestern Ry. Co.* (1899) 2 W. C. C. 152.

⁸⁸ *Malott v. Healey*, 2 Cal. I. A. C. Dec. 103.

⁸⁹ *Bush v. Ickleheimer Bros. Co.*, 1 Cal. I. A. C. Dec. 522. The risk of slipping while walking upon the employer's business is directly incidental to any employment which requires an employé to walk upon the business of his employer. It is therefore immaterial whether he be required so to walk only at irregular intervals or regularly, as for a traveling salesman. *Ketron v. United Railroads of San Francisco*, 1 Cal. I. A. C. Dec. 528.

city accentuates his street risks above those of other occasional travelers, and causes a special degree of exposure to this risk ordinarily external to the employment, and where he is killed by a heavy load of beams which fall from a building under construction, the accident arises out of his employment.⁹⁰

§ 119. — Injury from forces of nature

The general rule drawn from the English cases is that, where the accident is due to the forces of nature which might have been foreseen, there is an aggravation of the danger if the workman is more exposed as a result of his employment than the ordinary man, and, if the danger is increased by reason of the employment, the employer is liable. The employer cannot ordinarily be held liable for compensation for disability from sunstroke, freezing, and lightning. These are forces of nature which he cannot foresee and prevent, and the employé is ordinarily no more subject to injury from such sources than are others. But where the work and the method of doing the work exposes the employé to the forces of nature to a greater extent than he would be if not so engaged, the industry increases the danger from such forces, and the employer is liable.⁹¹

Thus an injury from being struck by lightning arises out of the employment where the employment necessarily placed the workman at the time of the accident in a position subjecting him to unusual risk from lightning, but not otherwise.⁹² In a Michigan case

⁹⁰ *Mahowald v. Thompson-Starrett Co.* (Minn.) 158 N. W. 913.

⁹¹ *Skougstad v. Star Coal Co.*, Rep. Wis. Indus. Com. 1914-15, p. 31.

⁹² "As far as the instant case is concerned the scope of the English statute may be considered identical with the Michigan Workmen's Compensation Law. Several cases have been passed upon by the English courts arising under the English law, where compensation was sought for injury by lightning, and, except in cases where the employment necessarily placed the employé at the time of his injury in a position subjecting him to unusual risk from lightning, compensation has been denied." *Klawinski v. Lake Shore & M. S. Ry. Co.*, 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A, 342.

A driver for an ice company was required to follow a fixed route, in sub-

the court quotes with apparent approval a memorandum opinion filed in the case wherein the Commission said: "Lightning stroke is

stantial disregard of weather conditions, though permitted to seek shelter in times of necessity. When a severe rainstorm, accompanied by lightning, was in progress, he left his team and went to a tall tree just within the lot line, either for protection or in the performance of his duties soliciting orders. Lightning struck the tree, and the same bolt struck him, and he was killed. It was held that the evidence sustained a finding that the death of the decedent was the result of an accident "arising out of" his employment, within the meaning of the Workmen's Compensation Act (Laws 1913, c. 467, § 9; Gen. St. 1913, § 8203). State ex rel. People's Coal & Ice Co. v. District Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344. In this case the court cited State ex rel. Duluth Brewing & Malting Co. v. District Court, 129 Minn. 176, 151 N. W. 912, wherein the court adverted to the distinction drawn by the courts between the statutory phrases "arising out of" and "in the course of," but did not deem it wise to attempt the making of a definition accurately distinguishing the two phrases. The court held that the present case did not call for such distinction. Andrews v. Fallsworth Industrial Society, Ltd., [1904] 2 K. B. 32, 90 L. T. 611, a leading case, holding that where a bricklayer was killed by lightning while working on a scaffold 23 feet from the ground, in a position which subjected him to peculiar danger and risk from lightning, his death arose out of his employment, and Roger v. School Board, [1912] S. C. 583, wherein the court said: "To be struck by lightning is a risk common to all and independent of employment, yet the circumstances of a particular employment might make the risk not a general risk, but a risk sufficiently exceptional to justify its being held that accident from such risk was an accident arising out of the employment, were also cited. Notice was taken of Klawinski v. Lake Shore, etc., R. Co., 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A, 342, which involved the death of a railway section hand, killed by lightning when in a barn near the right of way, to which he had gone for protection from a storm. In that case the man was exposed to no peculiar danger by the character of his work. The court, in referring to cases under the English law, said that compensation had always been denied for injury by lightning, "except in cases where the employment necessarily placed the employé at the time of his injury in a position subjecting him to unusual risk from lightning." The opinion of the court was that: "Decedent, by reason of his employment, was in no way exposed to injuries by lightning other than the community generally in that locality." In the Minnesota case the court distinguished Hoenig v. Industrial Commission of Wisconsin, 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339, holding that, where an employé was struck by lightning while working on a dam, his death did not arise out of his employment. The Wisconsin Industrial Commission held that his death did not arise out of his employment. The circuit court af-

not popularly spoken of as an accident where it comes from the action of the elements without the agency of man. When the industry, through the agency of man, combines with the elements and produces injury to the employé by lightning stroke, it may well be said that the injury grows out of the employment and is accidental. Such has been the decision of the English courts under the English Compensation Act. We are aware that the language of the English Act differs from the language of our Act, but if we accept the construction of the legislative committee which drew the Act, then we find the meaning of the two Acts in this respect identical. Clearly the industry may be and ought to be charged with the burden resulting from the hazards of the industry itself. * * * We have no desire to pass upon the question of public policy. That function is wholly within the province of the Legislature. We merely desire to correctly interpret the legislative intent. The legislative committee in its report says that 'compensation shall be paid when the injury grows out of the employment; it makes no difference who is to blame; it is sufficient that the industry caused the injury.' So in the case of lightning stroke, if we can find as a

firmed its holding, saying, however, that upon the same evidence it would not make a like finding, and the holding was sustained by the Supreme Court. By the Wisconsin statute the findings of the Commission are final upon questions of fact; and by section 30 of the Minnesota Act the review by the Supreme Court in compensation cases is by certiorari, and it is a review of questions of law and not of questions of fact. The Minnesota case also distinguished *Kelly v. Kerry Council*, 42 Ir. L. T. 23, wherein the court held that one killed by lightning while working on a public road did not come to his death from an accident "arising out of his employment," and distinguished the facts from those present in the *Andrews Case*, in that there was present no peculiar risk or danger incident to the employé's work, so that it could be said that the accident arose out of his employment. *Klawinski v. Lake Shore & M. S. Ry. Co.*, 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A, 342.

In *Jaskulka v. Hartford & N. Y. Transportation Co.*, 1 Conn. Comp. Dec. 542, it was held that there was insufficient evidence to show that plaintiff's death from sunstroke was due to the conditions of his employment, as distinguished from that of other persons working at the same time in the same locality, and that the injury was not shown to have arisen out of the employment.

fact that the injury grew out of the employment, or that the industry caused the injury, then undoubtedly compensation should be paid. Assuming the law to provide compensation for industrial accidents only—those growing out of the employment and caused by the industry—we must approach the consideration of each case of injury by lightning on the question of fact. Did the injury grow out of the employment, and did the industry cause the injury? The act provides for compensation for ‘personal injuries accidentally sustained * * * where the injury is proximately caused by accident.’ We are of the opinion that this language refers to industrial accidents, those caused by the industry and chargeable to the industry, and does not apply to injuries resulting from those forces of nature described in the common law as acts of God, such forces as are wholly uncontrolled by men.” The rule applicable in the case of lightning applies in case of injury from other forces of nature such as injury from frostbite,⁹³ glare or heat

⁹³ A longshoreman employed in unloading a vessel on a pier in an open harbor is exposed to greater danger and likelihood of getting frozen than an ordinary outdoor worker, and the freezing of his hands while so employed was an accident arising out of his employment. *McManaman's Case* (Mass.) 113 N. E. 287.

A workman hired to deliver coal during extremely cold weather, who froze his foot in the course of delivering a load of coal at an unoccupied house, where there was no opportunity to warm himself, was especially exposed to the danger of freezing, and could recover compensation, even though the injury was one commonly known as due “to the forces of nature.” *Skougstad v. Star Coal Co.*, Rep. Wis. Indus. Com. 1914-15, p. 31.

In *Dorrance v. New England Pin Co.*, 1 Conn. Comp. Dec. 24 (affirmed by superior court on appeal), it was held that a watchman whose duties required him to get coal from a shed and wheel it to the boiler room, about 35 feet away, several times during the night, was not exposed to undue hazard of frostbite, and that injuries therefrom did not arise out of his employment.

The injury did not arise out of the employment where the hand of a journeyman baker was frostbitten while he was delivering bread (*Warner v. Couchman* [1912] 5 B. W. C. C. 177, H. L., and [1911] 4 B. W. C. C. 32, C. A.), or where a seaman had his hands frostbitten while handling frozen ropes at Halifax, Nova Scotia (*Karemaker v. Owners of S. S. Corsican* [1911] 4 B. W. C. C. 285, C. A.).

of the sun,⁹⁴ and injury from being struck by articles dislodged by the wind.⁹⁵

§ 120. — Injury caused by coemployé or others

An accident arises out of the employment where it is incidental thereto and a natural consequence thereof, though caused by a fellow workman⁹⁶ or others,⁹⁷ but not if incurred while the injured

⁹⁴ The injury arose out of the employment where a seaman, while his ship was in port at Hayti, was put on duty on a blackened steel deck without any shade, and the reflection of the blazing sun injured his eyesight (*Davies v. Gillespie* [1912] 5 B. W. C. C. 64, C. A.), and where a seaman was incapacitated by sunstroke while he was painting the sides of his ship, in port in Mexico (*Morgan v. Owners of S. S. Zenaida* [1910] 2 B. W. C. C. 19, C. A.), but not where a school janitor, sent by the head master to deliver a message on a very hot day, became giddy and fell, with fatal consequences (*Rodger v. Paisley School Board* [1912] 5 B. W. C. C. 547, Ct. of Sess.), or where a plumber, who was laying pipes in a road on a very hot day, was of impaired vitality, and had to stoop a great deal, and sustained apoplexy or sunstroke while so employed, causing his death (*Robson, Eckford & Co., Ltd., v. Blakey* [1912] 5 B. W. C. C. 536, Ct. of Sess.).

⁹⁵ The injury arose out of the employment where a workman was stooping over his work, so that he could not see the fall of a piece of slate, which was blown from a neighboring roof during a gale, and was struck on the head by it (*Anderson & Co., Ltd., v. Adamson* [1913] 6 B. W. C. C. 874, Ct. of Sess.), but not where a carter was leading his horse and cart through a yard, and a sheet of iron was blown from a neighboring roof so as to strike him (*Kinghorn v. Guthrie* [1913] 6 B. W. C. C. 887, Ct. of Sess.).

⁹⁶ In *Re Employers' Liability Assur. Corporation*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, it was held that where a workman was killed by an intoxicated fellow workman, whose dangerous disposition, when intoxicated, was known to the employer, the injury arose out of the employment. The court said: "The injury came while the deceased was doing the work for which he was hired. It was due to the act of an obviously intoxicated fellow workman, whose quarrelsome disposition and inebriate condition were well known to the foreman of the employer. A natural result of the employment of a peaceable workman in company with a choleric drunkard might have been found to be an attack by the latter upon his companion. The case at bar is quite distinguishable from a stabbing by a drunken stranger, a felonious

⁹⁷ See note 97 on following page.

attack by a sober fellow workman, or even rough sport or horseplay by companions, who might have been expected to be at work. Although it may be that upon the facts here disclosed a liability on the part of the defendant for negligence at common law or under the Employers' Liability Act might have arisen, this decision does not rest upon that ground, but upon the causal connection between the injury of the deceased and the conditions under which the defendant required him to work."

Where a workman was injured in a fight with two Italian fellow employés, who disliked him because he had previously taken their place when they were discharged, the accident was incidental to the employment, and might have been reasonably anticipated, and therefore arose out of the employment. *Harnet v. Steen*, 2 N. Y. St. Dep. Rep. 492 (affirmed in 169 App. Div. 905, 153 N. Y. Supp. 1119, and in 216 N. Y. 101, 110 N. E. 170).

The accident arose out of the employment where a workman was using a brush which belonged to another machine, and was injured when the workman to whom it belonged snatched it from his hand, not intending to cause injury (*Eng. Act. 1897*; *McIntyre v. Rodger & Co.* [1904] 6 F. 176); also where a newspaper reporter was ordered by his employer to get a first copy of the newspaper off the press to see if the makeup was correct, and was forcibly resisted by the pressman, the reporter repeatedly and properly attempting to do as he was instructed, and then, when about to report the matter to his superior, and as a consequence of his proper efforts, was unexpectedly and without further provocation assaulted (*Brown v. Berkeley Daily Gazette*, 2 Cal. I. A. C. Dec. 844).

⁹⁷ Where a journeyman carpenter was struck and killed by a bar of metal, which fell from an upper story of a building in course of construction, upon which he was working, the bar being caused to fall by the workman of an independent contractor, the accident arose out of his employment. That the bar was caused to fall by a workman of an independent contractor did not preclude recovery of compensation. (*P. L. 1911*, p. 136, § 2) *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458. This case cites *Challis v. London & Southwestern R. Co.*, [1905] 2 K. B. 154, holding that where an engine driver, while driving an engine under a bridge, was injured by a stone dropped by a boy from the bridge, his injuries were caused by an accident arising "out of" and in the course of his employment, distinguishing *Armitage v. Lancashire & Yorkshire Ry. Co.*, [1902] 2 K. B. 178, wherein the accident was not one of the risks to which it was within the scope of the employment of the workman to submit, and citing *Nisbet v. Rayne and Burn*, [1910] 2 K. B. 689, holding that the death of a cashier, who was robbed and murdered in a railway carriage while carrying money to pay the wages of his employer's workmen, was caused by accident arising "out of" and in the course of his employment, on the ground that the risk of being robbed and murdered is a risk incidental to the employment of those who are known to carry considerable sums in cash on regular days by the same route to the same place, citing also *Anderson v. Balfour*,

workman is acting outside the scope of his employment,⁹⁸ or if caused by something done by a fellow workman outside the scope of

[1910] 2 I. R. 497, holding (Cherry, L. J., dissenting) that injury sustained by a gamekeeper through a criminal attack by poachers was injury arising "out of" and in the course of his employment.

Where an employé with a number of other employés, was standing in line before a pay window for the purpose of receiving his pay check, and some of the employés began pushing and shoving in a friendly way, and applicant was pushed out of line and received a fall, from which he was injured, the mere scuffling does not take the employé temporarily out of the employment, but he is entitled to compensation for injuries sustained while on the grounds of the employer, for he was to all intents and purposes in the employ of the employer, and the injury arose out of the employment. *Garls v. Pekin Cooperage Co.*, Bulletin No. 1, Ill., p. 75.

The fact that the injury, occasioning the death of an employé while in the course of his employment, did not result from any negligence on the part of the employer, his officer, agent, or employé, but was caused solely by the negligence of a third person, did not relieve the decedent's employer from paying compensation on account of such death. *Biddinger v. Champion Iron Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 70.

Accidents arising out of employment: Where several lads were picking stones and other foreign matter from coal as it passed by them on a moving belt, and one of them threw a stone at another, and his eye was so badly injured as to have to be removed. *Clayton v. Hardwick Colliery Co., Ltd.* (1914) 7 B. W. C. C. 643, C. A. Where an unpopular schoolmaster of an industrial school died of injuries received from an assault by a deliberate conspiracy of his pupils. *Trim Joint District School v. Kelly* (1914) 7 B. W. C. C. 274, H. L. Where the foreman of a firm of furniture movers was fatally injured by an assault by a man who had been disappointed in getting a van on hire, and the men who hired vans on their own account were of a rough class, and several previous assaults of this nature had been made on different persons. *Weekes v. Stead & Co.* (1914) 7 B. W. C. C. 398, C. A., where a taxicab driver, driving an officer from Plymouth to an outlying fort during the war, did not hear the sentry's challenge, because of the noise of an engine and stormy weather, and was shot in the leg. *Thorn v. Humm & Co.* (1915) 8 B. W. C. C. 190, C. A.

⁹⁸ Where a carpenter foreman, working on his brother's house, got into an altercation with some men, and his brother, taking charge of the controversy, was succeeding, and he then began to take part in the fight, and was struck by a piece of iron thrown at him, the accident did not arise out of his employment. *Clark v. Clark* (Mich.) 155 N. W. 507.

his employment,⁹⁹ particularly if the act be malicious,¹ or if caused by the willful act of a third person committed against the employé

⁹⁹ The injury, to be "out of" the employment, when caused by a coemployé, must be a natural incident of it, one which a reasonable person familiar with the situation might expect to happen as a result of the exposure caused by the employment. The Act means more than that it (the accident) must arise out of the parties being brought together by the employment (where the accident results from the act of a fellow-servant). It means that it must have an origin in the occupation in which the parties are engaged. *Ely v. M. S. Brooks & Sons*, 1 Conn. Comp. Dec. 390 (superior court reversing commissioner).

Where a workman engaged in installing machinery was taken ill, and being advised by an employé of the company on whose premises he was working to take some salts, which the employé said might be had at a certain place in the factory, took a chemical from the place indicated, which, however, was poison and resulted in his death, the accident did not arise out of his employment. *O'Neil v. Carley Heater Co.*, 218 N. Y. 414, 113 N. E. 406.

Where a 17 year old boy, carrying toys from the basement to a reserve room, steps into the room of a fellow employé with whom he was very friendly, and with the remark, "Look pleasant," points the toy camera at him and, pressing the button, causes the wire spring to shoot into his face, striking and destroying the sight of one of his eyes, such accident does not arise out of the employment, and such injured employé is not entitled to compensation. The act causing injury was more than a mere pleasantry in passing, as in *Flint v. Coronado Beach Co.* The act of pointing a toy camera and discharging it was of such a character that the possibility and even probability of harm coming thereby should reasonably have been anticipated by the offending employé, notwithstanding the fact that he was a boy 17 years of age. *Fishering v. Daly Bros.*, 2 Cal. I. A. C. Dec. 940.

The injury did not arise out of the employment where a workman was injured by a piece of iron thrown in anger by another workman at a third (*Armitage v. Lancashire & Yorkshire Railway Co.* [1902] 4 W. C. C. 5, C. A.); where a mine worker, in dodging some rubbish thrown by a fellow workman, struck his head against the side of the passage and was injured (*Baird & Co., Ltd., v. Burley* [1909] 1 B. W. C. C. 7, Ct. of Sess.); and where one workman pushed a fellow workman, without any reason, and he in saving himself accidentally injured the eye of his assailant (*Shaw v. Wigan Coal & Iron Co., Ltd.* [1910] 3 B. W. C. C. 81, C. A.).

¹ A workman, injured by a malicious act of a fellow workman, does not come within the scope of the Washington act. (Wk. Comp. Act Wash. § 3) *Rulings Wash. Indus. Ins. Com.* 1915, p. 5.

for reasons personal, and not because of his employment,² or because such third person is drunk.³ An act done by some one who happens to be in the same employment, which has no relation to that employment, but was a wrongful act, and was intended to be a wrongful act against another person in the same employment, is not within the scope of the employment as part of the risk of the employment.⁴ For a workman to throw something at another is

² Even though the injury or death be caused by the tort of a third person, under the Washington Act the employé may obtain compensation by election and assignment, except where a willful act of such third person, committed against the employé, is for reasons personal and not because of his employment. (Wk. Comp. Act Wash. § 1) Rulings Wash. Indus. Ins. Com. 1915, p. 3.

Fatal injuries to a cigar store clerk, sustained in a quarrel between him and a stranger, not a customer, did not arise out of his employment, in the absence of evidence that the quarrel was not a personal one. *Treadwell v. Marks*, 3 Cal. I. A. C. Dec. 3.

An assault, to come within the Compensation Act, must either be pending the employment of the one who commits it, or so shortly after the cessation of the employment as to be necessarily connected with it, or at least must be for some real grievance shown to have arisen out of the employment. *Cowen v. Cowen New Shirt Laundry, Inc.*, *The Bulletin*, N. Y., vol. 1, No. 8, p. 11.

Where a workman, in a quarrel with another employé fell back against a machine, and died without recovering consciousness, his injury did not arise out of the employment. *Malloy v. Fidelity & Casualty Co. of N. Y.*, 2 Mass. Wk. Comp. Cases, 401 (decision of Com. of Arb.).

Where an engineer was shot in pursuance of the premeditated purpose and intention of a fellow workman, the occurrence was not an industrial accident, though it happened on the premises of the employer, since there was no greater hazard of being shot about those premises than any other. *Arnold v. Holeproof Hosiery Co.*, Rep. Wis. Indus. Com. 1914-15, p. 32.

³ The injury did not arise out of the employment where a cook in a hotel, in trying to avoid the pestering of a drunken guest who came into the kitchen, injured her arm (*Murphy v. Berwick* [1910] 2 B. W. C. C. 103, C. A.), or where a drunken man, who had been told by a carter to leave his horse alone, struck the carter two blows, and the carter died from the results (*Mitchinson v. Day Bros.* [1913] 6 B. W. C. C. 191, C. A.).

The injury received by a bartender from a glass thrown at him by a drunken patron, who does not know what he is doing, arises out of the employment, where the glass is not thrown in a personal altercation between them. *State ex rel. Anseth v. District Court (Minn.)* 158 N. W. 713.

⁴ *Armitage v. Lancashire & Yorkshire Railway Co.* (1902) 4 W. C. C. 5, C. A.

not a danger which is incidental to employment in a coal mine, but is an act which is entirely outside the scope of the employment.⁵ But the disobedience by fellow workmen is as much one of the risks of a man's employment as a defect in the mechanical appliances.⁶

That the injury was caused by an independent criminal agency does not render it noncompensable where the danger of injury by such means was an incident of the performance of the work, as well as of the time and place of the performance.⁷ Injuries received in protecting the employer's property or interests against law violators are compensable where the injured employé's acts are within the scope of his employment, as where one in charge of his employer's business or property and in the discharge of his duties is injured by an unruly employé,⁸ trespasser,⁹ robber,¹⁰ or passen-

⁵ *Baird & Co., Ltd., v. Burley* (1909) 1 B. W. C. C. 7, Ct. of Sess.

⁶ *Scott v. Payne Bros., Inc.*, 85 N. J. Law, 446, 89 Atl. 927, citing *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *Archibald v. Ott* (W. Va.) 87 S. E. 791.

⁷ This appears from cases heretofore noticed. An injury to a railroad engine driver, occasioned by a stone thrown from a bridge by a boy while the engine was passing under it, was held to be an accident arising out of the employment (*Challis v. London & S. W. Ry. Co.*, [1905] 2 K. B. 154), because such a danger is a matter of common knowledge and is accordingly deemed to have been within the contemplation of both master and servant. Murder of a paymaster incident to his robbery is an accident arising out of the employment (*Nisbet v. Rayne and Burn*, [1910] 2 K. B. 689), because the habitual carrying of large sums of money in the course of the employment and as an act of service therein is an exposure to the risk of an attack by robbers. A premeditated fatal assault on a schoolmaster by bad and unruly pupils is an accident arising out of the employment (*Trim Joint District School Board v. Kelly* [1914] App. Cas. 667).

⁸ The danger of being turned upon and beaten by an unruly employé in the event of being reprovved or discharged for disobedience is a risk which

⁹ The injury arose out of the employment where a mill superintendent was shot and killed by a trespasser whom he ordered out, and it was not only a part of his general duties to order off trespassers, but he had special instructions as to this particular trespasser (*In re Reithel*, 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A, 304, and where a gamekeeper on duty was attacked by poachers and injured (*Anderson v. Balfour* [1910] 3 B. W. C. C. 588, C. A.).

¹⁰ See note 10 on following page.

ger,¹¹ or by a customer on whom he is waiting,¹² and where a peace officer is injured in attempting to make an arrest or prevent a dis-

every foreman takes, and arises out of, and is incidental to, his employment. Assaults arising out of the exercise of his authority by a foreman are to be distinguished from ordinary fights between two workmen upon a job. *Rudder v. Ocean Shore R. R. Co.*, 1 Cal. I. A. C. Dec. 209. Where an assistant foreman was assaulted by two workmen, whom he had just reprimanded for not doing their work properly, the accident arose out of the employment. *Yume v. Knickerbocker Portland Cement Co.*, 3 N. Y. St. Dep. Rep. 353 (affirmed in 169 App. Div. 905, 153 N. Y. Supp. 1151).

But where a teamster, whose mules broke the tongue of his wagon and put him in a frenzy of anger, unexpectedly beat the foreman, who was standing near, for not having rendered certain assistance, such unprovoked assault did not constitute a compensable accident, there having been no instructions given by the foreman, or attempt to discharge or discipline the teamster. *Petersen v. Valley Pipe Line Co.*, 2 Cal. I. A. C. Dec. 606. Nor was the accident compensable where a foreman was injured by a former employé, and it did not appear that the foreman received the injury in the necessary performance of his duties, or that the unprovoked assault was even accidental as to the former employé. *Halm v. Marshall*, 2 Cal. I. A. C. Dec. 605.

¹⁰ The danger of being held up by a highwayman is a risk of the occupation which every street car conductor or motorman has to take, and may properly be held to arise out of the employment. *Morrison v. Los Angeles Ry. Corp.*, 2 Cal. I. A. C. Dec. 18. Where a bartender is shot on his refusal to throw up his hands at the order of hold-up men attempting to rob a saloon at midnight, and while he is trying to reach the adjoining room to get a revolver, the accident arises out of the employment. *Henning v. Henning*, 2 Cal. I. A. C. Dec. 733. Where a night watchman in a paper mill was required in his rounds to visit places accessible and particularly inviting for an attack upon him, and the risk of attack was a complement of his employment, he being employed for that particular purpose, an assault for the purpose of robbery by a coemployé was an accident arising out of his employment. *Walther v. American Paper Co.* (N. J. Sup.) 98 Atl. 264.

¹¹ Under the Washington Act, employés who are injured by third persons while actually engaged in the performance of their duties are entitled to compensation for disabilities resulting, as, for example, street car conductors, assaulted by disorderly passengers for insisting on obedience of the company's rules. (Wk. Comp. Act Wash. § 3) *Rulings Wash. Indus. Ins. Com.* 1915, p. 6.

¹² The employé had been instructed to decline to supply a certain customer with merchandise until he had paid a bill long overdue. This customer, after having paid his bill and received the goods ordered, later had occasion to pass

turbance.¹³ On the other hand, an injury is not compensable where the risk thereof was not involved in the employé's duties.¹⁴

the employé, and, being in an angry mood because of the latter's refusal to serve him in the first instance, called the employé a name and struck at him as he passed. The employé parried the blow and the customer laid hands on him, the employé meanwhile resisting, with the result that the latter received the personal injury which caused him to be totally incapacitated for work. The Committee of Arbitration came to the conclusion that the employé was subjected to a risk in the proper carrying out of his employer's orders through no contributory action or remark of his own. The Board affirmed the Committee's decision and held that the employé was entitled to compensation. *O'Connor v. London Guarantee & Accident Co., Ltd.*, 2 Mass. Wk. Comp. Cases, 387 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

Where the secretary and office manager of a company is shot by a customer, who has been sued by the company to collect an unpaid account, the assault being entirely unexpected and unprovoked, and occurring in the office of the company when the customer comes in and demands a receipt in full for the account, which has been paid, and while the secretary is making out the receipt, the accident arises out of the employment. *Craycroft v. Craycroft-Herrold Brick Co.*, 2 Cal. I. A. C. Dec. 654.

¹³ Where a deputy marshal, in attempting to ascertain the cause of a disturbance and to induce the disturber to desist, is, without reason, shot by such disturber, the accident is peculiarly a risk of that employment, and compensable. *Acrey v. City of Holtville*, 2 Cal. I. A. C. Dec. 587. Where a city marshal is murdered by persons whom he is seeking to arrest as suspicious characters, his widow is entitled to a death benefit. *Colson v. City of Burbank*, 2 Cal. I. A. C. Dec. 127.

¹⁴ *Petersen v. Valley Pipe Line Co.*, *supra*; *Halm v. Marshall*, *supra*.

The injury did not arise out of the employment where a workman, seeking to assist his employer, who had been beset by rowdies, was stabbed and fatally injured (*Collins v. Collins* [1907] 2 Ir. R. 104, C. A.); nor where an errand boy was assaulted by his employer, who had been in an asylum, and was subject to fits of melancholia (*Blake v. Head* [1912] 5 B. W. C. C. 303, C. A.); nor where the agent and collector of a brewery was murdered while making a delivery of beer, and it did not appear that the purpose of the attack was robbery, a risk connected with his employment, or that the employer had any reason to anticipate that the attack would be made (*Schmoll v. Weisbrod & Hess Brewing Co.* [N. J. Sup.] 97 Atl. 723).

In *Devanzo v. Jarvis*, 1 Conn. Comp. Dec. 435 (affirmed by superior court on appeal), where the claimant while at work was feloniously assaulted by two disreputable men, who had previously been his coemployés and who had been discharged, the attack being due to animosity cherished because claim-

Where a night watchman is murdered by burglars whom he has surprised on the premises of his employer, his death is caused by an accident arising out of his employment.¹⁵ But the occurrence does not arise out of the employment where he is shot and killed by a fellow watchman temporarily insane, and the employer and all other persons were previously unaware of his tendency to insanity.¹⁶ Nor does the injury so arise where a night watchman, mistakenly believing that two officers are robbers, fires at them, and they believing him to be a robber, return the fire, injuring him, and it appears that his duties do not involve the risk of the injury received.¹⁷

Where the owner of a small store, also local agent for an express company is killed while defending his store from robbery, and it does not appear that the robbers were endeavoring specifically to steal the express company's property, but were merely looking for valuables, without regard to ownership or custody, the death does not arise out of the employment, and the express company is not liable.¹⁸

§ 121. — — Injury from horseplay or practical joking

Unless the workman is actually engaged at the particular time in the performance of some duty which contributes to the injury, an injury to a workman from skylarking or horseplay or practical joking, though it may arise in the course of, cannot be said to arise

ant had secured their discharge, it was held the injury did not arise out of the employment. In *Loesser v. East Shore Amusement Co.*, 1 Conn. Comp. Dec. 449, it was held that where a bartender was injured about the face and eye by a glass thrown at him by the porter in the saloon, immediately following an altercation over a half-eaten sandwich of claimant, which the porter had thrown away, the injury did not arise out of the employment.

¹⁵ *Mason v. Western Metal Supply Co.*, 1 Cal. I. A. C. Dec. 284.

¹⁶ *Allyn v. Fresno Brewing Co.*, 2 Cal. I. A. C. Dec. 784.

¹⁷ *In re Harbroe*, 223 Mass. 139, 111 N. E. 709.

¹⁸ *Herrick v. Wells Fargo & Co.*, 2 Cal. I. A. C. Dec. 85.

out of, the employment, whether the injured person instigated the occurrence or took no part in it.¹⁹ It has been held, however, that

¹⁹ "If two workmen leave their work and begin to indulge in horseplay, they are not doing their master's work, but, on the contrary, are doing what is absolutely inconsistent with the carrying on of their master's work, and it cannot be said that anything which happens in consequence of such conduct arises out of the employment." (Eng. Act 1897) Lord Justice Clerk, in *McIntyre v. Rodger & Co.* (1904) 6 F. 176.

If an employé is assaulted by a fellow workman, though in play, an injury so sustained does not arise out of the employment. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N. W. 509.

An employé who is injured by a practical joke or by the horseplay of his fellow employés is not entitled to compensation. Such injury does not arise out of his employment, for the reason that it bears no relation to the duties he is required to perform. *Koch v. Oakland Brewing & Malting Co.*, 1 Cal. I. A. C. Dec. 373.

An employer is not liable, under the Workmen's Compensation Act (P. L. 1911, p. 134), to make compensation for injury to an employé which was the result of horseplay or skylarking, so called, whether the injured or deceased party instigated the occurrence or took no part in it; for, while an accident, happening in such circumstances, may arise in the course of, it cannot be said to arise out of, the employment. *Hulley v. Moosbrugger*, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203.

In *Armitage v. L. & Y. Ry. Co.*, L. R. [1902] 2 King's Bench, 178, a boy of 16 years of age, engaged at work where he and other boys were employed, was pushed into a pit by another boy for a "lark." Becoming angry, he picked up a piece of iron and threw it at the boy who pushed him in; it missed him, and hit another boy in the eye, injuring him, for which he claimed compensation from his employer. The county court judge held that the accident was one which arose out of and in the course of the boy's employment, and awarded compensation. This judgment was reversed. Three opinions were delivered in the case. Collins, M. R., held that the findings of the county judge on questions of fact, if there be evidence to support them and he has not misdirected himself in point of law, are final. Among other things, he said, at page 181: "A boy, engaged in the same work as the respondent, in anger threw a piece of iron at another boy, which missed him and hit the respondent. This was a wrongful act entirely outside the scope of the employment. The statute does not provide an insurance for the workman against every accident happening to him while he is engaged in the employment of his master, but only against accidents arising out of and in the course of that employment. * * * As a matter of law, it cannot be said that an accident caused to a workman while engaged in his work by a fellow workman's doing a wrongful act entirely outside the scope of his employment is an ac-

where a workman's hand was crushed when he attempted, while engaged in operating a triphammer, to remove a tin can placed on

cident arising out of and in the course of the employment. For these reasons I think the appeal must be allowed." Mathews, L. J., observed at page 182: "The Act gives compensation in respect of accidents 'arising out of and in the course of the employment.' If the words had been merely 'arising in the course of the employment,' possibly the result might have been different; but we have to deal with the additional words 'out of,' which we must suppose to have been introduced by the Legislature for some reason." And Cozens-Hardy, L. J., said at page 183: "I think that some meaning must be given to the words 'out of' in the section. They appear to point to accidents arising from such causes as the negligence of fellow workmen in the course of the employment, or some natural cause incidental to the character of a business. An accident arising out of the dangerous nature of a business carried on, and not involving any human agency, such, for instance, as spontaneous combustion of some material, might be said to arise out of the employment. But I do not think that an accident caused by the tortious act of a fellow workman having no relation whatever to the employment can be said to arise out of the employment." In *Wrigley v. Nasmyth, Wilson & Co.*, Workmen's Compensation Reports (England) 1913, p. 145, it was held that where a turner while larking with another turner was knocked into a lathe, thereby injuring himself, the accident did not arise "out of and in the course of the employment" within section 1, subdivision 1, of the Workmen's Compensation Act, 1906. In *Hillis v. Shaw*, Id. p. 744, it was said: "A domestic servant whilst in the course of her employment was accidentally shot and injured by a farm laborer, who was carrying a gun from the house to the fields, where it was required by the employer for the purpose of shooting crows. In reply to the question, 'Did he present it at you in a joke?' put by the county court judge, the injured servant stated: 'He might have pointed it at me; it was not intended.' Held, that the evidence given by the servant herself was sufficient to justify the conclusion that the injury was caused by the larking or fooling of the laborer; and that therefore this was not an accident arising out of the employment within the meaning of section 1, subdivision 1, of the Workmen's Compensation Act, 1906."

The injury did not arise out of the employment, where an employé was injured from falling while carrying a filled bucket down a flight of stairs, due to a coemployé's taking advantage of his peculiar susceptibility of being tickled (*Coronado Beach Co. v. Pillsbury* [Cal.] 158 Pac. 218); where a workman's eye was destroyed from being struck by a spring ejected playfully by a coemployé from a trick camera (*Fishering v. Pillsbury* [Cal. 1916] 158 Pac. 215); where an employé was injured from hot water turned on him by a fellow employé as a practical joke (*Vittorio v. California Pottery Co.*, 3 Cal. I. A. C. Dec. 26); where a workman fell and was permanently crippled as a result

the lower die by a bystander, his injury arose out of his employment, though the bystander placed the can on the die for fun in

of being hoisted on a crane by his fellow workmen as a practical joke (*Fitzgerald v. Clarke & Son* [1909] 1 B. W. C. C. 197, C. A.); where a workman's injury was due to fellow workmen, who stumbled into him while indulging in horseplay (*English Act 1897; Falconer v. London & Glasgow Engineering & Iron Shipbuilding Co., Ltd.* [1901] 3 F. 564, Ct. of Sess.); where a workman injured himself while rescuing a fellow workman who had become involved in danger as a result of horseplay (*Mullen v. Stewart & Co., Ltd.* [1909] 1 B. W. C. C. 204, Ct. of Sess.); nor where a housemaid was struck in the eye and injured by a ball which was thrown at her playfully by a nurse under the same employer (*Wilson v. Laing* [1910] 2 B. W. C. C. 118, Ct. of Sess.).

Injuries resulting from inexcusable horseplay on the part of a fellow servant who was using a compressed air hose in cleaning his clothes after work, and inserted the hose into the workman's rectum, did not arise from the performance of services "growing out of and incidental to his employment." (*St. 1915, § 2394—3, subd. 2 Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, 156 N. W. 143.

In *Ely v. M. S. Brooks & Sons*, 1 Conn. Comp. Dec. 390 (superior court reversing commissioner), where the claimant while working was struck in the eye by a piece of wire thrown by a girl working near by, in a spirit of fun and to attract his attention, it being necessary after some time to have the eye removed, it was held the injury did not arise out of the employment. In *Carrigan v. Winchester Repeating Arms Co.*, 1 Conn. Comp. Dec. 327 (affirmed by the superior court on appeal), where deceased and a fellow workman were working near each other sorting scrap metal with pointed sticks, and the fellow workman, being hit by a bullet thrown by some one in a spirit of fun, made at the deceased with his stick, which was run through deceased's wrist when he threw up his arm to parry the thrust, it was held such accident did not arise out of the employment, though it did occur in the course of the employment. But in *Griffin v. A. Roberson & Sons*, *The Bulletin*, N. Y., vol. 1, No. 10, p. 18, compensation was awarded, though it was not clear whether the employé fell as the result of the work he was doing, or in trying to ward off some foolish action of a coemployé, where it appeared that whatever was done was done while he was at work. And in *Grandfield v. Bradley Smith Co.*, 1 Conn. Comp. Dec. 479, where a girl, requiring an empty box for her work, which should have been supplied her by a boy hired for that purpose, went to get one from another boy, who supplied another table, and was resisted by him in a spirit of fun, and injured, it was held the injury arose out of her employment. This case was distinguished from other cases of play by the fact that the claimant was not engaged in play, but was in the performance of her duties.

which the injured workman took no part.²⁰ An injury to the eye did not arise out of the employment where the employé while in the toilet felt something strike her arm, and looked through a crack to see where the article had come from, whereupon a girl in the adjoining toilet thrust some scissors through the crack into her eye.²¹

§ 122. Area of duty—Absence—Entry and exit

A distinction must be drawn between the doing of a thing recklessly or negligently which the workman is employed to do and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employé does the work he is employed to do may well be held to be a risk incidental to the employment. Otherwise in the other case.²² As said by Judge Holt, of the Minnesota Supreme Court, in a recent opinion: "When a servant undertakes in the course of his employment, during the proper hours therefor, and in the proper place, to do something in the furtherance of his master's business, and meets with accidental injury therein, the trial court's finding that the accident arose out of and in the course

²⁰ (Wk. Comp. Act, § 1) *Knopp v. American Car & Foundry Co.*, 186 Ill. App. 605.

²¹ *De Fillipis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. Supp. 761.

²² *Barnes v. Nunnery Colliery Co., Ltd.* (1911) 4 B. W. C. C. 43, C. A., and (1912) 5 B. W. C. C. 195, H. L.

A workman who, on being instructed by a subforeman to come down off a roof, where he was working, for lunch, descended by means of a loose rope extending over the edge of the roof, the end of which he directed a fellow workman to hold for him, instead of using a ladder securely fastened to the side of the building, received a "personal injury arising out of his employment" (*Clem v. Chalmers Motor Co.*, 178 Mich. 340, 144 N. W. 848, L. R. A. 1916A, 352); but where one employed in the construction of a railroad was ordered by the fire warden to assist in extinguishing a forest fire, as authorized by statute, an injury received while he was so working did not arise out of his employment. *Kennelly v. Stearns Salt & Lumber Co.* (Mich. 1916) 157 N. W. 378.

of employment should not be disturbed, unless it is clear that the ordinary servant, in the same situation, would have no reasonable justification for believing that what he undertook to do when injured was within the scope of his implied duties." ²³

It is a controlling factor in determining whether an injury arose out of the employment whether the employé was within the area of his duty. For example, the accident arose out of the employment where a delivery boy was injured from being thrown from a bicycle after he had called at his home and taken lunch and while he was on his way to make a delivery,²⁴ where the driver of an express motor truck, within the scope of his employment, was crossing the street on foot to deliver a package, and was struck and killed by an automobile while so doing,²⁵ where a civil engineer sent to survey a quarry and bring his notes back to the home office for inspection and consultation was drowned on the wrecking of the steamship while he was returning,²⁶ where a shipmaster who went ashore to pay a labourer's wages at a public house, at which he remained two hours, on his return, quite sober, fell from the dock and was drowned,²⁷ but not where the employé fell and was injured during the noon hour, while racing with other employés,²⁸ where a workman after his day's work cutting ice put up his tools, and started home by a short cut across the pond instead of by the public highway, and while crossing the pond slipped and fell,²⁹ where a workman was injured while stepping off a car on his way to work, about two hundred feet from where his work was, and be-

²³ *State v. District Court*, 129 Minn. 176, 151 N. W. 912.

²⁴ (*Wk. Comp. Act*, pt. 2, § 1) *Beaudry v. Watkins* (Mich.) 158 N. W. 16.

²⁵ *Miller v. Taylor* (Sup.) 159 N. Y. Supp. 999.

²⁶ *Hutchinson v. Pacific Engineering & Construction Co.*, 2 Cal. I. A. C. Dec. 600.

²⁷ *Jones v. Ship Alice and Eliza* (Owners of), (1910) 3 B. W. C. C. 495, C. A.

²⁸ *Thompson v. Employers' Liability Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 145 (decision of Com. of Arb.).

²⁹ *Atkins v. Scranton*, 1 Conn. Comp. Dec. 34.

fore time for him to begin work,³⁰ where a typesetter working overtime late at night went out for lunch by an unusual way, over a freight elevator through a rear door used only to admit freight, and on returning stepped into an open space between the elevator and the street,³¹ where a buyer and department manager, while in a bathroom of a hotel during a business trip, became faint and unconscious and fell to the floor, striking her face and sustaining an injury thereby,³² nor where a workman visited a building which his employer was constructing, for purposes of his own at a time when he was not engaged in doing any of his employer's work, and was injured.³³ A fireman employed upon continuous duty day and night is not acting in the course of his employment while at home or going to and from meals at his home unless a fire alarm should come in and he should start to a fire. In the absence of such fire alarm, he is acting in the course of his employment only when he is about the fire engine house or at a fire or otherwise discharging duties connected with his employment.³⁴

It does not prevent an injury from arising out of the employment that the workman had no express authority to do the particular act,³⁵ that he was not acting strictly in accordance with his in-

³⁰ *McWilliams v. Haskins*, 1 Conn. Comp. Dec. 324.

³¹ *Wheatley v. Journal Publishing Co.*, 1 Conn. Comp. Dec. 110.

³² *Jacobs v. Davis-Schonwasser Co.*, 2 Cal. I. A. C. Dec. 1013.

³³ *Lynn v. Employers' Liab. Assur. Corp. Ltd.*, 2 Mass. Wk. Comp. Cases, 507 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

³⁴ *Perry v. City of San Jose*, 1 Cal. I. A. C. Dec. 537. Where an employé is hired to be upon continuous service day and night as a fireman, it does not follow that every accident received in the course of the 24 hours arises out of the employment. If he were injured by stepping upon his rake while taking care of his lawn, it would not arise out of his employment as fireman. Where he borrows a horse to ride to his home for a meal, and is injured by the horse slipping and falling in coming into the yard of the engine house on his return from his meal, such accident does not arise out of his employment, and he is not entitled to compensation for his injury. *Id.*

³⁵ Where an employé was injured from attempting to form an unexploded dynamite shell into a key, believing the shell to have been exploded, and he

structions,³⁶ that he was working on a holiday,³⁷ or that he has formed an unexecuted intent to abandon his employer's business,³⁸ nor does it prevent an injury from being within the area of the employé's duties that at the time thereof he is attending on his personal necessities,³⁹ but the rule is otherwise where he has un-

needed such a key to perform his duties, the injury was due to accident arising out of his employment, though he had no particular authority to make the key. *State ex rel. Duluth Brewing & Malting Co. v. District Court* (1915) 129 Minn. 176, 151 N. W. 912.

In *Loveland v. Parish of St. Thomas Church*, 1 Conn. Comp. Dec. 14, it was held that a church sexton, part of whose admitted duties was to preserve order on the church premises, was injured by stumbling over a wheelbarrow while going to stop a fight between two boys on the grounds, he sustained an injury arising out of his employment.

If it is the duty and the custom of an employé to do whatever is found necessary to be done in a shop, and he is injured in the performance of his work, he is entitled to compensation, as the accident arose out of his employment. *Whaley v. Hudson*, Bulletin No. 1, Ill., p. 186.

Where an employé, hired to assist the weighmaster, held horses which had been weighed while the owner went to settle with the weighmaster, he having performed such services before under the direction of the weighmaster, such service was incidental to his employment. *Manis v. City of Milwaukee*, Bul. Wis. Indus. Com. 1912-13, p. 29.

³⁶ That a school principal, killed from being struck by a basket ball on the school ground, while he was supervising some test exercises during school hours, should, under the rules of the school board, have held the tests at recess, did not preclude him from being engaged in a service incidental to and growing out of his employment. *Milwaukee v. Indus. Com.*, 160 Wis. 238, 151 N. W. 247.

³⁷ In *Reese v. Yale & Towne Mfg. Co.*, 1 Conn. Comp. Dec. 154, it was held that, where an iron bar fell on the workman's foot while he was taking an inventory for his employer on a holiday, he sustained an accident arising out of his employment.

³⁸ Where a workman was killed by the running away of a horse which he was taking to water in the performance of his duties, he was injured while acting within the scope of his employment, though he had formed an unexecuted intention to abandon his master's business after performing this duty and to take the horse for his own convenience on a journey of his own. *Pigeon v. Employers' Liab. Assur. Corp.*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737.

³⁹ Where a railroad trackman was run down by a train while standing on the track getting a drink, with his back to the approaching train, the acci-

necessarily left his work for his own purposes, or purposes not connected with the employment.⁴⁰ An injury occurring during his absence from this area cannot be said to be due to the employ-

ment arose out of his employment. *Solle v. N. Y., N. H. & H. R. R.*, 4 N. Y. St. Dep. Rep. 393. Also, where a laborer on a railroad culvert was fatally injured while crossing the track to go to dinner in a bunk car at the call of his foreman, the accident arose out of his employment. *Carini v. Nickel Plate R. R. Co.*, 4 N. Y. St. Dep. Rep. 423.

The injury arose out of the employment where a housekeeper of a hotel, in which she resided, whose duty it was to be available at all hours, but who commenced active work at 8 a. m., was injured at 7 a. m. while going for hot water for toilet purposes (*Leonard v. Fremont Hotel*, 2 Cal. I. A. C. Dec. 998), and where an engineer, employed to install machinery on a dredger, was required by his employers for their benefit to live on board, and while preparing his breakfast was injured by the explosion of a gas stove (*McLean v. Shields*, 2 Cal. I. A. C. Dec. 1046).

⁴⁰ The evidence showed that the employé, a clerk, received a fatal injury in the building in which the office of the subscriber was located. She left her place of employment at lunch time, fully clothed for the street, and while attempting to get off the elevator at the ninth floor received an injury which caused her death. She was on the way to the office of a friend on that floor for the purpose of making a personal delivery of a Christmas gift, this errand having no connection with her employment. It was held the injury did not arise out of the employment. *Ross v. Casualty Co. of America*, 2 Mass. Wk. Comp. Cases, 666 (decision of Com. of Arb.).

Where a farm laborer, after taking up his employment and having dinner, was injured by accident while driving to the station after his box, he having been allowed, according to custom, to take his employer's horse and cart for the purpose, the accident did not arise out of his employment. *Whitfield v. Lambert* (1915) 8 B. W. C. C. 91, C. A.

In *Cavagnero v. American Mills Co.*, 1 Conn. Comp. Dec. 163, it was held, where the breaking of the claimant's leg was due to moving toward a fellow employé in order to better hear some remarks on politics or religion, unconnected with the employment, while on the premises during his noonday lunch hour, that the injury did not arise out of the employment. In *Cohen v. Union News Co.*, 1 Conn. Comp. Dec. 62, it was held that where a newsboy running on certain trains, by reason of missing his regular train, had two hours to wait at a station, and while there went to the baggage room, wholly unconnected with his business, and was caught between a safety gate and the floor of an ascending elevator he was trying to board, the injury did not arise out of the employment.

ment,⁴¹ though the wages paid him cover the time when the injury occurred,⁴² subject to the qualification that, where the absence

⁴¹ Where a laundry driver is accustomed for his own convenience to work on his employer's account books at home nights, instead of working on them at his employer's place of business, where desk room is furnished, he cannot be said to be performing services growing out of and incidental to his employment while in the act of going home at night with the books. *Ogilvie v. Egan*, 1 Cal. I. A. C. Dec. 79.

Accidents not arising out of employment: Where a longshoreman finished his work for his employer at 7 o'clock on the night before his injury, which occurred while he was crossing railroad tracks the next morning after making an unsuccessful application for more work. *Ganley v. Employers' Liab. Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 159 (decision of Com. of Arb.). *England*. Where a postman was sent for a postal order to the Hatton Garden post office, and, failing to obtain one there, went on a half mile farther to the general post office, and there fell and injured himself. *Smith v. Morrison* (1912) 5 B. W. C. C. 162, C. A. Where a ship's captain, returning from a trip to a hotel ashore, hailed his ship from the quay and asked for a boat, and fell into the water and was drowned before the boat arrived, it not being established that he went ashore on ship's business. *Fletcher v. Owners of S. S. Duchess* (1910) 3 B. W. C. C. 239, C. A., and (1911) 4 B. W. C. C. 317, H. L. Where a ship's steward, after a trip ashore, was seen on the quay, but was not observed to have reached the gangway, and then a splash was heard, and the cry of "Man overboard!" and he was taken from the water dead. *Kitchenham v. Owners of S. S. Johannesburg* (1911) 4 B. W. C. C. 91, C. A., and 311, H. L. Where a ship's fireman, returning after a week-end absence from his ship with permission, was injured by slipping on the steps of the quay. *Kelly v. Owners of Foam Queen* (1910) 3 B. W. C. C. 113, C. A. Where a seaman, on his way back from leave ashore, fell off the quay at a place where a row of barrels greatly narrowed the passageway, and was drowned. *Craig v. Owners of S. S. Calabria* (1914) 7 B. W. C. C. 932, Ct. of Sess. Where the dead body of the engineer of a steam trawler in dry dock

⁴² The injury did not arise out of the employment where an employé did two hours' overtime work, then was ordered to go home to supper and return for more overtime work, the time in the interval to be included in that for which he was paid at overtime rates, and while returning after supper to the employer's factory was accidentally killed by a train on railroad tracks outside the premises (*Leite v. Paraffine Paint Co.*, 2 Cal. I. A. C. Dec. 1022), or where a lumber company's employé was injured while assisting a fire warden as required by statute, though he was paid his regular wages by his employer, who was reimbursed by the state and county (*Kennelly v. Stearns Salt & Lumber Co.* [Mich.] 157 N. W. 378).

is legitimate, as where it is with leave, the area of duty includes the reasonable or permitted means of going and returning.⁴³ But

was found in the dry dock some time after he had gone ashore for dinner. *Gilbert v. Owners of the Nizam* (1910) 3 B. W. C. C. 455, C. A. Where a ship's fireman, who bought his own provisions, but was under no contract obligation to do so, was drowned when he fell from the pier on his return from a ship ashore after some provisions. *Parker v. Owners of S. S. Black Rock* (1914) 7 B. W. C. C. 152, C. A. Where a ship's steward, going ashore to buy stores for the ship, gained permission to visit his home, and went there for breakfast before going to the stores, and was injured on his way from his home to the stores. *Lee v. Owners of S. S. St. George* (1914) 7 B. W. C. C. 85, C. A. Where a boiler scaler, after a trip ashore for dinner, stopped on his return to the quay to watch repair work being done to the ship, and was killed by a rope which snapped and struck him while he was standing in an area roped off and marked dangerous. *Murray v. Allan Bros. & Co., Ltd.* (1913) 6 B. W. C. C. 215, C. A. Where a ship's steward, returning late at night, found that his ship had been moved during his absence on leave for purposes of his own, and was struck by a train and injured while making his way along the dock side toward the new berth. *Biggart v. Owners of S. S. Minnesota* (1912) 5 B. W. C. C. 69, C. A. Where a donkeyman, returning to ship, was fatally injured by slipping from the gangway, but there was no evidence to show his reason for going ashore, or whether or not he had leave. *McDonald v. Owners of S. S. Banana* (1909) 1 B. W. C. C. 185, C. A. Where a sailor, who went ashore for his own purposes, returned after dark, and tripped on the gangway, fell off into the water, and was drowned. *Ilyndman v. Craig & Co.* (1911) 4 B. W. C. C. 438, C. A. Where a discharged sailor, at the end of his voyage, got from his ship onto a "dolphin," a floating stage forming a part of the dock premises, and fell into the water and was drowned while passing from the dolphin to the quay. *Cook v. Owners of S. S. Montreal* (1913) 6 B. W. C. C. 220, C. A. Where a ship's engineer, returning from a trip ashore with leave, found his boat missing, and tried to get out to his ship in a 27-foot lifeboat without any oars, paddling with the rudder, and was blown out to sea and drowned. *Halvorsen v. Salvesen* (1912) 5 B. W. C. C. 519, Ct. of Sess. Where a workman on a ship, after going ashore contrary to orders, was further disobedient on his return in trying to jump aboard, instead of using the gangway, and, falling into the water, was drowned. *Martin v. Fullerton & Co.* (1909) 1 B. W. C. C. 168, Ct. of Sess.

⁴³ *Kearon v. Kearon* (1911) 4 B. W. C. C. 435, C. A.

Accidents arising out of employment: Where an employé was hired as a woodchopper upon timber lands belonging to the defendant, and was entitled to board and room at a camp provided by the employer, and received an in-

it is essential that the risk be due to the means of access, and not to something wholly unconnected with the employment, such as the drunkenness of the workman.⁴⁴ Ordinarily an employé injured

jury due to a fall while returning from the place where he had been at work to his employer's cookhouse for supper, and it appeared that the day's work was agreed to commence when the choppers left the cookhouse in the morning, and to close when they reached the cookhouse in the evening. *Saari v. Pacific Lumber Co.*, 2 Cal. I. A. C. Dec. 182. Where a woodsman, who was supplied with his board and lodging at a lumber camp situated a mile from the place of his labor, and had to go to and from his work one evening, slipped and fell into the river and was drowned. *Mendocino Lumber Co. v. Southwestern Surety Insur. Co.*, 2 Cal. I. A. C. Dec. 755. *England*. Where a seaman, on his return after a legitimate trip ashore for purposes of his own, fell from the ladder, which was the only means of access to his ship, and was drowned. *Moore v. Manchester Liners, Ltd.* (1910) 3 B. W. C. C. 527, H. L., and 2 B. W. C. C. 87, C. A. Where a seaman, after being ashore for his own purposes, was returning to his ship by means of a gangway, which connected it with another vessel lying between it and the quay, and was thrown into the water by the slipping of the gangway, and drowned. *Leach v. Oakley, Street & Co.* (1911) 4 B. W. C. C. 91, C. A. Where a ship's steward, after a trip ashore with leave, returned to the ship by the cargo skid, which the crew often used, contrary to orders, instead of by the gangway, and in stepping from the skid to the dock fell into the hold, fatally injuring himself. *Robertson v. Allan Brothers & Co., Ltd.* (1909) 1 B. W. C. C. 172, C. A. Where a boatman met with an accident in jumping from a ketch he had been piloting into his own small boat. *Barbeary v. Chugg* (1915) 8 B. W. C. C. 37, C. A. Where a seaman, going home from his ship, crossed a plank leading to a ladder fixed against the side of the quay, and then, while mounting the ladder, fell and was injured. *Webber v. Wansbrough Paper Co., Ltd.* (1914) 7 B. W. C. C. 795, H. L., and (1913) 6 B. W. C. C. 583, C. A. Where a seaman, returning to his ship, after crossing the gangway, was standing with one foot on the rail of the ship and the other on a ladder from the rail to the deck, and lost his balance, fell into the water, and was drowned. *Canavan v. Owners of S. S. Universal* (1910) 3 B. W. C. C. 355, C. A. Where a seaman, who had been ashore for his own purposes, on his return found no gangway, and the ladder commonly used was missing, so, after hailing and getting no answer, he jumped aboard, and was injured. *Kearon v. Kearon* (1911) 4 B. W. C. C. 435, C. A.

⁴⁴ The accident did not arise out of the employment where a sailor became intoxicated while ashore with leave, and in returning, while mounting the gangway, was fatally injured by a fall (*Nash v. Owners of S. S. Rangitira* [1914] 7 B. W. C. C. 590, C. A.); or where a sailor returned to his

on the premises of the employer in going to or from work is entitled to compensation for such injuries.⁴⁵ However, where he is injured while entering the premises of his employer to go to work, but before he has dismounted from a private conveyance carrying him to his work, he cannot be said to have entered upon the performance of his duties or any task incidental thereto at the time of his injury, even though the accident occurs upon the employer's premises.⁴⁶ Where, however, the employé lives upon the prem-

ship in a state of hopeless intoxication, was thrown from the quay to the deck as the ship was moving away, and, after getting up, staggered around and then fell over the side of the ship and was drowned (*Frith v. Owners of S. S. Louisianian* [1912] 5 B. W. C. C. 410, C. A.)

⁴⁵ Where a miner, at the end of his day's work, changed his clothes, and, still carrying a miner's lamp, started towards the bottom of the shaft, with the intention of ascending to the top of the mine, and about 200 feet from the room where he had been at work and about one-half mile from the bottom of the shaft one of his eyes was put out by coming in contact with a piece of slate hanging from the roof, it was held his duties had not ended until he left the mine, and that the accident arose out of his employment. *Sedlock v. Carr Coal Mining & Mfg. Co.*, 98 Kan. 680, 159 Pac. 9.

A roadmaster of a railroad requested an interpreter to get ten men, such as he had secured before, and bring them to a certain siding for the purpose of going to work, at the same time giving him a pass for himself and ten men, from the place where they were to be secured to the place of work. After arriving at the place of work, one of the men, while removing his baggage, was struck by a train and killed. The evidence was held by the Board to be sufficient to justify the conclusion that the deceased was in the employ of the railroad company, and that the injury arose out of the employment. *Patterson v. Bloomington, D. & C. R. Co.*, Bulletin No. 1, Ill., p. 101.

⁴⁶ *Perry v. City of San Jose*, 1 Cal. I. A. C. Dec. 537. The general rule is that employés are under the protection of the Compensation Act when they reach their place of employment on the premises of the employer, and that they remain under the protection of the Act only until they leave the premises of the employer to return to their homes. It is also a general rule that accidents to employés while going to and returning from their work are not compensable. *Saari v. Pacific Lumber Co.*, 2 Cal. I. A. C. Dec. 182.

Where a laborer on a highway was brought to his place of employment by a passing automobile as a friendly act, and while in the act of alighting, and before he had presented himself ready for work, lost his balance and fell, the injury did not arise out of his employment. *Beatty v. County of Los Angeles*, 2 Cal. I. A. C. Dec. 1058.

ises of the employer, and is not injured upon a public highway while going to and from work, the risk of accident while so going and coming is a risk of the employment.⁴⁷ Where the injury has arisen through the workmen using special modes of access provided by their employers to enable them to go to or come from the actual place of employment, the courts have uniformly held that it arose out of the employment.⁴⁸ But where an employé, in returning to his ship, does not use the safe means of access provided by his employer, but of his own volition uses a means of access that is both unreasonable and unsafe, he does so at his own risk. Where, however, because of drowsiness or absent-mindedness, and not intentionally, he misses the gangway provided by the employer, and by mistake climbs up a ladder left leaning against the ship by painters, which ladder does not reach to the rail or any other opening in the ship, and falls, his injuries arise out of the employment.⁴⁹

⁴⁷ *Saari v. Pacific Lumber Co.*, *supra*.

⁴⁸ *Moore v. Manchester Liners, Ltd.* (1910) 3 B. W. C. C. 527, H. L., and 2 B. W. C. C. 87, C. A. The employer is liable under the Act for the condition of the ways provided for the ingress and egress of employés. *Wheeler v. Con-toocook Mills Corp.* (1915) 77 N. H. 551, 94 Atl. 265; *Boody v. Company*, 77 N. H. 208, 90 Atl. 859, L. R. A. 1916A, 10, Ann. Cas. 1914D, 1280.

Where an employé, who had gained permission to ride in his employer's elevator, was thrown violently against the opposite wall of a hall, in getting off, which accident caused a strangulated hernia, he sustained an injury arising out of his employment. *Herrick v. Employers' Liab. Assur. Co., Ltd.*, 2 Mass. Wk. Comp. Cases, 122 (Dec. of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct. 217 Mass. 432, 104 N. E. 432). Where a certain stairway was the only means of exit to the street from the third story, where an employé worked, and she was injured while on her way down the stairs on her way to luncheon, the injury arose out of her employment. *Sundine v. London Guarantee & Accident Co., Ltd.*, 2 Mass. Wk. Comp. Cases, 833 (decision of Indus. Acc. Bd., affirmed by Sup. Jud. Ct., 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318).

In *Barnard v. H. Garber & Co.*, 1 Conn. Comp. Dec. 572, where an aged workman fell on the steps of his employer's establishment when entering to begin work in the morning, on account of their slippery condition, it was held the injury arose out of the employment.

⁴⁹ *Boucher v. Olson & Mahony Steamship Co.*, 1 Cal. I. A. C. Dec. 248.

§ 123. Incurring of additional risks

While a workman has no right by his own conduct for his own purposes to add a risk which is not incidental to the employment,⁵⁰ and, where he goes beyond his rights in this respect, an accident resulting in consequence thereof will be held not to have arisen out of his employment,⁵¹ particularly where he acts in violation of ex-

⁵⁰ *Revie v. Cumming* (1912) 5 B. W. C. C. 483, Ct. of Sess.

⁵¹ Where employes were obliged to enter their place of employment over a railroad's private right of way or one along a public street, but the latter was the safer, although causing employes a longer walk, and therefore not customarily used by them, the use by an employe of the more dangerous crossing is an added and unnecessary risk not incidental to the employment, and an accident resulting therefrom does not arise out of the employment. *Leite v. Paraffine Paint Co.*, 2 Cal. I. A. C. Dec. 1022.

Accidents not arising out of employment: Where a laborer, whose duties were to sack coal and assist the driver of the coal wagon in the unloading on the delivery of orders, voluntarily and without the knowledge of the employer and during the absence of the regular driver, took upon himself the delivery of an order. *Siri v. Arata & Co.*, 2 Cal. I. A. C. Dec. 645. *Connecticut.* Where a workman's fall was caused either by the assault of his foreman or by his attempting to escape a real or supposed assault, which was due solely to either the workman's serious and willful misconduct or his intoxication. *Cooper v. New Haven Rigging Co.*, 1 Conn. Comp. Dec. 157. Where the employe left the machine where he was working, and went to another room and tried to shape a piece of wood needed for repairing his own machine, which repair was not necessary, and was injured on the buzz saw while so engaged. *Duke v. E. Horton & Son*, 1 Conn. Comp. Dec. 673. Where the claimant was injured while giving a coemploye a ride on a truck used for carrying beams, during the noon hour and after she had finished her lunch, being allowed to eat lunch on the premises by her employer. *Socquet v. Connecticut Mills Co.*, 1 Conn. Comp. Dec. 653. Where a clerk was injured while polishing a ring on a buffing wheel, work which was of no benefit to his employer and was wholly unconnected with his duties. *Maynard v. New London Ship & Engine Co.*, 1 Conn. Comp. Dec. 47. *Wisconsin.* Where a conductor on a street car exchanged places with his motorman and undertook to run the car back at night, without there being any emergency which required him to do so, and died from injuries caused by the car jumping the track. *Neumann v. Milwaukee Electric Ry. & Light Co.*, Bul. Wis. Indus. Com. vol. I, p. 92. *England.* Where a dock laborer, seeking a ride to the dock gates on his way to dinner, tried to climb into a train, fell and was injured thereby. *Morrison v. Clyde*

Navigation Trustees (1910) 2 B. W. C. C. 99, Ct. of Sess. Where a brakeman employed to walk behind a lorry got up onto the lorry to talk with the driver, and, when getting down to apply the brakes, fell, and was injured. *Revie v. Cumming* (1912) 5 B. W. C. C. 483, Ct. of Sess. Where a builder's foreman, hired to inspect jobs, left his inspecting each evening in ample time to catch a train, which enabled him to report before 6 o'clock, and on one occasion arrived just as the train was moving away, and was fatally injured by a fall when he attempted to board it while in motion. *Jibb v. Chadwick & Co.* (1915) 8 B. W. C. C. 152, C. A. Where a farm laborer, after finishing his day's work, had to go to his employer's farm two miles away for his pay and instruction, and, accepting a lift from the driver of one of his employer's carts, was thrown out and injured. *Parker v. Pont* (1912) 5 B. W. C. C. 45, C. A. Where a workman was injured while crossing the metals at a railway station, instead of passing over the footbridge. *Pritchard v. Torkington* (1914) 7 B. W. C. C. 719, C. A. Where a canal overseer employed by a railroad company took a short cut from the station to his office, going down the railroad line, instead of around by the road, and was killed by a train. *McLaren v. Caledonian Ry. Co.* (1912) 5 B. W. C. C. 492, Ct. of Sess. Where a crane-man in charge of two cranes climbed upon a third, and was fatally injured in doing so, and there was no evidence to show his reason. *Millers v. North British Locomotive Co., Ltd.* (1910) 2 B. W. C. C. 80, Ct. of Sess. Where a workman was drowned while swimming across a river between two farms, instead of going across the bridge. *Guilfoyle v. Fennessy* (1913) 6 B. W. C. C. 453, C. A. Where a workman climbed onto a hot-water tank in a building, although he was not allowed to do so, and while eating his supper there fell into the tank through an opening and was scalded to death. *Brice v. Lloyd, Ltd.* (1910) 2 B. W. C. C. 26, C. A. Where a workman, for his own ease, got into a hoist, which was well lighted, but so low that he had to stoop to get in, and was crushed to death by the machinery. *Rose v. Morrison & Mason, Ltd.* (1911) 4 B. W. C. C. 277, C. A. Where a workman, instead of going to a water-closet, went into an inclosed space under an engine, and while there scalded his foot in hot water escaping from the engine. *Thomson v. Flemington Coal Co., Ltd.* (1911) 4 B. W. C. C. 406, Ct. of Sess. Where steering a canal boat and driving the horse were distinct duties, and a boatman told a driver under his order to steer in place of another boatman, who had gone off, and the driver met with an accident and was drowned while steering. *Whelan v. Moore* (1910) 2 B. W. C. C. 114, C. A. Where a workman was hired to stack empty flour sacks by hand, and hoisted sacks to the top of a stack by means of a rope and a revolving shaft, and was injured. *Plumb v. Cobden Flour Mills Co., Ltd.* (1914) 7 B. W. C. C. 1, H. L., and (1913) 6 B. W. C. C. 245, C. A. Where a collier, traveling from work in a train provided by his employers, jumped off before the train reached the platform, and was seriously and permanently injured. *Price v. Tredegar Iron & Coal Co.* (1914) 7 B. W. C. C. 387, C. A. Where the driver of a motor van, find-

press rules, warnings, or instructions,⁵² yet, where a workman, while performing his duties, meets with an accident to which he is

ing that, because of a worn-out clutch, he could not shift gears without considerable noise and probable damage to the gears, after complaining several times, took up some of the floor boards, so that he could press the clutch farther down, and was seriously injured when his rug became caught in the machinery. *Partridge v. Whiteley, Ltd.* (1915) 8 B. W. C. C. 53, C. A.

⁵² Where some boys employed in a steel mill got into one of several wagons, standing on a steep incline, during an interval of rest, and, the wagon starting to move, one of them jumped out and tried to sprag the wheels, and was fatally injured in the attempt, the accident did not arise out of the employment, since the boys had been warned several times not to go near the wagons. *Powell v. Lanarkshire Steel Co.* (1904) 6 F. 1039, Ct. of Sess. (Act of 1897).

Accidents not arising out of employment: Where an employé, upon his return from a vacation, in attempting to go to the place of his employment, insisted upon riding upon a wagon of his employer, contrary to the rules of his employer and the positive orders of the driver of the wagon, and in so doing fell from the wagon and suffered an injury. *Gonzales v. Lee Moor Contracting Co.*, 2 Cal. I. A. C. Dec. 302. *England.* Where a collier was fatally injured while riding, contrary to rules, on the couplings between two trams, going from one part of the mine to another. *Powell v. Brynddu Colliery Co.* (1912) 5 B. W. C. C. 124, C. A. Where a workman, going home to dinner, tried to jump, contrary to the regulations, onto a tram carrying rubbish, and in so doing fell and was killed. *Pope v. Hill's Plymouth Co.* (1910) 3 B. W. C. C. 339, C. A., and (1912) 5 B. W. C. C. 175, H. L. Where a miner, after finishing his day's work, jumped onto a hutch, intending to ride to the bottom of the pit, although such action was against the regulations, and was injured on the way. *Kane v. Merry & Cuninghame, Ltd.* (1911) 4 B. W. C. C. 379, Ct. of Sess. Where a boy, sent to deliver a message, his tramway fare being paid, was permanently injured in trying to board a tram car which was running at a speed of five miles an hour, although he knew of a notice forbidding such action. *Wemyss Coal Co., Ltd., v. Symon* (1913) 6 B. W. C. C. 298, Ct. of Sess. Where a flagman on a traction engine, supposed to be either riding in the van behind the engine or walking in front of it, mounted to the drawbar, although he had been warned not to, and was injured by slipping off. *McKeown v. McMurray* (1911) 45 Ir. L. T. 190, C. A. Where a fishmonger's boy, delivering fish at the kitchen of an infirmary on the third floor, in spite of former caution went up in a hoist instead of by the stairs, and was injured. *McDaid v. Steel* (1911) 4 B. W. C. C. 412, Ct. of Sess. Where a collier was killed in an untimbered, very dangerous "goaf," into which the rules forbade him to go, and where he had gone to ease himself. *Cook v. Manvers Main Col-*

more exposed than persons not so engaged, the accident arises out of his employment, though he is acting negligently or contrary to rules.⁵³ If an employer is without knowledge of a practice among his employes which adds an exceptional risk to the employment, it would be plainly unreasonable to hold that he was bound to anticipate an accident happening from such unknown risk. But where

lieries, Ltd. (1914) 7 B. W. C. C. 696, C. A. Where a girl, working on a steam threshing machine at passing sheaves to the millman, tried in his temporary absence, although she had been warned not to leave her place, to step across the machinery to where she could talk to a fellow servant, and was injured. *Callaghan v. Maxwell* (1900) 2 F. 420, Ct. of Sess. (Act of 1897). Where a second mate, who had become intoxicated, was ordered by his captain to go to his room, but instead went aft to talk to the chief engineer on a personal matter, and on the way fell down a hatchway and was killed. *Horsfall v. Owners of S. S. Jura* (1913) 6 B. W. C. C. 213, C. A. Where a youth in a mine sought to reach his work a mile away by riding in a tub on an endless rope, which, although forbidden, was a common method, and was fatally injured. *Barnes v. Nunnery Colliery Co., Ltd.* (1911) 4 B. W. C. C. 43, C. A., and (1912) 5 B. W. C. C. 195, H. L. Where a boy, employed on a private railway, whose duties were to walk in front of moving wagons which were being pushed by an engine and keep watch during shunting operations, was riding on the buffer of the first wagon, contrary to the rules, and slipped, and was injured. *Herbert v. Fox & Co., Ltd.* (1915) 8 B. W. C. C. 94, C. A.

⁵³ *William v. Llandudno Coaching & Carriage Co., Ltd.* (1915) 8 B. W. C. C. 143, C. A. See next preceding section.

Where a lad working at a machine was forbidden to sit down, because it was dangerous to do so, and he nevertheless did sit down, and was seriously and permanently injured by so doing, the accident arose out of the employment, because he was doing the work he was engaged to do. *Chilton v. Blair & Co., Ltd.* (1914) 7 B. W. C. C. 607, C. A.

Deceased, who was working about a barn of respondent, and occasionally drove a wagon, on the occasion on which he met his death took a different route, and drove through a subway under a right of way of a railroad, which was not a regularly traveled wagonway, but had all the appearances of a wagonway, and in attempting to drive under the subway his head was caught between the top of the tank and the lower beams of the bridge, from which he received injuries causing his death. The Board held that deceased was working in the line of his employment, that he drove through the subway in an apparent honest effort to subserve the interest of the employer, and that the accident arose in the course of the employment. *Hamang's Estate v. Paragon Refining Co.*, Bulletin No. 1, Ill., p. 23.

he knows of such practice and does not forbid it, and an accident happens, the accident will be deemed to have arisen out of the employment.⁵⁴

Where a workman employed to operate an engine and dynamo in the basement of a building goes to an upper floor, where he volunteers as a special favor to other workmen to take them in the elevator to a floor above, and is killed in so doing, his death does not result from injuries arising out of his employment.⁵⁵ But where

⁵⁴ *Terlecki v. Strauss*, 85 N. J. Law, 454, 89 Atl. 1023, affirmed by Court of Errors and Appeals, 86 N. J. Law, 708, 92 Atl. 1087; *Hulley v. Moosbrugger*, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203; *Schmoll v. Weisbrod & Hess Brewing Co.* (N. J. Sup.) 97 Atl. 723.

⁵⁵ *Spooner v. Detroit Saturday Night Co.*, 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A, 17. Distinguishing *Miner v. Franklin County Telephone Co.*, 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195, holding that "the voluntary offer of a willing servant to make himself useful in a matter not covered by any express command, when the proffered service is accepted by his superior, although not by an approval expressed in words, cannot be said, as a matter of law, to put the servant outside the limits of his employment." In that case the plaintiff was an employé of the defendant telephone company. On the day of the accident the defendant's foreman said to the linemen, of which the plaintiff was one, that they would go down and splice the cable at a certain point, and all went together to the place. On arriving there the foreman told the plaintiff and another lineman to go to a certain place and get a ladder. They were unable to get it, and the plaintiff so reported to the foreman on their return. The foreman was then on the cable seat, with his materials at hand, and was just commencing the work of splicing. After watching him awhile, the plaintiff said he guessed he would go up and help him, and received no reply. The plaintiff then ascended the pole, and stood on an upper cross-arm, and handed the sleeves to the foreman as he needed them; the foreman taking them from him and using them as he proceeded with the splicing. After working in this manner for about 20 minutes, the foreman placed the bag containing the sleeves on the other side of him, which put them beyond the plaintiff's reach; and, after looking on a while, the plaintiff said he would go down, and proceeded to do so, receiving therein the injury complained of. These were the circumstances tending to show that the plaintiff was in the performance of and carrying on the very work for which he was employed, to wit, he was assisting his foreman, who undoubtedly represented the master. In the instant case *Spooner* was rendering no service which was either accepted by or known to his superior, but

an employé of a contracting company was fatally injured while attempting to rescue from a cave-in a fellow laborer working only a few feet away on the same general undertaking, although for a different employer, the accident arose out of his employment.⁵⁶

was engaged in a voluntary, friendly act, entirely outside the scope of his employment upon the night in question. Distinguishing also the case of *McQuibban v. Menzies*, 37 Scottish Law R. 526. In that case a workman was engaged as a laborer in a steam joinery, his duty being to carry wood from the machine men to the joiners and to clean and sweep up the floor of the machine room. A belt in connection with one of the machines became loose, and he went, without being asked to do so, to assist the machine man in replacing the belt upon the shaft. At the request of the machine man the workman ascended a ladder to try and replace the belt, and, his arm being caught in the belt, he was drawn up into the shaft and received fatal injuries. It was admitted that, had a foreman been present, he might have ordered the workman to do this act, but no other person had authority to order him to do so. It was held that the accident was one arising out of and in the course of the employment in the sense of the Workmen's Compensation Act. The court said: "The question of law which we have to decide is whether the deceased workman was injured by an accident arising out of and in the course of his employment, and, although that would appear primarily to be a question of fact, there is no doubt that in cases of this kind questions of fact and law sometimes run into one another. The words 'arising out of and in the course of the employment' appear to me to be sufficient to include something which occurs while the workman is in his master's employment and on his master's work, although he is doing something in the interest of his master beyond the scope of what he was employed to do. The Act does not say, 'when doing the work which he was employed to perform,' but it is a fair inference that, if it had been intended to limit the right to compensation to such accidents, different language would have been used from that which occurs in the Act. It must be assumed, therefore, that the Legislature used language of wider scope to include cases where a workman intervenes to do something useful and helpful to his master, although outside the special duties which he is employed to perform." After citing cases, the court concluded: "The action of the workman in this case appears to me to have been a natural and helpful intervention in the conduct of his master's business, and accordingly I am of the opinion that the question should be answered in the affirmative."

⁵⁶ *Water v. William J. Taylor Co.*, 218 N. Y. 248, 112 N. E. 727, affirming 170 App. Div. 942, 154 N. Y. Supp. 1149.

§ 124. — Intoxication

Injuries due alone to drunkenness of the injured employé are not compensable,⁵⁷ but slight intoxication will not necessarily prevent an injury from arising out of the employment.⁵⁸ In the language of an English jurist: "A man may be engaged in the performance of his work and an accident may occur incidental to his work, and therefore out of his employment, even although he is in a state of intoxication so great as to be, in the opinion of ordinary people, unfit for the performance of his work. If an accident befalls him under these conditions, it appears to me that, owing to his intoxicated condition, it is rightly called an accident due to serious and willful misconduct, but it is none the less an accident arising 'out of' his employment, because it is incidental to it."⁵⁹

§ 125. Susceptibility to risk

Susceptibility to risk does not prevent recovery for an injury or death proximately caused by an injury arising out of the em-

⁵⁷ Where the workman had practically left his employment to go on a spree, and was thereafter injured while in an intoxicated condition, the injury did not arise out of his employment. *Minnaugh v. Brooklyn Union Gas Co.*, *The Bulletin*, N. Y. vol. 1, No. 8, p. 10.

Where the mate of a steamship, so drunk that he was ordered to leave the bridge, died of injuries sustained from falling down the ladder, the accident did not arise out of his employment. *Murphy & Sandwith v. Cooney* (1914) 2 I. R. 76, C. A. Where a commercial traveler was seen drunk on a railway platform, and later was found in an injured condition on the rails, the accident did not arise out of the employment. *McCrae, Ltd., v. Renfrew* (1914) 7 B. W. C. C. 898, Ct. of Sess.

⁵⁸ Where a stableman, who was under the influence of liquor, was fatally injured while he was ascending a ladder fastened to the wall, for the purpose of chopping feed in the loft, the accident arose out of the employment. *William v. Llandudno Coaching & Carriage Co., Ltd.* (1915) 8 B. W. C. C. 143, C. A.

⁵⁹ Lord President, in *Frazer v. Riddell & Co.* (1914) 7 B. W. C. C. 841, Ct. of Sess. Where the driver of a traction engine fell from his engine and was killed, the accident arose out of his employment, even though he was drunk at the time. *Id.*

ployment.⁶⁰ Every workman brings with him to his employment certain infirmities. They may be disabilities of age, or disabilities of infirmity not connected with age. That a workman put in a

⁶⁰ (Pub. Laws 1911-12, c. 831, art. 1, § 1) *Carroll v. What Cheer Stables Co.* (R. I.) 96 Atl. 208; *Smith v. McPhee Stevedoring Co.*, 1 Cal. I. A. C. Dec. 197; *Rose v. City of Los Angeles*, 2 Cal. I. A. C. Dec. 574; *Crowley v. City of Lowell*, 223 Mass. 288, 111 N. E. 786.

In *McGarva v. Hills*, 1 Conn. Comp. Dec. 533 (affirmed by superior court on appeal), it was held that predisposition to heat exhaustion is not a bar to recovery of compensation for death due to sunstroke; Commissioner Chandler saying: "To apply in the Connecticut jurisdiction the rule that none but physically perfect men may receive compensation would amount to a practical repeal of the Act by court construction. Especially would it exclude all sunstroke and heat exhaustion cases, because it is probably an established medical fact that no one who is not in some way physically predisposed to the disorder ever suffers from it."

Where a man working on the edge of an open hold of a ship had an epileptic fit and fell into the hold, the accident arose out of the employment. *Wicks v. Dowell & Co., Ltd.* (1905) 7 W. C. C. 14, C. A. This case was followed in the case of *Driscoll v. Cushman's Express Co.*, Mass. W. C. C. (July 1, 1912—June 20, 1913) pp. 125, 130, where the driver of an express wagon, employed by the defendant, while driving his wagon, suffered a fainting fit, or an "epileptiform attack," falling from his wagon and fracturing his skull, dying from the effect of the fracture. It was held by the Industrial Accident Board in review, and in confirmation of the decision of the Committee of Arbitration, that the employé was exposed to a substantial and increased risk owing to his occupation, that the injury arose out of and in the course of his employment, and that the dependent mother was entitled to compensation. In *Fennah v. Midland, etc., Ry.*, 4 B. W. C. C. 440, where an engine driver, at work on his engine while stopped at a station, tightening up a nut, fell to the permanent way and died from the effects of the fall, and where it appeared that he had previously had fainting fits, it was held that recovery could be had—that it was an accident arising out of his employment. Compensation was allowed in *Ismay v. Williamson*, 1 B. W. C. C. 232 (House of Lords), where the accident was a heat stroke from a furnace which happened to a hand employed in the engine room, and who was shown to have been in poor physical condition, not fit to stand the heat; in *Clover, Clayton & Co. v. Hughes*, 3 B. W. C. C. 275 (House of Lords), a case of death of a workman who had a very serious aneurism of the aorta, which ruptured while he was engaged in his ordinary occupation; in *McInness v. Dunsmuir & Jackson*, 1 B. W. C. C. 226 (Court of Session, Scotland), where a workman having hardening of the arteries, by overexertion brought on cerebral hemorrhage, which

dangerous position is more liable to accident by reason of the disability which he brings with him, and an old man is much more likely in a dangerous position to meet with an accident than is a young man, will not relieve the employer from liability. The accident arises out of the employment none the less because the remote cause is an infirmity existing when the employment was undertaken.⁶¹ Thus, where a hack driver is injured from being thrown

was more likely to occur in his case on account of the hardening of the arteries; in *S. S. Swansea Vale v. Rice*, 4 B. W. C. C. 298, a case of temporary illness, contributing to the accident of falling overboard from a vessel; in *Groves v. Burroughes & Watts, Ltd.* (1911) 4 B. W. C. C. 185, C. A., where a workman, after an operation, resumed his work at the lever of a machine before his wound was completely healed, and, being suddenly missed, was found several yards away speaking to a foreman, with the blood pouring from his wound, which had been reopened; in *Brown v. Kemp* (1913) 6 B. W. C. C. 725, C. A., where an old rupture came down while a brewer's assistant was lifting a cask, and the county court found the fact of the accident; in *Dotzauer v. Strand Palace Hotel, Ltd.* (1910) 3 B. W. C. C. 387, C. A., where a scullion who had an abnormally sensitive skin suffered inflammation of his hands from washing crockery in hot water and soda; and in *Maskery v. Lancashire Shipping Co.* (1914) Stone's W. C. A. Ins. Cas. 290 (Court of Appeal, England), a case of death from heat stroke suffered by a laborer in the engine room of a steamer in the Red Sea, deceased being physically unfit for the work, which involved exposure to extreme heat.

⁶¹ *Wicks v. Dowell & Co., Ltd.* (1905) 7 W. C. C. 14, C. A.

"When you are taking the incapacity which follows when a second cause has intervened, in my opinion it is the employers at the time of the intervention of that second cause who are liable for the whole incapacity; the liability is not less because the man has brought to his work something which makes an accident more serious than it otherwise would be." *Fletcher Moulton, L. J.*, in *Noden v. Galloways, Ltd.* (1912) 5 B. W. C. C. 7, C. A. "In my opinion, when once the case is shown that the man having the disability occasioned by the 1902 accident met with another accident in 1910, it is the second employer who is liable, and who alone is liable, and that it is not relevant to say that the 1902 accident was a contributing cause." *Cozens-Hardy*, in *Noden v. Galloways, Ltd.*, *supra*.

Where an employé was partially paralyzed and totally incapacitated for a year by reason of an injury due to strain, and died of pneumonia which he was unable to resist because of his weakened condition, the injury arose out of his employment. *Merritt v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 635 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.). The

from his seat while dizzy in consequence of a disease, the question whether the accident arose "out of" his employment depends on whether the proximate cause arose out of the employment, regardless of the fact that such proximate cause was originated or aided by the employé's disease as the remote cause.⁶² To this rule that the benefits of the Compensation Acts are not restricted to persons in normal condition, but cover subnormal persons as well, exception has been made where varicose ulcers had been so repeated and so virulent as to leave only scar tissue upon the shins of an injured workman, so that a slight abrasion of the skin, which in the normal person would have amounted to nothing, resulted in a protracted and stubborn ulcer.⁶³

evidence showed in this case that the employé received a personal injury while lifting a crate of bottles, and that this injury had materially accelerated and aggravated a nervous condition which existed at the time; also it was in evidence that the employé was doing work which was entirely beyond her physical ability to perform. It was held that the employé was entitled to compensation. *Pidgeon v. Md. Casualty Co.*, 2 Mass. Wk. Comp. Cases, 348 (decision of Com. of Arb.). Another employé fell and broke his leg while performing his usual work, and it became necessary to amputate it. The insurer refused to pay compensation on the ground that the leg was in such a weakened condition, due to a previous operation, that any slight jar would cause a fracture. The medical evidence showed that the fracture was due to a fall arising out of and in the course of the employment, and that the injured leg was "possibly weaker" than the other leg prior to the injury. It was held that the employé was entitled to compensation. *Kesler v. Mass. Employes' Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 168 (decision of Com. of Arb.).

Where the medical evidence showed that the applicant's falling of the womb was directly caused by straining and heavy lifting done in the course of her employment, no disease being present, but the injury having been made possible by laceration at the time of the birth of a child 30 years before, such injury was caused by accident arising out of the employment. *Loustalet v. Metropolitan Laundry Co.*, 1 Cal. I. A. C. Dec. 318.

⁶² *Carroll v. What Cheer Stables Co.* (R. I.) 96 Atl. 208. A hack driver was injured from being thrown from his seat while he was helpless from dizziness due to the disease; his fall was an accident arising out of his employment. (Wk. Comp. Act, Pub. Laws 1911-12, c. 831, art. 1, § 1) *Id.*

⁶³ *Keen v. Scott Co.*, 2 Cal. I. A. C. Dec. 533.

DIVISION IV.—PROOF

§ 126. Burden, requisites, and sufficiency of proof

In a proceeding under a Workmen's Compensation Act the burden of proving the facts necessary to establish a case is on the claimant, the same as in any proceeding at law.⁶⁴ He must show by competent testimony, direct or circumstantial, not only the fact of an accident or injury, but that it occurred in connection with the alleged employment, and both arose out of and in the course of the service at which the workman was employed.⁶⁵ The burden is

⁶⁴ *Corral v. William H. Hamlyn & Son* (R. I.) 94 Atl. 877.

⁶⁵ *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243; (Wk. Comp. Act, St. 1911, c. 751, amended by St. 1912, c. 571) *In re Von Ette*, 223 Mass. 56, 111 N. E. 697; *In re Scanlan*, Op. Sol. Dept. of L. 724.

The burden of furnishing evidence from which the inference can be legitimately drawn that the injury arose "out of and in the course of his employment" rests upon the claimant. *McCoy v. Michigan Screw Co.*, 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A, 323; *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 999; *Armour & Co. v. Industrial Board of Illinois*, 273 Ill. 590, 113 N. E. 138; *Lannigan v. Lannigan*, 222 Mass. 198, 110 N. E. 285; *In re Doherty*, 222 Mass. 98, 109 N. E. 887; *In re Savage*, 222 Mass. 205, 110 N. E. 283; *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *Reimers v. Proctor Pub. Co.*, 85 N. J. Law, 441, 89 Atl. 931; *Barnabus v. Bersham Colliery Co.* (1910) 102 L. T. R. 621, 3 B. 216, and on appeal (1910) 103 L. T. R. 513, 4 B. 119, 48 S. L. R. 727; *Cowell v. Mason*, 1 Cal. I. A. C. Dec. 614; *Spencer v. Dowd*, 1 Cal. I. A. C. Dec. 46.

In a case involving a fatal accident attended with uncertainty as to details, the court, opinion by Judge Steere, said: "I think one may deduce from the decisions: (1) That the burden is always on the applicant to prove that death resulted from an accident arising out of as well as in the course of the employment; (2) that such proof need not be direct, but may be circumstantial evidence, but there must be facts from which an inference can be drawn, as distinguished from mere conjecture, surmise, or probability; and (3) that an award by an arbiter cannot stand unless the facts found are such as to entitle him reasonably to infer his conclusion from them." *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243.

To entitle an injured employé or his dependents to compensation it is necessary to prove: (1) That the accident occurred in the course of the employment, that is, while the employé was performing some service for his

on the applicant to establish the fact of accident, if accident be essential under the Act,⁶⁶ that the injury complained of was proxi-

employer; and (2) that the accident arose out of the employment, that is, that the nature of the accident is in some way incidental to or connected with the nature of the employment. *Bush v. Ickleheimer Bros. Co.*, 1 Cal. I. A. C. Dec. 522. Where a traveling salesman crossing on a ferry from San Francisco to Oakland upon business becomes nauseated and dizzy, and after reaching Oakland fell because of such dizziness, the fall causing concussion of the brain and disability for a considerable period of time, and the evidence fails to show that the bay was rough or weather bad at the time of crossing, such evidence is insufficient to establish an accident arising out of the employment as the cause of the concussion of the brain. There must be evidence in such cases to connect the cause of the fall with a risk incidental to or arising out of the work being performed. *Van Winkle v. Johnson Co.*, 2 Cal. I. A. C. Dec. 188.

In the absence of evidence that it was part of an employé's duty to cross a track or be on such track, there could be no recovery for death of a workman who was killed by an engine on the main track, who had left his place of work at a car on a side track. *Lannigan v. Lannigan*, 222 Mass. 198, 110 N. E. 285.

Sufficiency of proof that injury arose out of and in course of employment. Evidence authorizing a finding that decedent, while at work for his employer as a journeyman carpenter on a building in the course of erection, was killed by the falling of a bar of metal from one of the upper stories, which was caused to fall by a workman of an independent contractor, who had work on the same building, authorized a finding that decedent's death arose "out of and in the course of his employment." (P. L. 1911, p. 136, § 2) *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458. *Massachusetts.* Evidence that an employé, working on a car on a spur track which was about four inches below the main line, left the car and went upon one of the main tracks of the railroad, where he was struck by an engine and killed, without any evidence showing that it was part of his employment to cross the main track, or why he was there, was not sufficient to support a recovery under the Act. In *re Savage* (1915) 222 Mass. 205, 110 N. E. 283. The evidence showed that the employé was overcome in the press room of the subscriber, and, starting home, collapsed on the street and was taken to the hospital. A physician who treated him on several occasions stated he could find no evidence of anything tubercular in the lung. The hospital records and the certificate of death gave tuberculosis as the cause of death. It was held that the employé did not receive a personal injury arising out of and in the course of his employment. *Leary v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 184

⁶⁶ See § 99, ante.

mately caused thereby,⁶⁷ and that the incapacity or death resulted from such injury.⁶⁸ This burden may be sustained by circumstan-

(decision of Com. of Arb.). *Michigan*. Evidence that a workman contracted blood poisoning from scratching his hand on a manifold on which he was working, and died, showed that his injury arose out of and in the course of his employment. *Fitzgerald v. Lozier Motor Co.* (1915) 187 Mich. 660, 154 N. W. 67. Evidence that a workman, after injuring his hand on a nail in some fuel with which he was firing an oven in defendant's bakery, died of septic pneumonia resulting from systemic sepsis, which developed from the wound, showed that his injury arose out of and in the course of his employment. *Reck v. Whittlesberger* (1914) 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771. *Wisconsin*. A decision of the commissioners that the miliary tuberculosis from which decedent died was partly caused by a gas explosion could not be disturbed, where it was reasonably sustained by the testimony of physicians qualified to speak on the subject and by other evidence. *Heileman Brewing Co. v. Schultz* (1915) 161 Wis. 46, 152 N. W. 446. Where it appeared merely that the workman's thumb became swollen while he was at work, and the physician called found it infected, and the infection developed until he was permanently deprived of the use of the hand, it was held that it had not been proven that the injury was sustained in the course of employment. *Christiansen v. St. Mary's Hospital*, Rep. Wis. Indus. Com. 1914-15, p. 20. *California*. Where the employé, while in the course of his employment after a rainstorm, driving floating brush away from a railway bridge, was last seen going along the bank downstream, and it appeared that there was no necessity nor apparent reason for his leaving the bridge, and no service to be rendered elsewhere, and that he was drowned by slipping off the bank a thousand yards from the bridge, marks on the bank so indicating, the evidence was held insufficient to show that he was performing service in the course of his employment at the time of drowning. *Peroni v. San Francisco, Napa & Calistoga Ry.*, 2 Cal. I. A. C. Dec. 818. Where an employé was employed to operate an automobile for hire by his employer, and was seen to depart in the automobile driving two passengers for hire, and some days later was found dead by the roadside, circumstances tending to show that he had been murdered by the passengers for some unknown reason, not that of robbery, such evidence was insufficient to establish that his murder was due to any risk arising out of his employment. There is no presumption of law to the effect that a chauffeur is, by reason of his occupation, subject to any special risk of being murdered, and, in the absence of direct evidence sustaining this, a death benefit cannot be allowed to his dependents. *Gibson v. Aves*, 2 Cal. I. A. C. Dec. 185. Evidence that a prescription pharmacist, by reason of the poor lighting of his

⁶⁷ See § 127, post.

⁶⁸ See §§ 127, 129, post.

tial evidence or inferences having a substantial basis in the evidence.⁶⁹ A preponderance of the evidence is sufficient. By a "pre-

working quarters and the fumes arising from the chemicals, suffered a constant irritation of his eyes, resulting in temporary disability, was insufficient to prove an accident arising out of and in the course of his employment. *Boehme v. Owl Drug Co.*, 2 Cal. I. A. C. Dec. 529. *England*. Where the lid of a barrel thrown from a window of a mill struck a workman working in the yard, but there was no evidence as to why or by whom the lid was thrown, it was not proved that the accident arose out of the employment. *Bateman v. Albion Combing Co., Ltd.* (1914) 7 B. W. C. C. 47. In a case where a miner was carrying powder in a canister, and it exploded, injuring him fatally, and the trial judge drew an inference that the man had uncovered the powder in preparing to charge a blasting hole to which he was going at the time, it was held that the burden of proof had not been discharged. *Pugh v. Dudley* (1914) 7 B. W. C. C. 528, C. A. In a case where a workman returning from work complained of a pain in his side, and was later found to have a fractured rib, from which he grew steadily worse, and finally died, and where the only evidence of an accident was a notice he had sent to his manager, and the payment of money compensation to his wife, it was held that there was proof that the accident arose out of and in the course of the employment. *Harley v. Walsall Wood Colliery Co., Ltd.* (1915) 8 B. W. C. C. 86, C. A. Evidence that a man after an operation went back to his work at the lever of a machine before his wound was completely healed, and when suddenly missed was found speaking to a foreman some yards away, with blood pouring from the reopened wound, showed that the accident arose out of the employment. *Groves v. Burroughes & Watts, Ltd.* (1911) 4 B. W. C. C. 185, C. A. Where a butcher's canvasser was in the habit of riding a bicycle on his rounds, and came back one day lame, covered with mud, and in pain, it was held there was evidence of an accident arising out of and in the course of his employ-

⁶⁹ *Fitzgerald v. Lozier Motor Co.*, 187 Mich. 660, 154 N. W. 67; *Frey v. Kerens-Donnewald Coal Co.*, 271 Ill. 121, 110 N. E. 824; *Poccardi v. Public Service Com.* (1915) 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299; *In re Von Ette*, 223 Mass. 56, 111 N. E. 697.

Where a boy, who was caught in a driving belt, said that he had not touched it, but had been caught up by the sleeve, and his employers declared that to be impossible, the trial judge, after visiting the spot, held that the boy had been caught up by the sleeve and then instinctively taken hold of the belt, and so been carried up, and it was held that the inference was supported by the evidence. *Durrant v. Smith & Co.* (1914) 7 B. W. C. C. 415, C. A. But where the physician in attendance refused to state that death was caused by the accident, there was no basis for an inference to that effect by the court. *Reimers v. Proctor Pub. Co.*, 85 N. J. Law, 441, 89 Atl. 931.

ponderance of the evidence" is meant such evidence as, when weighed with that opposed to it, has more convincing force, and

ment. *Haward v. Rowsell & Matthews* (1914) 7 B. W. C. C. 552, C. A. Evidence that the employment of a collier was such that scratches were often caused on his arms or legs, that he went to work perfectly sound in the morning, and later required help with his work (which was unusual), and limped and rubbed his knee, and was later found to have an abraded knee, eventually dying from septic poisoning, showed that the accident arose out of the employment. *Hayward v. Westleigh Colliery Co., Ltd.* (1915) 8 B. W. C. C. 278, H. L., and (1914) 7 B. W. C. C. 53, C. A. Where a mason's laborer sustained an abrasion on the thumb of the hand which held the chisel, and two weeks later an abscess appeared in the armpit, and the man died, and where circumstances were consistent with the entry of a microbe into his thumb, causing blood poisoning, on the day of the accident, it was held that there was sufficient evidence to support an inference that the accident arose out of the employment. *Fleet v. Johnson & Sons* (1913) 6 B. W. C. C. 60, C. A. Where a repairer began work at a colliery in the evening uninjured, and went home the next morning with one of his fingers crushed, finally dying of blood poisoning, there was evidence to support an inference that the accident arose out of the employment. *Mitchell v. Glamorgan Coal Co., Ltd.* (1908) 9 W. C. C. 16, C. A. Where a cook on board a ship fell overboard in the daytime during perfectly calm weather, and was drowned, there was no evidence of an accident arising out of his employment. *Bender v. Owners of S. S. Zent* (1910) 2 B. W. C. C. 22, C. A. Where a railway fireman went to work with a cut on his finger wrapped in a piece of rag, and coal dust and oil got into the cut while he was working, and blood poisoning set in, the inference of the trial court that the coal dust and oil were the cause of the blood poisoning was not supported by the evidence. *Chandler v. Great Western Ry. Co.* (1912) 5 B. W. C. C. 254, C. A. Where a weaver at work caused an abrasion of his eye by rubbing it after getting dust in it, and at some undetermined place and time a germ entered through the abrasion, and caused inflammation and total incapacity, the accident did not arise out of the employment. *Bellamy v. Humphries & Sons, Ltd.* (1913) 6 B. W. C. C. 53, C. A. Where a miner's wife found his feet swollen and wounded two days after a piece of rock fell on it, and the man died of tetanus, the microbe of which might have got in through the wound, the accident was inferred to have been caused by the wounds, and hence arose out of his employment. *Stapleton v. Dinnington Main Coal Co., Ltd.* (1912) 5 B. W. C. C. 602, C. A. Where a workman in good health, working in the hold of a ship, came up out of the hold in great pain, went home, where it was found he had marks on his ribs, and died of pneumonia, there was sufficient proof of an accident arising out of his employment. *Lovelady v. Berrie* (1910) 2 B. W. C. C. 62, C. A. Where a collier, who was obliged to work on his knees, died of blood poisoning

from which it results that the greater probability is in favor of the party on whom the burden rests.⁷⁰ While if death occurs immediately or soon after the accident, it is not essential that there shall have been any eyewitness to the accident,⁷¹ and in some jurisdictions the strict rule as to the burden of proof is somewhat re-

caused by an abscess on one of them, but there was no evidence to show what actually caused the abscess, it was held that it had not been proven that the accident arose out of the employment. *Howe v. Fernhill Collieries, Ltd.* (1912) 5 B. W. C. C. 629, C. A.

⁷⁰ *Cline v. Studebaker Corporation* (Mich.) 155 N. W. 519, L. R. A. 1916C, 1139.

⁷¹ In *re Von Ette*, 223 Mass. 56, 111 N. E. 697; *Marshall v. Owners of Steamship Wild Rose*, [1910] A. C. 486; *Fletcher v. Ship Duchess*, [1911] A. C. 671.

A railroad employé, found after a train had gone out, with his feet toward the track and an injury in his head, and who died a short time afterward from a broken neck, was injured by an accident presumably arising out of and in the course of his employment. *Musik v. Erie R. R. Co.*, 85 N. J. Law, 129, 89 Atl. 248. This case finds support in *Nicholas v. Dawson*, 15 T. L. R. 242; *McDonald v. Owner of S. S. Banana*, 24 T. L. R. 887; *Bender v. Owners of S. S. Zent* 100 L. T. 639; *Gilbert v. Owners of Nizam*, 79 L. J. K. 1172.

The employé left the shop to fill a bottle and did not return. His unexplained absence caused a fellow workman to look for him, and he noticed the employé was lying at the foot of a stairway upon which he stood while filling the bottle. He was dead when discovered. It was held that the fatal injury arose out of and in the course of his employment. *Carroll v. U. S. Casualty Co.*, 2 Mass. Wk. Comp. Cases, 488 (decision of Com. of Arb.). It was the custom of an employé to warn the stablemen of the arrival of teams by ringing a bell, and he often looked out of the window to notice whether the team had been admitted. The sill was only 27 inches from the floor; the employé was a tall man; the floor was often wet, and in consequence might possibly be slippery; employés would be apt to lose their balance looking out of this window. The dead body of the employé was found on the ground underneath the window from which he looked to note the arrival and admission of teams, a few minutes after the bell had been sounded to announce the arrival of one. There were no witnesses to the fatality. It was held that the widow was entitled to compensation. *O'Brien v. Casualty Co. of America*, 2 Mass. Wk. Comp. Cases, 226 (decision of Com. of Arb.).

Where a brewery employé, whose duty it was to clean up after the day's work and turn on steam in certain machines, was found unconscious from an injury in the basement of the building, and thereafter died, the conclusion

laxed,⁷² the burden of proof, even in such case of death, rests on the claimant, ordinarily to the same extent as it would rest on the

that he was injured by accident in the course of his employment was warranted. *Heileman Brewing Co. v. Shaw*, 161 Wis. 443, 154 N. W. 631.

Where the employé, an ignorant foreigner, did not go to a doctor for two weeks after the injury to his leg, and no one saw the accident, but several fellow workmen testified to having been told of the accident a few minutes after it happened, and the superintendent admitted that the workman showed him an injury to his leg two days after the date of the accident, the evidence was sufficient to prove the accidental origin of the injury. *Oyos v. Pacific Sewer Pipe Co.*, 2 Cal. I. A. C. Dec. 622. Where a night watchman, last seen alive when he relieved his fellow watchman upon his employer's premises, was murdered by unknown criminals upon the employer's premises in the middle of the night, the murderers having been obliged to climb over a fence to enter the premises, and no testimony was offered as to who the murderers were or their specific motives for committing the murder, the evidence justified the inference that the night watchman was murdered while acting in the course of his employment and that his death arose out of his employment. *Shea v. Western Grain & Sugar Products Co.*, 2 Cal. I. A. C. Dec. 559.

Where an engine driver was standing half on the frame of his engine and half on the platform, tightening a nut, and shortly afterward was seen lying on the permanent right of way between the engine and the platform, and died five minutes later, it was held that the accident arose out of his employment. *Fannah v. Midland Great Western Ry.* (1911) 4 B. W. C. C. 440, C. A. In a case where a ship's fireman was last seen on deck getting a drink of water, and shortly after disappeared, while the ship was at sea, an inference that the accident arose out of his employment was upheld. *Lee v. Stag Line, Ltd.* (1912) 5 B. W. C. C. 660, C. A. Where an officer of a ship on a fine morning complained of giddiness, and, after going below and taking some castor oil, returned to his watch on deck, and then was missed and never seen again, there was sufficient evidence that death arose out of his employment.

⁷² Where the lips of an injured employé are closed by death, the burden of proof which ordinarily rests upon the applicant to establish the fact of employment, injury, and death arising out of the employment, is somewhat relaxed. The defendants are required to disclose all information in their possession and at least in some measure to assume the burden of proof of a valid defense. *Merritt v. North Pacific Steamship Co.*, 2 Cal. I. A. C. Dec. 237. Evidence indicating that a night watchman was murdered while on duty on property which he was employed to watch authorized an award, though claimant did not negative the possibility that death resulted from a conflict brought on by deceased. *Western Grain & Sugar Products Co. v. Pillsbury* (Cal.) 159 Pac. 423.

workman if living.⁷³ Evidence conclusively showing an injury adequately accounted for by acts of the workman in the course of his employment is not overcome by the fact that the injury might by some possibility have resulted from some other cause not shown to exist. In such case the issue must be determined in the light of the greater likelihood.⁷⁴ But the claimant fails if an inference favorable to him can only be arrived at by a guess; likewise when two or more conflicting inferences equally consistent with the facts arise from them.⁷⁵

Owners of S. S. Swansea Vale v. Rice (1911) 4 B. W. C. C. 298, H. L. Where an engineer, fulfilling his contract of employment, was in his bunk on a steam tug an hour before daylight, and being missed an hour later, his dead body was found floating in the water near the ship, there was evidence that the accident arose out of his employment. *Mackinnon v. Miller* (1910) 2 B. W. C. C. 64, Ct. of Sess. Where a ship's watchman was seen ashore with a parcel of food in his hand at the time of evening when he usually attended to the shore end of the mooring ropes, and next morning was found dead in the water 40 yards away, the parcel being found between the mooring ropes and the gangway, there was evidence of an accident arising out of the employment. *Richardson v. Owners of Ship Avonmore* (1912) 5 B. W. C. C. 34, C. A. Where a puddler left his furnace and set out along the bank of a canal towards a blacksmith's shop, and eight hours later was found drowned in the canal halfway along his route, the accident was held to have arisen out of his employment. *Furnival v. Johnson's Iron & Steel Co., Ltd.* (1912) 5 B. W. C. C. 43, C. A.

⁷³ "The onus of proving his case is as much on the executors of a deceased workman as on a living one who has been injured." Farwell, L. J., in *Bender v. Owners of S. S. Zent*, [1909] 2 K. B. 41.

⁷⁴ *Gurney v. Los Angeles Soap Co.*, 1 Cal. I. A. C. Dec. 163.

In a case under the federal Act it appeared that a colored youth, sixteen years of age, employed upon river and harbor work, left his work, taking a government skiff to go across the river for some reason unknown to any one but himself. As there was no definite evidence to the contrary, it was considered that he was doing something incidental or necessary to his occupation. *In re Webb*, Op. Sol. Dept. of L. (1915) 336.

⁷⁵ *McCoy v. Michigan Screw Co.*, 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A, 323; *Lannigan v. Lannigan*, 222 Mass. 198, 110 N. E. 285; *Sponatski's Case*, 220 Mass. 527, 528, 108 N. E. 466, L. R. A. 1916A, 333; *King's Case*, 220 Mass. 290, 107 N. E. 959; *Fumiciello's Case*, 219 Mass. 488, 107 N. E. 349.

"It has been held repeatedly that in cases arising under this Act, in order

Claimants for compensation under the Washington Act must prove that the employer's business was extrahazardous within the

that an award of compensation may be made, the burden of proof rests upon the claimant to show by a preponderance of the evidence that an injury occurred and that it arose out of and in the course of the employment. The determination of these issues cannot be left to speculation, surmise, or conjecture. If the evidence upon the questions involved is slender, but is sufficient to satisfy a reasonable man, a case has been made out in favor of the claimant." *In re Von Ette*, 223 Mass. 56, 111 N. E. 697.

"Something fell in the plaintiff's eye, causing pain; he rubbed the eye; gonorrhœal infection followed; he did not have the infection previously. We cannot determine whether the infection in the eye came from the substance which fell into it, from water with which he bathed it, or from a towel with which he rubbed it; but in either event we regard the dropping of the substance in the eye as the legal cause of the subsequent loss of sight, within the meaning of the Compensation Act. If this be correct, then any man at work at any occupation who gets something in his eye while at work and rubs the eye, the rubbing being followed by gonorrhœal infection, may recover for the loss of the eye simply on producing evidence of these facts, together with evidence tending to show that he did not have gonorrhœal infection previously. We cannot agree that this is good law. It bases liability upon conjecture. Unless there be some evidence tending to show that the substance which fell in the eye caused the infection, and unless that fact can be found, we cannot regard the subsequent loss of the eye as proximately resulting from an injury incidental to or growing out of the employment." *Voelz v. Indus. Com.*, 161 Wis. 240, 152 N. W. 830.

"The burden, and the whole burden, of proving the conditions essential to the obtaining an award of compensation rests upon the applicant and upon nobody else, and if he leave the case in doubt as to whether those conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus which lies upon him." *Collins, M. R.*, in *Pomfret v. Lancashire & Yorkshire Ry. Co.*, [1903] 2 K. B. 718, (Act of 1897).

Where a workman employed in building a bridge over a river near its outlet in a bay was last seen alive at his home some miles from the place of work, and his body was afterwards found in the bay, and there was no evidence as to how he met his death, the presumption was that he came to his death by accident, but not that the accident arose out of his employment. *Henry Steers v. Dunnewald*, 85 N. J. Law, 449, 89 Atl. 1007.

Where the evidence was that the injured employé felt a soreness in his right hand, which developed into an infection, with permanent disability, such infection being supposed to have arisen from a crack in the callous of the employé's finger, caused by turning a wheel or crank, but he could not say

meaning of the Act, that an accident occurred injuring the workman while he was performing his duty in such employment, and

how it happened, or that the hand was bruised while working, the evidence was insufficient to prove that the disability was caused by an accident occurring in the course of his employment. While it was probable that the accident was so received, it was nevertheless mere conjecture, and not proved. *Netherland v. Contra Costa Constr. Co.*, 1 Cal. I. A. C. Dec. 440.

Evidence held insufficient to prove accident arising out of employment: Where a miner was found lying across the rails in a mine, with injuries that tended to show that he had been riding on a tub and had struck his head against the roof, which sloped down at this place, and there was a tub 11 yards ahead of him which had been moving in the same direction. *Bates v. Mirfield Coal Co.* (1913) 6 B. W. C. C. 165, C. A. Where a seaman returned to his ship intoxicated and went to his bunk, and was found next morning fatally injured in the hold, to which access had been gained by forcing open a locked door, by whom not being known. *O'Brien v. Star Line, Ltd.* (1909) 1 B. W. C. C. 177, Ct. of Sess. Where a ship's fireman with a parcel of food in his arm was seen on a jetty hailing his ship for a boat, and fell from the jetty and was drowned, and there was no evidence concerning his reason for going ashore. *Dixon v. Owners of S. S. Ambient* (1912) 5 B. W. C. C. 428, C. A. Where a sailor set out from his ship, which was at the quay side, for the purpose of getting provisions, and next morning was found drowned in the dock about 10 or 15 feet from the gangway and 3 feet from the shore, and his cap was found on the quay. *Mitchell v. Owners of S. S. Saxon* (1912) 5 B. W. C. C. 623, C. A. Where a ship's cook, with Bright's disease, which caused frequent micturition, was last seen in his galley in the early morning, and where to reach the water-closet he would have had to step out of the galley onto the open deck, in the dark, and about 8 feet from the side, which was protected by a railing 3 feet 7 inches high, and the weather was rough. *Burwash v. Leyland & Co., Ltd.* (1912) 5 B. W. C. C. 663, C. A. Where a ship's cook, resting in his bunk one afternoon while his ship was in harbor, was told by the captain to prepare tea for the crew, was missed an hour and a half later, although all his outer clothing was in his saloon, and next day was found drowned, wearing only underclothes, there being evidence that he sometimes vomited over the side of the ship. *Kerr v. Ayr Steam Shipping Co., Ltd.* (1914) 7 B. W. C. C. 801, H. L., and (1913) 6 B. W. C. C. 324, Ct. of Sess. Where an omnibus driver, while sitting on his bus at a railway station, fell to the ground and died, not of the fall, but of heart disease. *Thackway v. Connelly & Sons* (1910) 3 B. W. C. C. 37, C. A. Where the dead body of a miner, who had been warned not to work at a place where blasting was being begun, was found in the débris after the blasts had been shot, but there was no evidence to show how he got there. *Traynor v. Addie & Sons* (1911) 4 B. W. C. C. 357, Ct. of Sess. Where a workman, who had charge of a barge

that the injuries resulted in wholly or partly impairing his earning power at any gainful work.⁷⁶

anchored near a wharf, left the cabin, and when next seen was found drowned 150 feet upstream from the barge. *Charvil v. Manser & Co., Ltd.* (1912) 5 B. W. C. C. 385, C. A. Where a bargeman ashore with leave was found three days later, drowned, with a rope from another barge around his arm, and the county court judge inferred that the man was using the other barge to return when he was drowned. *Booth v. Leeds & Liverpool Canal Co.* (1914) 7 B. W. C. C. 434, C. A. Where an engineer on a ship, which was lying in a tidal basin, went on deck at night to get some fresh air, and was the next day found drowned close to the ship, and just under a part of the railing where the crew commonly sat. *Marshall v. Owners of Wild Rose* (1910) 3 B. W. C. C. 76, C. A., and (1912) 5 B. W. C. C. 385, H. L. Where a lad, hired to control a motor engine from a switchboard, left his place for some unknown reason, and, getting through the fence around the engine, was killed. *Smith v. Stanton Ironworks Co. Collieries, Ltd.* (1913) 6 B. W. C. C. 239, C. A. Where a workman, recovering from the effects of the anæsthetic administered before an operation for the amputation of his finger, was again subjected to the anæsthetic during the removal of a decayed tooth, and died, the probability being just as great that death resulted from spasm in an attempt to swallow blood due to the second operation as that it was due to the anæsthetic given for the first operation. *Charles v. Walker, Ltd.* (1910) 2 B. W. C. C. 5, C. A.

In *Leach v. Oakley Street & Co.*, [1911] 1 K. B. 523, where there was no proof whether the returning seaman had reached the gangway, the employer was not liable. In this case *Fletcher-Moulton, L. J.*, says: "The return to the ship is in the course of his employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship. Thus, if the risk is one due to the means of access to the ship, the accident arises out of the employment; but if the accident arises from something not specifically connected with the ship, it cannot be said to arise out of his employment. I do not think the dividing line is where he actually touches the ship or the special means of access to it." In *Fletcher v. Owners of Ship Duchess*, [1911] A. C. 671, it was held that where the master of a ship went ashore, returned to the pier, hailed his ship to send a boat, and before the boat reached him fell off the pier and was drowned, the accident did not arise out of his employment. In *Webber v. Wansborough Paper Co., Ltd.*, [1913] 3 K. B. 615, a seaman, in order to reach his home from his ship, had to cross a plank, one end of which rested on the dock, the other end on the rung of a ladder, which was permanently fixed to and formed a part of a quay. He crossed the plank in safety, but

⁷⁶ (Wk. Comp. Act Wash. § 12) *Rulings Wash. Indus. Ins. Com.* 1915, p. 20.

Where a claimant under the New York Act was engaged in operating a lighter when injured, his failure to show that the vessel was not one of another state or country will not defeat his right of recovery.⁷⁷

When an employé is taken ill at work, and dies soon thereafter, there is no presumption that he was killed "in the course of employment."⁷⁸ Nor will it be presumed merely from the nature of his employment that lead poisoning contracted by a printer was contracted in the course of his employment.⁷⁹

The presumption that a deceased workman committed suicide cannot be indulged in as a mere presumption, without any fact or circumstance upon which it can be logically predicated, for the presumption of law is in favor of life, and the natural desire and struggle to preserve rather than to destroy it.⁸⁰ The presumption against suicide calls for proof of the fact which it negatives.⁸¹

when he had ascended a few steps of the ladder slipped and fell. The court held that the sphere of his employment was the ship, and not the quay, and that, as he was injured while he was ascending the fixed ladder attached to the quay, the accident did not arise out of and in the course of his employment.

⁷⁷ *Edwardson v. Jarvis Lighterage Co.*, 168 App. Div. 368, 153 N. Y. Supp. 391.

⁷⁸ *In re Gertrude Patterson*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 33.

⁷⁹ *In re Doherty*, 222 Mass. 98, 109 N. E. 887.

⁸⁰ *Milwaukee Western Fuel Co. v. Indus. Com.*, 159 Wis. 635, 150 N. W. 998; *Sorensen v. Menasha Paper Co.*, 56 Wis. 342, 14 N. W. 446.

⁸¹ *Milwaukee Western Fuel Co. v. Indus. Com.*, *supra*.

ARTICLE III

CAUSE AND RESULT

Section

- 127. When accident or injury proximate cause.
- 128. When proximate cause of disease.
- 129. When proximate cause of hernia—Proof.
- 130. Insanity.
- 131. Resulting incapacity or death.
- 132. Suicide.
- 133. Aggravation of existing disease.
- 134. Aggravation of injury after accident.
- 135. Additional injury.
- 136. Treatment in general.
- 137. Neglect and refusal of operation or medical services.

§ 127. When accident or injury proximate cause

Where the disability is so related to the accident that it is the natural consequence thereof, compensation should be awarded.⁸² But it is a principle of very general application that the industry is chargeable only with those consequences arising out of accidents which are proximate and direct, and not chargeable for disabilities remotely caused by the injuries.⁸³ Proximate cause is a question of fact, depending for its solution on no fixed rule but on the circumstances of the particular case.⁸⁴ The burden is on the claimant

⁸² *Lesh v. Illinois Steel Co.* (Wis.) 157 N. W. 539. In *Bockwich v. Housatonic Power Co.*, 1 Conn. Comp. Dec. 266, it was held that a causal connection between the injury or death and the employment, if established, is sufficient; proximate cause and effect need not be shown in order to substantiate a compensation claim.

⁸³ *Masich v. Northwestern Pacific R. R. Co.*, 2 Cal. I. A. C. Dec. 545.

⁸⁴ "The question whether the death resulted from or was accelerated by an accident is a pure question of fact." Lord Justice Clerk, in *Warnock v. Glasgow Iron & Steel Co., Ltd.* (1904) 6 F. 474, Ct. of Sess. "In my opinion it was as much a question of fact for the county court judge whether the continuance of the incapacity is due to the accident or to some other cause as it was to decide whether the original incapacity was due to the injury caused by

the accident to the workman." *Farwell, L. J., in Warnecken v. Moreland & Son, Ltd.* (1910) 2 B. W. C. C. 355.

Where an employé's death was due to his being poisoned by drinking from a bottle a poisonous fluid having the appearance of water, under the impression that it was drinking water, while he was at work on premises at which workmen supplied themselves with drinking water from a neighboring well by means of buckets and bottles, on account of the unsanitary condition of the city water furnished in the building by means of pipes, the injury resulted from his employment. As *Archibald's* negligence or carelessness is immaterial, and the injury was incurred manifestly in the course of his employment, it remains only to determine whether it resulted from the employment. *Archibald v. Ott* (W. Va.) 87 S. E. 791.

Where a workman was injured by straining the muscles of his side while laying cement blocks under a porch, through attempting to lift a heavy block, the injury was proximately caused by the accident, though there was no external evidence of injury. (St. 1915, § 2394—3 [3]). *Bystrom Bros. v. Jacobson*, 162 Wis. 180, 155 N. W. 919. "It seems, as counsel for respondents contend, that such calls are quite as well satisfied by the circumstances here. The thing which occurred was somewhat unusual. It was unexpected and undesigned. There was an external occurrence; the lifting of the heavy block, while the workman was not in an advantageous position to do so, requiring him to unduly strain the muscles of his right side. The undue strain was not foreseen or expected. A mishap resulted—muscular spasm and consequent disability. There was, plainly, the physical causation spoken of in *Milwaukee v. Industrial Com.*, 160 Wis. 238—240, 151 N. W. 247—the effort to handle the block while the workman was so circumstanced as to cause a perilous strain on the muscles of his right side."

Where, although the employé had been for many years crippled from a disease of the hip joint, and disability did not set in for four months after the accident, it appeared that for nine years immediately prior to the accident he had been well and vigorous, and the accident was such as might in itself cause such disability, it was held that such accident was the proximate cause of such disability. *McKee v. Southern Electrical Co.*, 2 Cal. I. A. C. Dec. 805.

In *Toole v. Robert D. Daly Co.*, 1 Conn. Comp. Dec. 651, it was held that in spite of certain existing diseases, which might cause incapacity at some future time, the disability was due to the original injury, and the compensation payments continued.

A messenger boy employed at a navy yard was injured by falling from a bicycle while in the yard. It was held that his subsequent death was traceable to the injury received at the time he fell. *In re McSorley Op. Sol. Dept. of L.* 331.

Where a miner, who, in order to be the first to ascend, stood in water for half an hour in the pit bottom, when he might have waited his turn on dry ground, contracted a chill and became permanently deaf, the injury did not

result from the accident. *McLuckie v. Watson, Ltd.* (1913) 6 B. W. C. C. 850, Ct. of Sess.

Burns.—It was questionable whether the fatal injury occurred by reason of the lighting of a cigarette by the employé and the ignition of his clothing, or by reason of the use of a lantern or light. The evidence showed that the clothing of the employé was saturated with oil, and that everywhere he ran after the accident oil dripped and pieces of clothing fell, following the flames from the oil drippings. The probable and reasonable cause of the presence of oil in such excess quantity was traced to the lantern, according to the testimony of several witnesses. The Committee of Arbitration held that the widow was entitled to compensation. *Parker v. American Mutual Liability Insur. Co.*, 2 Mass. Wk. Comp. Cases, 392 (decision of Com. of Arb.). Where an employé received a slight injury, to which bandages soaked in turpentine were applied, and some days later the employé accidentally set fire to the bandages while lighting his pipe, the burns received in the second accident are not proximately caused by the first accident, and are therefore not compensable. *Isaacson v. White Lumber Co.*, 2 Cal. I. A. C. Dec. 819.

Injury to knee.—A dislocation of the semilunar cartilage of the knee, caused by quickly rising from a stooping position required by the nature of the employment, was held to have been proximately caused by the employment. *Giampolini-Lombardi Co. v. Employers' Liability Assur. Co.*, 2 Cal. I. A. C. Dec. 1010. An employé stepped on a bobbin that lay on the floor in her place of employment, seriously wrenching her left knee. This knee had been slightly injured from another cause several months previous, incapacitating her for work at that time for two days. The latter injury was held to be the cause of all her incapacity for work at the time of the hearing, and she was entitled to compensation. *Toy v. Md. Casualty Co.*, 2 Mass. Wk. Comp. Cases, 147 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

Injury to eye.—When an accident to an eye, which at first appears not serious, results, after a week or more, in a diseased condition of the eye which destroys the sight, the "injury occurred," within the meaning of the statute, when the diseased condition culminated. *Johansen v. Union Stockyards Co.*, 99 Neb. 328, 156 N. W. 511. Where the evidence definitely shows that foreign substances got into the eye of the applicant while working in the course of his employment, and they subsequently cause irritation, resulting in ulceration and the loss of the sight of the eye, the loss was proximately caused by accident arising out of the employment. *Grant v. Narlian*, 1 Cal. I. A. C. Dec. 482. Where creosote accidentally dropping on an employé's eye caused an inflammation which would normally disappear, but which started up an inflammation due to the presence of a piece of steel which became embedded in the eye, five years previously, which latter inflammation resulted in the loss of the eye, but would not have occurred except for some such exciting cause as the creosote, the creosote was the proximate cause of the disability. *Shields v. Miller*, 2 Cal. I. A. C. Dec. 1032. A partial and temporary loss of sight, caused by the bursting of small blood vessels in the eye, held to have been caus-

to prove that the injury was the proximate cause of the incapacity or death,⁸⁵ as well as that the accident, if accident be essential, was the proximate cause of the injury.⁸⁶

ed either by heavy lifting, increasing the blood pressure of the applicant, or by applicant's getting cotton seed oil in his eye, both of these possible causes having occurred in the course of the employment at the time the eye trouble was first noted, and no other possible cause being in evidence. *Gurney v. Los Angeles Soap Co.*, 1 Cal. I. A. C. Dec. 163. Where gravel from a drill used in hydroelectric construction flew into a workman's eye and injured it, and the employer claimed that the loss of sight was due to tuberculosis, there was no connection between the tuberculosis and the injury, which was caused by the flying gravel. *Sileg v. Southern Cal. Edison Co.*, 2 Cal. I. A. C. Dec. 988. Where a workman who was blind in one eye, although the fact could not be detected, suffered an accident which made it necessary to remove the blind eye, and he then could not get work, because his incapacity was apparent, the incapacity was due to the accident. *Ball v. Hunt & Sons, Ltd.* (1912) 5 B. W. C. C. 459, H. L.; 4 B. W. C. C. 225, C. A. Where a miner, blinded in one eye by an accident, could not obtain work underground on account of his disability, and earned much lower wages at surface work, there was incapacity resulting from the injury. *Arnott v. Fife Coal Co., Ltd.* (No. 2), (1913) 6 B. W. C. C. 281, Ct. of Sess.

Loss of voice.—In *Unodeskia v. Scovill Mfg. Co.*, 1 Conn. Comp. Dec. 32, where the claimant, in a tubercular condition at the time of the injury, claimed that his loss of voice was due to burns received on the back of his hand from a solution of vitriol used in his employment, it was held that the accident was not connected with the loss of voice, but that the loss of voice was due to tubercular laryngitis.

⁸⁵ *Allen v. Southwestern Surety Ins. Co.*, 1 Cal. I. A. C. Dec. 67; *Dundee Steam Trawling Co., Ltd., v. Robb* (1910) 48 S. L. R. 13.

The burden of proof is upon the applicant for death benefits to establish that the death was proximately caused by an accident. *Lucien v. Judian Mfg. Co.*, 1 Cal. I. A. C. Dec. 509.

Sufficiency of proof that the death resulted from the injury.—Where it was claimed that the aneurism of the iliac artery, which caused death, was caused by a blow in the left groin, but the evidence indicated that such a result was improbable from such a blow, and that an aneurism is usually caused by an infected condition, the death was not shown to have proximately resulted from the accident. *McKenzie v. Pullman Co.*, 2 Cal. I. A. C. Dec. 984. Where the applicant, a sufferer from chronic troubles of the uterus, three months after the accident required an operation for draining a deposit of

⁸⁶ See note 86 on page 483.

As said in a Wisconsin case: "Proximate cause, as applied to negligence law, has, by definition, included within it the element

fluid from her hips, and surgical testimony gave rise to a serious doubt that the disability was the result of exterior injury, the proximate cause of the disability was held not have been shown to be exterior injury, and the burden of proof resting on the applicant was not discharged. *Ash v. Barker*, 2 Cal. I. A. C. Dec. 577.

In *Arnold v. Town of Brooklyn*, 1 Conn. Comp. Dec. 188, where the decedent, who died of pneumonia, was in a poor physical condition and of lowered vitality because of a previous disease, and the evidence of the schoolroom where she taught being insufficiently heated was weak and contradicted, it was held that the burden to show a causal connection between the death and the employment was not discharged. In *Theroux v. Shore Line Electric R. R. Co.*, 1 Conn. Comp. Dec. 667, where the death of the workman nearly two years after the injury was stated in the certificate of death by the attending physician to have been due to the injury received, and other medical evidence tended to corroborate this conclusion, the commissioner held a causal connection was to be assumed, and awarded compensation. In *Maloney v. Waterbury Farrel Foundry & Machine Co.*, 1 Conn. Comp. Dec. 220, it was held that where death was due to a pulmonary embolism, developed following an apparently safe operation for hernia, such developments being recognized by medical authorities as not uncommon even after simple operations, death was due to the injury. In *Corcoran v. Farrel Foundry & Machine Co.*, 1 Conn. Comp. Dec. 42, where after an operation for hernia a workman took scarlet fever while still in the hospital, and died, the attending physician certifying that his death was due to the fever, death was held not to have been proximately due to the hernia or the operation. In *Merriman v. Scovill Mfg. Co.*, 1 Conn. Comp. Dec. 596, it was held that, although an electric shock was shown to have been received in the course of employment, the preponderance of evidence did not support the theory of the attending physician that the workman's death, due to septic peritonitis, was due to a lesion of the intestines caused by the electric shock, but rather tended to show that death was due to acute appendicitis. In *Helms v. Harris Construction Co.*, 1 Conn. Comp. Dec. 498, where a workman received a wound on his forehead, on which, after it had closed, but while it was still fresh and tender, two blisters were formed by the rubbing thereon of the rim of his hat, and medical evidence showed that the breaking of these blisters opened a "gate of admission" for germs causing erysipelas, from which the workman died, it was held that death was due to the injury. In *Palama v. Chase Metal Works*, 1 Conn. Comp. Dec. 444, where the deceased workman was found dead in a sitting position near his work, and the evidence showed that death could not have been due to an electric shock as claimed, because the power had been shut off, it was held death was due to disease, and not to injury. In *Wetherell v.*

of reasonable anticipation. Such element is a characteristic of negligence not of physical causation. As long as it was necessary to

American Hardware Corp., Corbin Cabinet Lock Co. Div., 1 Conn. Comp. Dec. 367, where claimant had asthma prior to the alleged injury, claimed to be due to dusty conditions consequent upon scraping plaster, and medical evidence was to the effect that, while the dust might aggravate existing conditions, it could not have caused the claimant's condition, it was held the incapacity was not caused by the injury alleged. In *Petersen v. Sperry & Barnes*, 1 Conn. Comp. Dec. 370, where the continuous use of muscles required by claimant's work was a contributing cause of his disability, which was also due to a pre-existing rheumatic condition, and to getting wet in a storm, and his labor was not of a kind to have injured one performing it, requiring no more exertion than ordinary duties, it was held that his incapacity was not due to any injury arising from the employment. In *Foust v. Hartford Builders' Finish Co.*, 1 Conn. Comp. Dec. 512 (affirmed by superior court on appeal), it was held on medical testimony somewhat uncertain that the claimant's death had not been sufficiently shown to have been due to sudden and frequent changes of temperature required by his work, to warrant an award thereon.

"Counsel * * * contend that the award should not have been made, for the reason that the testimony shows that the attack of delirium tremens, and not the injury, was the proximate cause of his death. The record contains the testimony of four physicians, who appeared to be qualified to speak on such matters, and they gave it as their opinion that the attack of delirium tremens was caused by the injury; further that it was not unusual for delirium tremens to develop about 60 hours after an injury, when the secondary shock sets in, with patients who had been in the habit of using alcoholic liquors. Two physicians who testified for the defendants disagreed with this view, but the record, taken as a whole, is very persuasive that the deceased would not have developed delirium tremens when he did, had it not been for the injury and the shock which followed it. The fact that his system had been so weakened by his intemperate habits that it was unable to withstand the effects of the injury does not thereby shift the proximate cause of death from his injury to his intemperate habits. *McCahill v. N. Y. Transportation Co.*, 201 N. Y. 221, 94 N. E. 616, 48 L. R. A. (N. S.) 131, Ann. Cas. 1912A, 961. It is said by counsel that this case is similar to that of *McCoy v. Michigan Screw Co.*, 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A, 323. The cases are dissimilar in the material respect that in the case cited the claimant by his own act, after receiving the injury, communicated gonorrheal germs to his eye by rubbing it, in consequence of which he lost the use of it. It was clearly his own act after the injury which caused the loss of his eye. We are of the opinion that the finding of the board upon this question should

a recovery to have a negligent act stand as the cause of an injury, it did no harm to characterize causation in part at least in terms of

not be disturbed." Bird, J., in *Ramlow v. Moon Lake Ice Co.* (Mich.) 158 N. W. 1027.

While the Commission has no power to presume the occurrence of an accident, where the accident is clearly established, the statutory presumption in favor of the applicant applies in determining whether the death resulted from the accident or from a disease naturally and unavoidably resulting therefrom. (Wk. Comp. Act, § 21) *La Fluier v. Wood*, The Bulletin, N. Y., vol. 1, No. 7, p. 7. Where a workman, who was wet through while fighting fire on his employer's premises, continued at work for 20 days, complaining part of the time to his wife of pains in his side, and then developed lobar pneumonia and died, he having been exposed to bad weather in the meantime and having no fever until the day he quit work, it was held the disease was not caused by the exposure while fighting fire. *Tiedman v. Chelsea Fiber Mills*, The Bulletin, N. Y., vol. 1, No. 10, p. 16. In *Broderick v. Southern Pacific Co.*, 4 N. Y. St. Dep. Rep. 371, it was held that tetanus causing death resulted from a compound fracture and laceration of the workman's foot, sustained while handling lumber, a part of which fell on his foot.

Where the regular duties of a watchman in a bank included cleaning up and cleaning brass cuspidors, and on a certain evening he called on a clerk in one of the offices, and while there said he had pricked his thumb while cleaning cuspidors, and later died from blood poison which developed, death was shown to have resulted from an accident received in the course of the employment. *Patch v. First National Bank of Milwaukee*, Rep. Wis. Indus. Com. 1914-15, p. 9.

Where a workman fell from a cart without any apparent cause, and died nine days later, and the only medical evidence was that death had not been caused by the accident, but did not explain the cause of death, it was held that the burden of proof was not discharged. *Brown v. Kidman* (1911) 4 B. W. C. C. 199, C. A. Where a workman injured his ankle by a fall from a ladder, and after being in bed for a month died of appendicitic peritonitis, and the medical evidence conflicted as to whether the disease was caused by his accident, there was sufficient evidence that death resulted from his injuries. *Euman v. Dalziel & Co.* (1913) 6 B. W. C. C. 900, Ct. of Sess. Where an operation upon a coal heaver, who had been injured by a rush of coal, disclosed appendicitis of long standing, and a recent perforation of the bowels, and a post mortem examination after his death three days later revealed a second perforation, which had caused the death, and which must have occurred at least 12 hours after the operation, there was sufficient evidence of death resulting from the injury. *Woods v. Wilson & Sons Co., Ltd.* (1915) 8 B. W. C. C. 288, H. L., and (1913) 6 B. W. C. C. 750, C. A. Where an injured workman died from a stroke of apoplexy a fortnight after he re-

negligence. But when, as under the Compensation Act, no act of negligence is required in order to recover the element of negligence,

turned to work, there was not sufficient proof that death resulted from his accident. *Warnock v. Glasgow Iron & Steel Co., Ltd.* (1904) 6 F. 474, Ct. of Sess. Where a gardener suffered continual pain from a wound in his foot, caused by a nail which he had stepped on while at work, and a month later died of tetanus, there was evidence that death resulted from the injury. *Walker v. Mullins* (1909) 1 B. W. C. C. 211, C. A. Where a workman who had his hand punctured died three months later of erysipelas, but there was no evidence that it was due to the puncture, the medical referee saying it might or might not have been, there was no evidence of death resulting from the injury. *Hugo v. Larkins & Co.* (1910) 3 B. W. C. C. 228, C. A.

⁸⁶ *Lohrke v. Benicia Iron Wks.*, 1 Cal. I. A. C. Dec. 261; *Wallace v. Regents of University of California*, 1 Cal. I. A. C. Dec. 97.

The essential connecting link of direct causal connection between the personal injury and the employment must be established before compensation can be allowed. The injury must be the result of the employment and flow from it as the inducing proximate cause. The rational mind must be able to trace the resultant injury to a proximate cause set in motion by the employment and not by some other agency; otherwise there can be no recovery. In *re Madden*, 222 Mass. 487, 111 N. E. 379; In *re Von Ette*, 223 Mass. 56, 111 N. E. 697; *Com. v. Mink*, 123 Mass. 422, 25 Am. Rep. 109; *Sponatski's Case*, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333; *Furnivall v. Johnson's Iron & Steel Co., Ltd.*, 5 B. W. C. C. 43.

The burden of proof is on the applicant to show that an industrial accident was the proximate cause of the injury complained of. A failure to report an injury at the time it happens and for an unreasonable time afterward makes necessary the corroboration of the testimony of the injured party. *Armiger v. Townsend-Davis Baking Co.*, 1 Cal. I. A. C. Dec. 55; *Holden v. Maryland Casualty Co.*, 1 Cal. I. A. C. Dec. 14.

Sufficiency of proof of proximate cause.—Where a workman in good health discovered, two days after an unusually heavy lift in the course of his work, that he was ruptured, and died from a surgical operation to relieve it, the operating surgeon saying that the rupture was caused by a lift, there was sufficient evidence to establish a personal injury by accident in the course of employment. *Poccardi v. Public Service Commission*, 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299. Ordinarily varicocele comes through gradual development, and afflicts men who have to stand upon their feet; but it is conceded by competent medical authorities that it may result from an accident. In view of the testimony of the attending physician as to the nature and extent of applicant's injuries caused by the accident, the previous medical history of applicant, nature of his previous employment, and character of his

namely, reasonable anticipation, contained in the term 'proximate cause,' must be eliminated therefrom, and the phrase 'where the

claim for compensation, the Commission held that the varicocele was shown to have been proximately caused by accident. *Mitchell v. McNab & Smith*, 1 Cal. I. A. C. Dec. 116. Where the post mortem examination showed that the cause of death was the bursting of a small aneurism of the aorta, and that the aneurism had existed some time before the accident, and the medical history of the deceased shows that three days before death the deceased had strained himself by very heavy lifting, and complained thereafter of the straining, pain, and discomfort, this evidence, together with the medical testimony produced, was held to warrant the finding that at the time of the heavy lifting the increased blood pressure from the unusual exertion caused the inner linings of the aneurism of the aorta to give way, and that the subsequent bursting of the final coat of the outer wall, causing death, followed naturally and proximately from such heavy lifting done in the course of the employment. *Draper v. Lore & Co.*, 1 Cal. I. A. C. Dec. 132. Testimony of the injured man that he was injured on January 18, 1914, by a fall upon his elbow, which did not occasion disability until April 9, 1914, together with the testimony of two witnesses to the fall, and the evidence of the attending physician that the development of the later injury was consistent with the history given, and of the opinion of the commissioner taking the testimony as to the appearance of the applicant and his witnesses as to veracity, established the fact of injury in the course of the employment as the proximate cause of the later disability. (Commissioner Weinstock dissenting) *Johnson v. Sudden & Christenson*, 1 Cal. I. A. C. Dec. 422. Evidence that a woman was employed in a restaurant, part of her duties being to operate a dumb-waiter, that prior to any definite illness she complained of feeling ill and of finding the heavy lifting of the dumb-waiter too hard for her, that on a Saturday afternoon she went to her home complaining of illness, and on the following day was taken seriously ill with acute dilatation of the heart, was insufficient to prove that the heart trouble was proximately caused by an accident occurring in the course of the employment. *Hallett v. Jevne Co.*, 2 Cal. I. A. C. Dec. 231. Evidence that an employé fell about three feet from a plank, striking the ground in a sitting position, and complained of pain and stiffness for a few days, and was taken with convulsions approximately a week later, and died ten days thereafter from pneumonia, was insufficient to show that the pneumonia and death were proximately caused by the accident. *Senter v. Klyce*, 2 Cal. I. A. C. Dec. 704. Where the evidence of six witnesses for the defendant in general agreement was in direct conflict with the evidence of one witness for the applicant, and the facts related in the testimony of the one witness are not reasonably probable, the evidence of the applicant is insufficient to establish the alleged accident as the proximate cause of the injury. *Radley v. Nephew*, 2 Cal. I. A. C. Dec. 78. Evidence that an employé

injury is proximately caused by accident' used in the statute must be held to mean caused in a physical sense, by a chain of causation

was injured by a falling piece of wood striking him a glancing blow upon the left side of his head, and that after a few moments' dizziness he returned to work and continued work for some months thereafter, but subsequently became ill with fainting spells and dizziness, and was found to be suffering from epileptic seizures, and that an operation showed the existence of a slight depressed fracture of the inner plate of the skull, and that the accident was considered trivial at the time and produced no effect compatible with fracture of the skull, and that the epilepsy did not arise until some time after the supposed accident, and that the applicant had complained of some of the symptoms indicated prior to the injury, was insufficient to prove that the epilepsy was of traumatic origin and was received at the time of the blow testified to. (Commissioner Will J. French dissenting) *Larson v. Powers*, 2 Cal. I. A. C. Dec. 265. Evidence that an employé, engaged in operating an elevator, imagined that he saw a fellow employé about to be killed by the elevator, and immediately sustained a stroke of paralysis, resulting later in his death, and medical testimony that the paralysis, due to a hemorrhage in the brain, might be caused either by severe mental shock, as contended, or by a cerebral embolism due to a former diseased heart condition, in which case the supposed mental shock might never have occurred in fact, but be purely a hallucination due to the cerebral embolism, was insufficient to prove that the paralysis and death was caused by accident arising out of the employment. *Keck v. Morehouse*, 2 Cal. I. A. C. Dec. 264. Where an employé had been engaged on his knees in painting the deck of a boat, and bursitis and infection developed in the knee, and medical experts testified that the injury could only come from accident in such employment, then, although no accident can be definitely proven, the cause of the injury was sufficiently connected with the employment as an accidental cause. *Porter v. Anderson*, 1 Cal. I. A. C. Dec. 608. Evidence that the applicant fell upon his elbow on January 18, 1914, and that the elbow was sore for four or five days, and then ceased to trouble him seriously until March 28, when a bursa developed, which necessitated an operation for its drainage and reduction, showed that the fall was the proximate cause of such bursa. *Johnson v. Sudden & Christenson*, 1 Cal. I. A. C. Dec. 422. Where, a few weeks after the splashing of hot grease in the right eye of an employé, it is found that complete blindness in that eye exists, but a thorough examination fails to show any evidence of burn on the eyelids, cornea, or conjunctiva, and the opinion of physicians was that the injury was the result of systemic condition, and not the accident, this evidence was insufficient to prove that the accident was the proximate cause of the disability. *Taddei v. Schmitz's Estate*, 2 Cal. I. A. C. Dec. 592. Testimony of all the medical experts concerned in the case was conclusive of the fact that death of applicant's husband, seven weeks after

which both as to time, place, and effect is so closely related to the accident that the injury can be said to be proximately caused

a minor accident received in the course of his employment, was due to natural causes, and not caused proximately or remotely by said accident. *Far-rish v. Nugent*, 1 Cal. I. A. C. Dec. 98. In *Frabbie v. Freeburg*, 1 Conn. Comp. Dec. 614 (affirmed by superior court on appeal), where the medical testimony showed a causal connection between the striking of a member of claimant's body by a piece of stone while at his work and the tuberculosis necessitating its amputation, but failed to show any connection between the injury and tuberculosis of other members, compensation was awarded for incapacity due to the loss of the one member only. In *Cody v. Beach*, 1 Conn. Comp. Dec. 447, where two physicians who had known claimant many years, and one who had not, testified that his present condition was due to the injuries received, against one who had never seen claimant until shortly before the hearing and testified that the disability was due to old age and nephritis, it was held the causal connection was established. In *Sin-sigalli v. Suzio*, 1 Conn. Comp. Dec. 455, where a workman claimed to have torn the ligaments from the scapula while doing ordinary shoveling, and his physician testified the injury might have been so caused, the commissioner, considering this claim and evidence repugnant to everyday experience and common knowledge, called an independent expert, who testified the injury could only be due to a severe strain, or infection, and on this testimony held the burden of proof had not been discharged. In *Flaherty v. Locomobile Co. of America*, 1 Conn. Comp. Dec. 354, where a workman, whose duties required the lifting of pans or trays weighing from 100 to 200 pounds, complained several times to his foreman of pains in his back and severe headaches, and medical evidence was to the effect that his physical condition very probably resulted from a strain such as might be sustained in such an employment, the injury was held to be the effect of a strain due to his employment. In *Alton v. Hopkins & Allen Arms Co.*, 1 Conn. Comp. Dec. 378, where the workman died of chronic hypertrophy of the liver, and his widow made the claim that the disease was due to the breathing of acid fumes about the work of the deceased in respondent's browning department, but the physician who made a post mortem examination said he had never heard of a case of such disease caused by breathing acid fumes, and did not think it could be so caused, it was held the claimant's burden to show a causal connection between the death and the employment was not discharged. Where the accident alleged was not such as would be likely to cause the condition revealed by an operation upon the workman, and though a possible cause, was a very improbable one, the claim for compensation was dismissed. *Oberts v. Wisconsin Telephone Co.*, Rep. Wis. Indus. Com. 1914-15, p. 24. Where there was a fall of stone in a collier's shift, and four hours later he went home from work with an abraded thumb and a red patch on

thereby. To incorporate into the phrase 'proximately caused by accident' all the conceptions of proximate cause in the law of negligence would be to lug in at one door what the Legislature industriously put out at another. Proximate cause, under the law of negligence, always has to be traced back to the conduct of a responsible human agency; under the Compensation Act the words 'proximately caused by accident' in terms relate to a physical fact only, namely, an accident. Hence, if the injury or death can be traced by physical causation not too remote in time or place to the accident, then such injury or death was proximately caused by the accident, irrespective of any element of reasonable anticipation. The term 'proximately' was, no doubt, used to exclude physical causes so remote in time or place or both as to make them of doubtful value in tracing the relation between cause and effect."⁸⁷

§ 128. — When proximate cause of disease

An injury or disease is not compensable where the accident is merely the occasion of or coincident with the resulting disability or death, and not the cause thereof,⁸⁸ as where the real cause is a

his wrist, caused by incipient blood poisoning, but the medical evidence was that the infection must have taken place at least twelve hours before, it was held that the burden of proof was not discharged. *Jenkins v. Standard Colliery Co., Ltd.* (1912) 5 B. W. C. C. 71, C. A.

⁸⁷ *City of Milwaukee v. Industrial Com.*, 160 Wis. 238, 151 N. W. 247.

⁸⁸ Where a chauffeur suffers from acute gastric ulcer, such as often, according to expert testimony, punctures the wall of the stomach, then, though the employé suffers a puncture of the wall of his stomach immediately after exertion in cranking his employer's automobile, such injury is not proximately caused by the exertion; it is only the occasion, and not the cause, and the injury is not compensable. *Chenoweth v. Mitchell*, 2 Cal. I. A. C. Dec. 75. Where the workman, following an accident, was suffering from vertigo, but the uncontroverted medical evidence was that there had been no fracture of the skull or concussion of the brain, and that the vertigo was due to arterio-sclerosis, which is not caused by accident, the vertigo should not be considered as a disability resulting from the accident. *Carter v. Llewellyn Iron Works*, 2 Cal. I. A. C. Dec. 971. Where the applicant claimed that the accident produced a prolapsus of the uterus, causing disability

natural one.⁸⁹ It is otherwise in case of a disease which is merely incidental to the injury, where the chain of causation is complete

which required surgical and hospital treatment, and the evidence showed that she had long been a sufferer from troubles of the uterus in a most aggravated form, and there had been no inability to go on with her duties for two months following the accident, such disability was not proximately caused by the accident. The injury was the occasion, and not the cause, and the prolapsus was coincident with the fall from the chair, rather than consequent upon it, at most an aggravation of a chronic condition. *Ash v. Barker*, 2 Cal. I. A. C. Dec. 577. Where a workman fell and struck his head, and was unconscious for a half hour, but thereafter was not incapacitated, and showed no symptoms of cerebral trouble, a stroke of paralysis and cerebral hemorrhage three weeks after the fall, which resulted in his death, was not proximately caused by such fall. *McAdoo v. Cudahy Packing Co.*, 2 Cal. I. A. C. Dec. 512. Cerebral hemorrhage occurring to an employé while in the course of his employment, where it does not appear that it was occasioned or contributed to in any way by unusual effort or strain on the part of the employé, but solely on account of the disease known as arterio-sclerosis, is not an injury within the meaning of the Workmen's Compensation Act. In *re Mrs. Alfred Haries*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 101. Small pieces of steel, which lodged in the eye of the operator of a lathe, were not the proximate cause of the loss of his eye, which became infected, where it was proven that such workman was suffering from an infectious disease which was communicated to his eye by rubbing it with his hand. *McCoy v. Michigan Screw Co.*, 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A, 323.

Bright's disease.—Medical testimony showing that, where the applicant

⁸⁹ Testimony of medical experts held to establish that the death of applicant's husband, five months after an accident which caused a concussion of the brain and injuries to the chest, was due to heart disease produced by natural causes, and was not caused proximately by the accident. *Hoover v. Engvick*, 2 Cal. I. A. C. Dec. 875. Discovery of temporary blindness, due to hemorrhagic spots in the retina of an eye, following exposure to intense bright light, upon medical testimony was held not to be due to the bright light, but to natural causes; the testimony indicating that hemorrhage of the retina is always due to disease and never to intense light. *Crouch v. Ritter*, 2 Cal. I. A. C. Dec. 702.

The employé sprained his left wrist and dislocated the middle finger of his left hand. Twelve days later he was taken to a hospital, suffering from typhoid fever. He claimed compensation for the period during which typhoid fever incapacitated him, but it was held that there was no causal relation between the injury and the disease. *Johnson v. Casualty Co. of America*, 2 Mass. Wk. Comp. Cases, 170 (decision of Com. of Arb.).

from injury to death.⁹⁰ All physical consequences and diseases result from an injury when there is a causal connection between them.⁹¹ It does not prevent disability or death from being due to an injury arising out of the employment that the immediate cause was a disease, where the disease or its consequence was caused by

was injured by a fall and five days later a condition of acute Bright's disease developed, but there was no evidence of physical injury to the kidneys, such as would be shown by the presence of blood in the urine, etc., was held to establish that the accidental injury is not the proximate cause of the kidney trouble, but merely coincident with it. *Acute Bright's disease is probably never of traumatic origin.* *Husvick v. Simms*, 1 Cal. I. A. C. Dec. 266. The employé received a personal injury by reason of a strain while pulling a bale of burlap, and later became incapacitated for work because of a condition of Bright's disease. The evidence showed that said employé was suffering from a diseased condition of the heart, lungs, and kidneys, all symptoms of chronic Bright's disease, having no causal relation with the injury. It was held that the employé was not entitled to compensation. *Lima v. Ætna Life Insur. Co.*, 2 Mass. Wk. Comp. Cases, 800 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

⁹⁰ If a disease resulting in death is the effect of an accident, so as to be a mere link in the chain of causation between the accident and death, the death is attributable, not to the disease, but to the accident alone. *Rep. Nev. Indus. Com.* 1913-14, p. 25.

Where the deceased had developed a blister upon his heel, caused by rubber boots furnished by the employer, and the blister became infected, and subsequently Bright's disease developed and death resulted, but the medical evidence established that the injury and infection of the heel had poisoned the blood stream and caused the Bright's disease, the disease was incidental to the injury, and the chain of causation was complete from injury to death. *Wheaden v. Red River Lumber Co.*, 1 Cal. I. A. C. Dec. 640. Where an employé, in good health and without signs of stomach and duodenal trouble received a blow in the region of the stomach and duodenum, and was at once and thereafter affected with severe pains and continuous disability, the blow having been severe enough to cause internal injuries, and two months later his ailment was diagnosed as a duodenal ulcer, it being only conjectural that such an ulcer existed at the time of the accident, or, if it did then exist in a dormant state, that it would have become acute or worse without aggravation by reason of such a blow, the accident was the proximate cause of the disability. *Snyder v. Pacific Tent & Awning Co.*, 3 Cal. I. A. C. Dec. 1.

⁹¹ *Larke v. John Hancock Mut. Life Ins. Co.*, 90 Conn. 303, 97 Atl. 320.

the injury or by lessened vitality due to the injury.⁹² A workman is as much entitled to compensation if death results from exposure

⁹² A severe accidental injury, which, though it does not incapacitate the employé, exposes him to disease and so weakens him that he is unable to withstand it, may thus give rise to a disability for which compensation is payable. In re Atkinson, Op. Sol. Dept. of L., 235. It is unreasonable to deny compensation merely because the physical condition of the injured person is such as to predispose him to some ailment which is also a natural concomitant of the injury received. In re Osgood, Op. Sol. Dept. of L. 391.

Bronchitis.—Where a workman took bronchitis and died, thirteen months after an accident which left him in a debilitated condition, the bronchitis being fatal only in consequence of his weakened physical condition, his death was the result of the accident. *Thoburn v. Bellington Coal Co., Ltd.* (1912) 5 B. W. C. C. 128, C. A.

Pneumonia.—If an employé contracts pneumonia, due to exposure, his pneumonia is not the result of any injury, and therefore he is not entitled to compensation. Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 26. Death from lobar pneumonia, following inhalation of smoke and a wetting received by a member of a fire brigade while fighting fire to protect his employer's property, was caused by an injury arising out of the employment. In re McPhee, 222 Mass. 1, 109 N. E. 633. The employé received a scratch from the pin in a price tag at his place of employment on April 2, and died on May 1, as the result of an attack of pneumonia, which the claimant alleged to be due to a condition of sepsis which followed the scratch. It was held that there was no causal connection between the pneumonia and the injury. *Currie v. Royal Indemnity Co.*, 2 Mass. Wk. Comp. Cases, 174 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.). The evidence showed that the employé had received a severe strain, and became partially paralyzed thereby, and that for a year following the injury he was totally incapacitated for labor. About two days before he died he contracted pneumonia, and died as a consequence thereof. He was unable, because of his exhausted vitality and reduced power of resistance, to resist the attack of pneumonia. The death of the employé was due to the injury, the weakened condition due to the injury rendering the pneumonia fatal. *Merritt v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 635 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.). Where an employé is knocked from a wharf into the water while working to unload a ship, and the injuries caused by the blow are found not to be serious, but the employé dies subsequently from pneumonia due to the inhalation of water into the lungs, the exposure while waiting for an ambulance and while being taken to the hospital, and a general condition of weakened vitality due to overindulgence in intoxicants, such death is due proximately to the accident, and compensation may be awarded therefor. *Smith v. McPhee Stevedoring Co.*, 1 Cal. I. A. C. Dec.

consequent on and attributable to an accident as he would be if death had resulted from immediate physical injury.⁹³ Whether a

197. Where a lumberman suffered a slight fracture of the leg and was confined to the hospital, and thereafter was taken with pneumonia and died as a result thereof, death being hastened by his poor physical condition, it was held that such pneumonia was the result of the confinement and inaction, due to the fractured leg, and that the death was the proximate result of the accident. *Majeau v. Sierra Nevada Wood & Lumber Co.*, 2 Cal. I. A. C. Dec. 425. Where a workman, following a severe accident, and shock was exposed to stormy weather for an hour and a half in seeking medical assistance, and while at the hospital developed pleuro-pneumonia, the accident was the proximate cause of the pneumonia, and therefore the resulting disability was compensable. *Decormier v. Western Indemnity Co.*, 2 Cal. I. A. C. Dec. 764. Where a workman, insured against "death from the effects of injury caused by accident," dislocated his shoulder, and, being rendered unusually susceptible to cold by the accident, took pneumonia without ever leaving his bedroom, and died, it was held that death was due to the effects of an injury caused by accident. In *Bockwich v. Housatonic Power Co.*, 1 Conn. Comp. Dec. 266, where the claimant, though showing that the pneumonia causing the death of her son, upon whom she was dependent, might have been due to trauma, or to exposure to which the deceased was unusually subjected, failed to produce sufficient evidence to establish a causal connection between either of the assigned causes and the death, beyond conjecture, it was held that the burden resting upon her to establish the facts essential to her recovery was not discharged. In *Stanley v. F. R. Wood and W. H. Dolson Co.*, *The Bulletin*, N. Y., vol. 1, No. 4, p. 10, the workman's death, due to pneumonia, was held not to have been due to "such disease or infection as may naturally and unavoidably result" from the injury to his finger. *Isitt v. Railway Passengers' Association Co.* (1889) 22 Q. B. D. 504. Where a miner on his way to the surface in consequence of a breakdown in the shaft contracted pneumonia from a chill while he was waiting for the cage in a down draught of cold air, and died, the injury resulted from accident. *Watson, Ltd., v. Brown* (1914) 7 B. W. C. C. 259, H. L., and (1913) 6 B. W. C. C. 416, Ct. of Sess. Where a workman, after injuring his knee, took over two hours to walk the mile and a quarter to his home, and, catching cold, pneumonia supervened, finally turning into chronic asthma and bronchitis, rendering him unable to work, the holding of the trial judge that his condition "was not the natural result of the injury" was a misdirection. *Ystradowen Colliery Co., Ltd., v. Griffith* [1909] 2 K. B. 533, C. A. The death of an undertaker's workman, part of whose duty was to lift cof-

⁹³ *Brown v. Watson, Ltd.* (1914) 7 B. W. C. C. 259, H. L., and (1913) 6 B. W. C. C. 416, Ct. of Sess.

disease was proximately caused by an accident or injury, or by natural causes, is a question of fact to be determined from the facts of the particular case.⁹⁴ Claims for disability resulting from infec-

tion out of a van, who told his doctor he had had an accident while at work, and returned to work in a bruised condition, and who died of pneumonia supervening on pleurisy caused by an injury, was caused by accident. *Wright v. Kerrigan* (1911) 4 B. W. C. C. 432, C. A. Where a workman, who was insured, but not against cases where death was due to "disease or other intervening causes," was thrown from his horse while hunting and wet to the skin, and in consequence of the loss of vitality, caused by the fall, took pneumonia on the way home, and died, the accident was the direct and proximate cause of his death. *In re Etherington & Lancashire & Yorkshire Accident Insurance Co.* [1909] 1 K. B. 591, C. A. Where two doctors testified that the death of a workman from pneumonia four years after an accident to him was due indirectly to the accident, and two others testified that the disease was due to lowered vitality caused by the accident, the decision that death did not result from the injury was sustained. *Taylorson v. Framewellgate Coal & Coke Co., Ltd.* (1913) 6 B. W. C. C. 56, C. A. Where a workman who was injured had his arm put into splints at a hospital and was then sent home, where he died later of pneumonia, the finding of the county court judge that his death did not result from his injury is conclusive. *Cameron v. Port of London Authority* (1912) 5 B. W. C. C. 416, C. A. Where an undertaker's assistant, part of whose duty was lifting coffins out of a van, came home from work in a bruised condition, and, after telling his doctor he had had an accident in moving a coffin, died of pneumonia supervening on pleurisy caused by an injury, the accident arose out of his employment. *Wright v. Kerrigan* (1911) 4 B. W. C. C. 432, C. A.

⁹⁴ Where a gas fitter, who inhaled coal gas, died a few days later from paralysis, due to cerebral hemorrhage, but had also had a previous attack of paralysis seven months before, the decision of the county court judge that death was not due to gas poisoning was the decision of a question of fact within his power and duty. *Dean v. London & North Western Ry. Co.* (1910) 3 B. W. C. C. 351, C. A. Where a workman was thrown out of a cart, and afterward was found dead of syncope in the road at the summit hill, but there was no direct evidence as to what caused the syncope, it was not proven that death resulted from the accident. *Powers v. Smith* (1910) 3 B. W. C. C. 470, C. A.

Abscess.—Where petitioner's arm was broken while he was in defendant's employ, and he was treated at a hospital and the fracture united, but an abscess developed on the fleshy part of the thumb, which resulted in ankylosis of the thumb, making it permanently useless, the permanent injury to the thumb was due to the accident. *Newcomb v. Albertson*, 85 N. J. Law,

tion are limited to cases where there has been some well-defined accident in which it was extremely probable that the infection origi-

435, 89 Atl. 928. Where an abscess forms as the result of a break in the callos on the palm of the hand, at some time during an employment, involving the continuous use of a hammer, even though the injured employé was not aware of the exact time when such break occurred, the use of the hammer was the proximate cause of the injury. *Zavella v. Naughton*, 2 Cal. I. A. C. Dec. 956.

Anthrax.—In *Eldridge v. Endicott-Johnson & Co.*, *The Bulletin*, N. Y., vol. 1, No. 8, p. 8, it was held that a workman's death from anthrax did not result from "an accidental injury arising out of and in the course of his employment and such disease or infection as may naturally and unavoidably result therefrom" (Wk. Comp. Act, § 3, subd. 7), where it appeared that he would have been immune from anthrax at the particular time when he contracted it, had it not been for a prior injury from being cut with the razor while being shaved.

Apoplexy.—Where a workman claimed to have been injured by the vibration of an automatic drill which he was operating, and died from a stroke of apoplexy, following either a collapse from an embolism or a prior stroke, and, though one might suspect that the shaking of the drill caused the apoplexy, such conclusion was purely conjectural, and the commissioner was unable to convince himself that such was the case, compensation was denied. *Mohr v. Frederick L. Cranford, Inc.*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 10.

Blood poisoning.—Where an employé's hand was bruised, while he was at work, from being caught between pieces of timber, and the results of the blood poisoning which set in were proximately caused by accident, the injury was compensable. *Great Western Power Co. v. Pillsbury*, 171 Cal. 69, 151 Pac. 1136, L. R. A. 1916A, 281; 2 Cal. I. A. C. Dec. 482. The evidence showed that the deceased employé died on June 24th from gangrene of the great toe spreading upward through the body, and that the toe was crushed by accident arising out of the employment on June 6th, the gangrene following in due course thereafter. The death was proximately caused by accidental injury arising out of the employment. *Meyer v. Pacific Light & Power Co.*, 1 Cal. I. A. C. Dec. 333. Where a workman sustains a slight wound upon his hand while at work, which results in blood poisoning, which is given proper medical treatment and pronounced cured, and a few days thereafter he becomes ill from a retrocecal abscess and subsequently dies, such evidence, in the present condition of medical knowledge upon the subject, is insufficient to establish as a fact that the retrocecal abscess and death were caused by the prior infection in the hand. *Olney v. West Side Lumber Co.*, 2 Cal. I. A. C. Dec. 272. In *Coffey v. Borden's Condensed Milk Co.*, 1 Conn. Comp. Dec. 167, where the employé's leg was broken by being struck by a piece of ice which slid down the chute, and he died in the hos-

pital of blood poisoning, the workman's poor physical condition contributing to his death, but the injury being the exciting and contributing cause, it was held that there was a causal connection between the injury and death. The claimant, the mother of the employé, did not present any evidence which would show that the general septicæmia from which he died had any causal relation with a personal injury arising out of and in the course of his employment. An investigation made by the Committee showed, however, that this condition was due to the injury. She was held to be entitled to compensation. *Silva v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 597 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.). The widow testified that on an occasion about two years before the date of the hearing the employé was bitten and poisoned by insects while in the performance of his work as janitor and caretaker, cleaning a cellar in connection with the property, and that his death was a result of the poisoning and infection from these insect bites. The evidence showed that death was due to chronic cardiac valvular disease, complicated by septicæmia, having no causal connection with the injury, as alleged. The Committee of Arbitration held that the death of the employé did not have a causal relation with the personal injury. *Campbell v. Aetna Life Insur. Co.*, 2 Mass. Wk. Comp. Cases, 701 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.). An employé sustained an injury to his foot while in the course of his employment, a gangrenous condition developed, and he died a month later; the immediate cause of death being "gangrene of leg, septicæmia." It was held the employé's death resulted from the injury to his foot. In *re Winnie Wilson*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 84. Where a workman injured his foot, and erysipelas, which is a very unusual consequence of such a wound, set in, causing blood poisoning, which in turn caused his death, the death resulted from the injury. *Dunham v. Clare*, [1902] 2 K. B. 292, C. A.

Boils.—Where an employé, whose duties were principally to wash dishes and peel and prepare vegetables for the cook in a restaurant, suffered a disability from the breaking out of boils on his hands, there being no evidence to show that any boils developed where he received any cuts or scratches or bruises, or any other injury that would admit of staphylococcus infection, the injury was held not compensable. *Rolph v. Morgan*, 2 Cal. I. A. C. Dec. 543.

Brain trouble.—Claimant was thrown from a scaffold upon which he was working by an engine running into it. He continued at work for some time after reporting to the yard dispensary, and subsequently developed brain trouble, causing incapacity. It was held that connection was sufficiently established between the injury and the incapacity caused by the brain trouble. In *re Smith*, Op. Sol. Dept. of L. 759. Where the employé, a strong and healthy workman, who had lost little time from sickness in many years of employment, felt a sudden severe pain in his head while lifting a heavy keg, and immediately and for some time thereafter suffered from mental derange-

ment and weakness, the Commission held upon conflicting medical evidence that his condition was caused by the injury. *Fowler v. Risedorph Bottling Co.*, *The Bulletin*, N. Y., vol. 1, No. 7, p. 7.

Cancer.—Where an employé having a small cancer in the stomach, of a character such as not to cause death for many years, received a heavy blow, which inflamed the cancer, increasing its size to such an extent as to obstruct the ducts of the gall bladder and liver, and death followed one month after the injury, the accidental blow was the proximate cause of the death. *Rose v. City of Los Angeles*, 2 Cal. I. A. C. Dec. 574. Where a workman, in climbing over a steam pipe, fell straddle of it, and burned the end of his penis, and several months later was disabled by epithelioma, or cancer of the penis, it was held on conflicting medical testimony, considering that both the accident and the disease were of very rare occurrence, that the disease was due to the accident. *Richardson v. Builders' Exchange Ass'n*, *The Bulletin*, N. Y., vol. 1, No. 10, p. 18. In *Marcontonio v. The Charles Francis Press*, *The Bulletin*, N. Y., vol. 1, No. 12, p. 16, where the employé claimed to have slipped on the stairs and injured his leg just 24 hours before he was found to have cancer of the bone, but the injury produced no discernible bruise, and medical evidence was that the disease could not have developed so soon after the accident, it was held that the claimant had not established the accident as the cause of his disease. Where a dock laborer was incapacitated for three months by being struck in the back, and, having two operations for cancer of the kidney, died from the after-effects of the second, and where the medical testimony was conflicting as to the origin of the cancer, there was sufficient evidence to support a finding of death resulting from the injury. *Lewis v. Port of London Authority* (1914) 7 B. W. C. C. 577, C. A.

Epileptic fit.—Where a workman had an epileptic fit, and the work that he was doing was of such a character that would contribute, or combined with the fit would cause, the injury or death, the employer was liable. *Op. Atty. Gen. on Minn. Wk. Comp. Act*, Bul. 9, p. 28.

Headache.—In *Stampick v. American Steel & Wire Co.*, 1 Conn. Comp. Dec. 474, where a workman claimed he had headaches which were due to his injury, and though this was possible, it was unsupported by evidence, it was held his burden of proof was not discharged.

Heart trouble.—Where an employé's impaired heart was further injured by her work, pulling a carpet, the injury resulted from her work as a proximate cause contributing thereto, though a healthy person would not have been affected by the muscular exertion required, by the work. In *re Madden*, 222 Mass. 487, 111 N. E. 379. The employé received a personal injury, which resulted from the slipping of a beer barrel and the striking of his left side against the tail board of his wagon with sufficient force to fracture a rib. This injury brought about a lesion of the heart, which grew progressively worse, no new cause intervening, until the date of his death. The widow

was entitled to compensation. *O'Hare v. Employers' Liability Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 369 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.). An employé received a personal injury early in May and complained of pain in his side. Relief was afforded by strapping, and the employé reported for work. Later, in September, he died from acute dilatation of the heart, due to uræmic poisoning, having no causal relation with the injury. The widow was held not entitled to compensation. *Lynch v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 591 (decision of Com. of Arb.). The employé was of frail physique prior to the time of the injury, but had been able to perform her usual arduous tasks in a cotton mill for many years. She was then totally incapacitated for a long time by reason of a fall to the floor of the factory in which she was employed, during which time compensation was paid by the insurer. Then compensation was suspended, on the ground that she was no longer incapacitated for work because of conditions due to the injury, but by reason of a heart condition having no causal relation thereto. The evidence showed, however, that there was a complete chain of causation between the personal injury received by her and her present condition, and the Committee of Arbitration held that the employé was totally incapacitated for work as a result of her injury. *Otot v. American Mutual Liability Ins. Co.*, 2 Mass. Wk. Comp. Cases, 254 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

Typhoid fever.—In *Tillman v. Sperry Engineering Co.*, 1 Conn. Comp. Dec. 408, where deceased was taken sick in a place where he was especially exposed to sunstroke, but there was practically no evidence of any stroke, death being due to typhoid fever, and there was no evidence available as to how the disease was contracted, it was held that the claimant had not established a causal connection between the death and the employment. Where, though the workman claimed his typhoid fever was contracted from drinking water in the defendant's camp, the evidence did not show that the germ causing the sickness came from the water supplied, or from whence it came, nor that at the actual time the disease was contracted the workman was performing service incidental to his employment, the facts were insufficient to show an accident arising out of the employment. *Dupreis v. Holt Lumber Co.*, Rep. Wis. Indus. Com. 1914-15, p. 32.

Ulcer.—Where medical testimony and examination showed an illness following a blow upon the stomach was due to ulceration of the stomach, and also that prior to the happening of the accident the injured employé had been treated for gastritis, the disability occasioned by the blow was due to natural causes. *McLean v. Brooks*, 2 Cal. I. A. C. Dec. 288. In *Melia v. Race Brook Country Club*, 1 Conn. Comp. Dec. 549, where the fracture of claimant's leg caused blebs and ulcers, and three months after they had apparently healed, but during which time claimant was under medical treatment for his leg, a deep-seated infection set in, the commissioner, considering all the circumstances, including the improbability of its being due to

nated.⁹⁵ A condition of osteo-arthritis found to be in existence for a time after an accident and to be complicating the results of the injury does not prevent such disability of the injured employé from being proximately caused by the accident.⁹⁶

§ 129. — When proximate cause of hernia—Proof

Whether hernia was proximately caused by accident depends on the facts of the particular case.⁹⁷ The presumption is against her-

any other cause in this case, held that the later infection was due to the injury.

Sciatica.—Where a workman who had never suffered from sciatica prior to the injury to his back, and after two weeks' work following five months' incapacity from the accident was compelled to quit work, and where the original lesion as indicated by the pain was somewhere in the sacroiliac region, and medical testimony was that there were a number of symptoms which appeared to indicate sacroiliac trouble, there was testimony to support the finding of the Commission that the second incapacity was due to the original injury. *Southwestern Surety Ins. Co. v. Pillsbury* (Cal.) 158 Pac. 762.

⁹⁵ *McDonald v. Dunn*, 2 Cal. I. A. C. Dec. 71. Where a chambermaid contracts dermatitis, which results in the infection of the hands, the resulting disability is not compensable, if there is no proof of accidental origin or of an opportunity for the infection to enter by accident. *Id.* Where a book-keeper received a slight scratch on his thumb, and three days later the thumb became very painful, and serious infection was found to exist, the infection is proximately caused by accidental injury arising out of the employment. *Jameson v. Bush*, 1 Cal. I. A. C. Dec. 507.

In *Gaherty v. International Silver Co.*, 1 Conn. Comp. Dec. 403, where the claimant attributed the infection, causing inflammation of his face and the loss of a finger, to water splashed on his face and hands while washing the seat of a toilet, while in respondent's employ, but it was impossible at the time of the hearing, some ten months after the injury, to determine the nature or cause of the infection, it was held the employé had not sustained the burden of proof upon him.

⁹⁶ *Carmicheal v. Hogrefe*, 2 Cal. I. A. C. Dec. 734.

⁹⁷ *Poppo v. Silver Palace Theatre Co.*, 2 Cal. I. A. C. Dec. 397.

Accident proximate cause of hernia.—Where a janitor, lifting a carpet weighing over 500 pounds, complained of sharp pain resulting from the strain, and immediately ceased work, and upon examination soon after by a physician of his employer he was found to have a slight rupture of possible

nia being so caused, and hence the burden of proof rests on the applicant to clearly show that the injury resulted from accident in-

immediate origin, the Commission held that the hernia was of traumatic origin, the proximate result of the strain, and was compensable. *Id.* Where applicant, in boring horizontal holes in the timbering of a building with a heavy electric boring machine, holds the machine against his groin, and after 12 days of such work a small inguinal hernia appears, due to the irritation, such hernia is proximately caused by accident sustained in the course of the employment. *Mandell v. Ætna Life Insurance Co.*, 1 Cal. I. A. C. Dec. 265. A woman employé in poor health, while operating an addressograph machine by a foot lever, felt a sudden pain in her side and had to stop work. It was held that the protrusion which soon after developed in the right side was a hernia, resulting from the accident. *Bertram v. Crocker Co.*, 2 Cal. I. A. C. Dec. 351. Where no unusual effort has been exerted, and the evidence of traumatic origin is slight, though a hernia is found to exist, such hernia is not proven to have arisen from accident. *Covert v. Goldstone*, 1 Cal. I. A. C. Dec. 618. Where a linotype operator who had suffered from a hernia claimed that two later hernias were caused by a strain when he was trying to recover from a fall while carrying a heavy machine, and the evidence showed very mild symptoms of hernia after the alleged injury, such evidence is insufficient to establish the accident as a proximate cause of the injury. *Sef-ton v. Midway Driller Publishing Co.*, 2 Cal. I. A. C. Dec. 987. In *Maloney v. Waterbury Farrel Foundry & Machine Co.*, 1 Conn. Comp. Dec. 220, where the deceased workman felt a sudden pain while lifting a heavy crank shaft, and after working for part of the week with continual pain was found to have an inguinal hernia, it was held he had sustained a compensable injury. In *Wentworth v. Chamberlain Co.*, 1 Conn. Comp. Dec. 588, where the claimant strained the ligaments of his back, but such injury did not prevent his working, though causing pain and inconvenience, and eleven days later, while handling a heavy keg, the employé so aggravated his weakened condition that total incapacity resulted, it was held the injury occurred on the date of the first strain. In *Massa v. Crowe*, 1 Conn. Comp. Dec. 86, it was held that where the claimant, while lifting a heavy piece of granite, felt a sudden pain in the pelvic region, compelling him to stop work, and on an operation for hernia the surgeon found evidence that the hernia was of recent origin, the injury was compensable.

Pre-existing hernia.—Where a workman became sick and suffered a pain in the groin after helping to lift a heavy truck, and was found to be suffering from an old hernia, but argued that a new hernia had been caused by the strain, it was found as a fact that the incapacity resulted from the old hernia, and not from the accident. *Legge v. Nixon's Navigation Co., Ltd.* (1914) 7 B. W. C. C. 521, C. A. Where the applicant sustained an accidental hernia at the exact site of a prior hernia, which had been successfully operated on

stead of being merely coincidental with it.⁹⁸ It is not sufficient to establish as a fact that a hernia or the strangulation of a hernia is

eight years before, and had worked continuously since then as a laborer without noticing any ill effects from the operation, the later hernia is proximately caused by the accident, and cannot be attributed to the earlier hernia and operation. *Boggeln v. Coronada Hotel*, 1 Cal. I. A. C. Dec. 276. Where an employé, injured in an automobile accident, makes little complaint of his injuries at the time, and under pressure of necessity keeps at work for some weeks thereafter, until taken ill with strangulated hernia, death resulting from such strangulation, and it is shown that some years prior to the happening of the accident the employé had been operated upon for appendicitis and that that wound had not entirely healed, leaving a slight hernia, and that such hernia had become aggravated at about the time of the automobile accident, such evidence is insufficient to establish the death as a result of the automobile accident. If the hernia previously in existence had been substantially increased by the accident, the pain at the time of the tearing of the wider aperture would have been too excruciating and continuous to have allowed the deceased to go on with his work for some time thereafter. *Kiernan v. Turlock Irrigation District*, 2 Cal. I. A. C. Dec. 259. In *Aquilano v. Lambo*, 1 Conn. Comp. Dec. 145, where a workman with a prior gradually developing hernia was thrown forcibly against the side of a ditch he was digging by the caving in of the opposite bank, and shortly after was found to have an irreducible hernia, it was held that there was a causal connection between the employment, the injury, and the hernia, and that hence it arose out of his employment; the Commissioner saying: "The question is: Can it fairly be said that there is shown to exist any causal connection between the employment of the claimant prior to the injury, his injuries, and his present condition?"

Where an operation for a hernia results in a second operation for a paralysis of the bowels and culminates in death, an award for a death benefit should be given if the first operation were necessitated by accident arising out of and occurring in the course of the employment. *Hartford Accident & Indemnity Co. v. Bono*, 2 Cal. I. A. C. Dec. 668.

⁹⁸ *Toney v. Williams*, 1 Cal. I. A. C. Dec. 348; *Hagen v. Weinstein Co.*, 1 Cal. I. A. C. Dec. 615; *Mifsud v. Palace Hotel Co.*, 1 Cal. I. A. C. Dec. 37. There must be direct and positive testimony to establish the accidental character of a rupture. It is usually the result of disease or abdominal weakness. The accident is usually the occasion rather than the cause of the injury. *Hertert v. Wood Lumber Co.*, 1 Cal. I. A. C. Dec. 58. To establish the fact of hernia caused by accident arising out of the employment, it is necessary for the injured employé to show that the injury caused immediate disability by reason of the pain at the time of the accident. Where the accident is followed by a later development of hernia, the accident must usually be regard-

coincident with lifting or other laborious service, but it must be clearly established that the lifting or other laborious service was

ed as the occasion rather than the cause of the injury. *Jost v. General Electric Co.*, 1 Cal. I. A. C. Dec. 527.

Proof of proximate cause of hernia.—Inguinal hernia is often a matter of slow growth and prenatal tendencies, although it may be caused by a strain or other injury. As it rarely develops in the absence of a prenatal tendency, strong proof is always to be required to establish an industrial accident as its cause. Where the applicant cannot remember any occasion of strain or injury at the time his hernia was developing, the evidence is insufficient to establish an injury in the course of his employment as the cause thereof. *Cieck v. Standard Oil Co.*, 1 Cal. I. A. C. Dec. 135. Where an employé testifies that he suddenly felt a sharp pain in his groin while doing some heavy lifting, and employé left work immediately, making complaints to others of the happening of an accident, and where he reaches his home in considerable agony, and his condition is diagnosed by a physician, called in at once, as strangulated hernia, and the testimony of the physician, who later operated for the cure of the hernia, does not definitely establish that the hernia was of either new or older origin, the evidence is sufficient to warrant a finding that the hernia was proximately caused by accident. *Jorgensen v. Healy-Tibbitts Construction Co.*, 2 Cal. I. A. C. Dec. 46. Where the physicians who performed an operation to cure hernia testify that it was not of recent origin, this being shown by the character of the adhesions surrounding the rupture, although, on the other hand, another physician, who made a physical examination of applicant for a lodge shortly before the alleged accident, testifies that applicant had no hernia at that time, and applicant testifies that he received the hernia at the time of lifting a large rock in the course of his employment, the evidence is insufficient to establish such lifting as the proximate cause of the hernia. The medical advice of the Commission is that the evidence supplied by an operation is in all such cases the best evidence, and to be preferred to that of any physical examination separate from the operation. *Puljevich v. Lime Rock Sugar Co.*, 1 Cal. I. A. C. Dec. 165. In practically all cases where it is alleged that hernia was produced by an accident, the California Commission will not find that the hernia was caused by the accident, unless it is attended by a sufficient degree of shock and pain to wholly incapacitate the injured person from going on with his work that he was doing prior to the accident. All such hernias, not attended by sufficient symptoms, are to be regarded as occasioned, rather than caused, by the accident. *Ash v. Barker*, 2 Cal. I. A. C. Dec. 577. Where the evidence shows that a hernial sac had developed long before the accident and had been filled with fat, and that it remained only for an extraordinary strain of lifting to push the gut into the sac and create a hernia, such evidence is insufficient to establish an industrial accident as the cause of a hernia. The accident was

the actual cause.⁹⁹ Unless an accident or strain alleged to have caused a hernia was particularly violent, or was followed immedi-

held to be the occasion, and not the cause, of the hernia. *Jost v. General Electric Co.*, 1 Cal. I. A. C. Dec. 527. Where the employé continued to work within a few minutes after a strain sustained in lifting a heavy box, and for two days thereafter, suffering practically no pain, the hernia then discovered is not proved to be the proximate result of the accident. *Roesch v. Reo Pacific Co.*, 2 Cal. I. A. C. Dec. 486. Where at the time of the accident there is a sufficient degree of pain and shock to necessitate the employé's stopping work immediately, this is regarded as presumptive evidence of the existence of traumatic hernia, which evidence will be strengthened if an examination of the exterior shows extravasation of blood and tenderness on manipulation. The proof will be regarded as conclusive if, upon operation, lacerations are found in the inguinal canal. *Hartford Accident & Indemnity Co. v. Bono*, 2 Cal. I. A. C. Dec. 668. It will be presumed that in all cases of hernia there is a congenital weakness present, or else such hernia would not result in the absence of trauma definitely tearing the bowel or abdomen in some direct manner. Nevertheless, where the onset of the hernia is itself accompanied by sufficient pain and suffering to immediately cause the applicant to cease work, an award for compensation is often made, unless the findings at the operation are against the injured employé. *Kavas v. Northern Electric R. Co.*, 2 Cal. I. A. C. Dec. 196. Where there is conflicting testimony as to whether a hernia sustained by an employé was in fact an old condition or recently caused by accident, and the testimony of the applicant shows sufficient pain and disability at the time of the accident to ordinarily establish an accidental hernia, but the physician operating for its cure testifies that the operative findings showed the hernia to be an old one, preference will be given to the testimony of the operating physician, and no compensation will be allowed. The policy of the Commission in nearly all cases is to accept as conclusive the findings of the operating surgeon, if definite. *Id.* Where the evidence shows that deceased had done some heavy lifting on the morning he was taken sick, that he was taken violently ill with strangulated hernia on the afternoon of the same day, that he had not complained of hernia or other trouble as long as applicant had known him, several years, and the medical testimony is that the hernia was of very recent and accidental origin, and it was entirely possible for it to have been caused by lifting on the morning of the day alleged, such evidence is sufficient to warrant a finding that the hernia was caused by accidental injury sustained in the course of the employment of deceased, even though a strangulation does not usually follow closely upon the occurrence of a hernia. *Andreini v. Cudahy Packing Co.*, 1 Cal. I. A. C. Dec. 157.

⁹⁹ *Andreini v. Cudahy Packing Co.*, *supra*.

As said by Commissioner Chandler: "While there is a consensus of medi-

ately by severe pain, it cannot be said to be a probable cause, and the hernia must be held due to predisposition.¹ Evidence showing that the workman had a strong predisposition to hernia, and did not suffer any severe pain at the time of the accident, such as disabled him, does not establish the accident as the cause as distinguished from the occasion of the hernia. As said by the California Commission, it would be unjust to charge the industry with the cost of an operation to remedy a physical defect which was probably at least nine-tenths constitutional, and which probably would have manifested itself sooner or later upon very much slighter provocation.² But where the workman is found after an elevator accident to be suffering from inguinal hernia, and it also appears that from birth he had an undescended testicle which readily slipped back and forth through the hernial ring, greatly predisposing him to inguinal hernia, such predisposition will not bar him from compensation for the hernia if the evidence is sufficient to establish the accident as the immediate cause thereof.³ Where an employé is supposed to have sustained a hernia while doing heavy lifting, and the medical testimony taken following an operation for a cure shows that no hernia in fact existed, but that a congenital condition was present which had been aggravated by the accident, though not caused by it, that inability to labor following the accident did not last more than fourteen days, and that the operation was not performed to remedy a present condition of disability, but solely to repair permanent condition supposed to be due to the accident, the employé is not entitled to compensation.⁴

cal opinion that practically all inguinal hernia is either congenital or of slow development, there is also a general agreement among such authorities that the occasion or exciting cause of such hernia is frequently a strain or blow." *Massa v. Crowe*, 1 Conn. Comp. Dec. 86.

¹ *Kozlowski v. Illinois Steel Co.*, Rep. Wis. Indus. Com. 1914-15, p. 19.

² *Toney v. Williams*, 1 Cal. I. A. C. Dec. 348.

³ *Steinat v. German General Benevolent Society*, 1 Cal. I. A. C. Dec. 280.

⁴ *Kennedy v. Utah Construction Co.*, 2 Cal. I. A. C. Dec. 60.

Hernia as the result of accident appeared as a problem in Oregon, as in other states. The Oregon Commission early took the position that a claimant must satisfy the Commission that hernia resulted or developed through accident, and also furnish affidavits to the effect that hernia had not existed prior to the accident.⁵

In response to medical criticism of the theory of rupture by strain or exertion, the Washington Industrial Insurance Commission adopted rules requiring proof in cases of claims predicated on hernia: (1) That its origin was recent; (2) that it was accompanied by pain; (3) that it was immediately preceded by accidental strain in hazardous employment; and (4) that it did not previously exist. Similar rules have been adopted elsewhere. Notwithstanding the criticism calling forth these rules, they impliedly admit possibility and probability of rupture from a strain, when the strain and the rupture are in close relation.

§ 130. — Insanity

Where an employé becomes insane as the result of an injury,⁶ or following great excitement and mental shock incident to the peril of attempting the rescue of fellow workmen, in the course of his employment, and such excitement is shown to be an effective cause of the mental breakdown, and no intervening cause for insanity or insane condition or predisposition thereto prior to the accident is shown, the accident is the proximate cause of the insanity.⁷

⁵ First Annual Rep., Ore. Indus. Acc. Com. June 20, 1915, p. 18.

⁶ An employé received an injury to his hand by striking a rusty pipe, and blood poison set in, and thereafter he was taken to a hospital for treatment. The testimony of a physician showed that as a result of blood poison his mind became unbalanced, and that, during the night, he ran out of the hospital and disappeared, and that on the following morning his dead body was found on the railroad track. The Board held that there was a sufficient connection between the injury, infection of the hand, and subsequent death on the railroad track, to establish that the death of the man was the direct result of the accident sustained by him during the employment. *Chiesa v. United States Crushed Stone Co.*, Bulletin No. 1, Ill., p. 82.

⁷ *Reich v. City of Imperial*, 1 Cal. I. A. C. Dec. 337.

Where, however, immediately following an accidental injury, which in its nature would not have caused a disability of more than three weeks, the employé develops insanity, and the medical evidence shows that he was in a positive syphilitic condition, the proximate cause of the insanity, the accident is not the proximate cause of the continuing disability.⁸

§ 131. Resulting incapacity or death

Compensation is payable only in case of death or incapacity for work, total or partial, as a result of the injury,⁹ as hereinbefore noted¹⁰ without the intervention of an independent cause the separate consequences of which admit of definite ascertainment.¹¹ That the result was improbable or unexpected will not prevent recovery.¹² It is sometimes difficult to determine at what point in the chain of causation causes cease to be proximate and become remote, or cease to be remote and become proximate. The determination of the proximate or remote nature of any incident in the chain of causation must be determined from the facts of each par-

⁸ *Hansen v. Patterson Ranch Co.*, 2 Cal. I. A. C. Dec. 769.

⁹ Where a workman who burnt his arm was given light work, and five years later applied for arbitration, and the medical assessor found general physical weakness, which, however, he found was not due to the accident, the incapacity did not result from the injury. *Huggins v. Guest, Keen & Nettlefolds, Ltd.* (1913) 6 B. W. C. C. 80, C. A. Where a miner 63 years of age was injured, and on account of his age and constitution his enforced idleness caused him to become so obese that he was only fit for some sedentary occupation, the incapacity resulted from the accident. *Clark v. Taylor & Co.* (1914) 7 B. W. C. C. 856, Ct. of Sess. 871, H. L.

¹⁰ See § 127, ante, and footnote 85 thereunder.

¹¹ *Ruth v. Witherspoon-Englar Co.*, 98 Kan. 179, 157 Pac. 403. Where a teamster, through loss of memory due to a prior accident, wandered away from his wagon and fell into a swamp, and died from pneumonia resulting from the exposure, his death did not arise out of his employment. *Milliken v. A. Towle & Co.*, 216 Mass. 293, 103 N. E. 898, L. R. A. 1916A, 337.

¹² *Fleet v. Johnson & Sons* (1913) 6 B. W. C. C. 633.

ticular case. No general rule can be laid down.¹³ It is generally a mixed question of law and fact. Where death ensues, it is not material whether that was the reasonable and likely consequence; the only question being whether in fact death resulted from the injury. When that is established as the cause, then the right to compensation is made out. If the connection between the injury as the cause and the death as the effect is proven, then the dependents are entitled to recover, even though such a result before that time may never have been heard of and might have seemed impossible. The material inquiry relates solely to the chain of causation between the injury and the death.¹⁴ The mere fact that there have inter-

¹³ *Hughes v. Degen Belting Co.*, 1 Cal. I. A. C. Dec. 203. Whether a workman's death resulted from an accident arising out of his employment is a mixed question of law and fact. *Schmoll v. Weisbrod & Hess Brewing Co.* (N. J. Sup.) 97 Atl. 723.

¹⁴ (St. 1911, c. 751, pt. 2, § 6) *In re Sponatski*, 220 Mass. 526, 108 N. E. 466. L. R. A. 1916A, 333; *Dunham v. Clare*, [1902] 2 K. B. 292; *Ystradowen Colliery Co., Ltd., v. Griffiths*, [1909] 2 K. B. 533.

"The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken, so that the old cause goes out and a new one is substituted for it—that is, a new act which gives a fresh origin to the after consequences—then death is not the result of the original accident. If no new act intervenes, death has in fact resulted from the injury." *Peck v. San Francisco-Oakland Terminal Rys.*, 1 Cal. I. A. C. Dec. 462, approving *Dunham v. Clare*, *supra*. That which, following in a natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred, is the proximate cause of such event. Where the event is certain without the occurrence of the accidental injury, such injury is not a proximate cause of the event (death), even though it accelerated it. *Waldman v. Hermann*, 1 Cal. I. A. C. Dec. 82. Though the efficient cause—the one setting in motion the various physical factors whose unbroken sequence of development results in injury or death—is a trivial event in itself, nevertheless, where there is evidence to support its probability, and none to establish the contrary, the accident is the proximate cause of the injury and death. *Johnson v. Southern Cal. Box Factory*, 1 Cal. I. A. C. Dec. 577.

Where a patient was recovering normally from an amputation of the leg necessitated by an accidental crushing, followed by a septic condition, which healed, and 24 days after the operation he suddenly died, and it was found that his death was caused by an embolism resulting from the septic condition,

vened between the wrongful cause and the injurious consequences acts produced by the volition of animals or of human beings does not necessarily make the result so remote as to preclude recovery. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable con-

which in turn was the result of the accident, the death resulted from the accident. *Akins v. Pac. Light & Power Corp.*, 2 Cal. I. A. C. Dec. 985. Where an employé was suffering from old age, paralysis agitans, and chronic myocarditis, and the testimony of attending physicians was that these diseases were certain to cause death before long, but that, barring accidents, the employé might have lived for many months, or even for some years, and such employé was injured by accident while working at his employment, receiving a fracture of the femur, and died six weeks later from the combined result of all the causes mentioned, such accidental injury was held to have been a proximate cause of the death, and compensable. *Hughes v. Degen Belting Co.*, 1 Cal. I. A. C. Dec. 203.

A blacksmith was kicked on the right hand by horse while he was attempting to fit a shoe on said horse, and was incapacitated for work for a period of about a month, after which he resumed his regular employment. Shortly afterwards he became ill, and died in the hospital a day later from a perforated ulcer of the stomach. The medical evidence showed that there was no causal relation between the ulcer and the injury. The Commission held that the death of the employé did not result from a personal injury arising out of and in the course of his employment. *Twoomey v. Royal Indemnity Co.*, 2 Mass. Wk. Comp. Cases, 540 (decision of Com. of Arb.).

A workman, suffering with hernia as the result of an accident, was taken to the hospital and operated on; but, owing to his poor physical condition, only an old hernia was operated on. A later operation was performed, and in recovering from the latter he contracted pneumonia and died. His death resulted from the injuries received in his employment. *Moore v. William Harkin & Sons*, 4 N. Y. St. Dep. Rep. 383.

Where the workman while in the hospital for treatment for his injury, contracted tonsilitis, which was epidemic in the ward, and which was the immediate cause of his death, his paralytic condition making treatment for the tonsilitis difficult and contributing to the seriousness of the disease, it was held that his death was proximately caused by the injury. *Keehan v. City of Milwaukee*, Bul. Wis. Indus. Com. 1912-13, p. 24.

Where a carman was taken to a hospital following a fall from his van, and died there three weeks later, but there was no medical evidence as to the cause of the death, the doctor who attended him being abroad at the time of the trial, it was held there was no evidence that death resulted from the accident. *Honor v. Painter* (1911) 4 B. W. C. C. 188, C. A.

nection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues.¹⁵ For example, where the employé had sustained a mortal injury, one from which death must sooner or later occur, a fracture of the spine with a severance of the spinal cord, which caused not only a complete paralysis of the lower limbs, but a loss of power and sensation below the seat of injury, and he was obliged to lie in bed in one position, in consequence of which an extensive bed sore developed, bringing about blood poisoning, the immediate cause of his death, the death resulted from the injury.¹⁶ On the other hand, to use the language of an English case, the question in case of death is not whether the accident was responsible for the death, but whether death resulted from the accident.¹⁷ Suppose a workman has met with an accident and has been put on a stretcher to be removed to the hospital, and on the way to the hospital is killed by lightning, or is shot by a lunatic, or is run over by a vehicle. In all these cases it could truly be said that but for the accident the man would not have died at the time at which and in the way in which he did die, because, if the accident had not happened, the man would have been at work, and not on the stretcher. But, nevertheless in all these cases a new cause was introduced and it would be out of the question to say that death resulted from the accident.¹⁸ In a case decided by the Court of Appeals under the English Workmen's

¹⁵ *In re Burns*, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787; *McDonald v. Snelling*, 14 Allen (Mass.) 290, 92 Am. Dec. 768. Where the tip of a workman's crushed finger was amputated, but adhesions remained, and the employers applied for review on the ground that the work would have broken down the adhesions, and just three days before the hearing the man submitted to a further amputation, there was incapacity resulting from the injury. *Burgess & Co., Ltd., v. Jewell* (1911) 4 B. W. C. C. 145, C. A.

¹⁶ *In re Burns*, *supra*.

¹⁷ *Dunnigan v. Cavan & Lind* (1911) S. C. 579, Ct. of Sess.

¹⁸ *Id.*

Compensation Act, wherein it appeared that the injured workman, though he had recovered from the immediate effects of the injury, had never recovered his normal health, but continued to be weak and debilitated, that thirteen months after the accident he died from bronchitis following an attack of influenza, and that it was by reason of the weakened condition to which the accident had reduced him that the bronchitis proved fatal, the court held that the death resulted from the injury.¹⁹

§ 132. Suicide

Where there follows as the direct result of a physical injury an insanity such as to cause the workman to take his own life through an unaccountable impulse or in a delirium of frenzy without conscious volition to produce death, having knowledge of the physical consequences of the act, there is a direct and unbroken connection between the injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary willful choice determined by a moderately intelligent mental power which knows the purpose and the physical effect of the suicidal act, even though choice is dominated by a disordered mind, then there is a new and independent agency, which breaks the chain of causation arising from the injury.²⁰ Where there is no evidence tending to suggest

¹⁹ *Thoburn v. Bedlington Coal Co.*, 5 *Butterworth's Compensation Cases*, 128. The same principle was upheld in *Dunham v. Clare*, [1902] 2 K. B. 292, in which the death for which compensation was allowed was brought on by a supervening attack of erysipelas, but was found to have been the result of the preceding injury. See, also, *Ystradowen Colliery v. Griffiths*, [1909] 2 K. B. 533.

²⁰ (St. 1911, c. 751) *In re Sponatski*, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333.

Before an employé had completely recovered from temporary total disability caused by an accident in the course of his employment, he suddenly became insane and was committed to an asylum. The wound received had healed at the time of his becoming insane, and there was nothing to indicate that the insanity resulted from the wound. The Commission held that the disability resulting on account of the insanity did not result from an injury

either suicide or homicide, the presumption is that the deceased did not commit suicide.²¹ It has been held that, where a workman who had been injured in the head was eight months later found drowned in a canal, the fact that he had become depressed and irritable as a result of his injury was not evidence that he had committed suicide;²² also that, where a workman became depressed, worried, and in pain because of an accident to his eye, and committed suicide, there being no evidence of insanity except the suicide itself, there was no evidence to support the finding of the trial judge that the man killed himself during a fit of insanity caused by the accident.²³

§ 133. Aggravation of existing disease

Where, but for the accident, the person would not have died at the time at which, and in the way in which, he did die, the accident must be held to have been the cause of his death,²⁴ though it merely accelerated a pre-existing disease.²⁵ For example, the

sustained in the course of employment. In *re Charles Ebner*, vol. 1, No. 7, *Bul. Ohio Indus. Com.*, p. 47.

Where a sheriff-substitute dismissed as irrelevant the claim of a widow of a workman who, after losing the sight of one eye, had the other also injured, becoming almost blind, and, being alleged to have become insane, committed suicide, the court held, on appeal, that there was evidence which entitled the claim to be considered. *Malone v. Cayzer, Irvine & Co.* (1909) 1 B. W. C. C. 27, Ct. of Sess.

²¹ *W. R. Rideout Co. v. Pillsbury* (Cal.) 159 Pac. 435.

²² *Southall v. Cheshire County News Co., Ltd.* (1912) 5 B. W. C. C. 251, C. A.

²³ *Grime v. Fletcher* (1915) 8 B. W. C. C. 69, C. A.

²⁴ *Golder v. Caledonian Ry. Co.* (1903) 5 F. 123, Ct. of Sess.

²⁵ Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment because it develops within it. When the exertion of the employment acts upon the weakened condition of body of the employé, or upon an employé predisposed to suffer injury in such a way that a personal injury results, the injury must be said to arise out of the employment. An employé may be

fact that a miner permanently incapacitated by an accident had heart disease, which would have incapacitated him even if there

suffering from heart disease, aneurism, hernia, or other ailment, and the exertion of the employment may develop his condition in such a manner that it becomes a personal injury. The employé is then entitled to recover for all the consequences attributable to the injury. *Hartz v. Hartford Faience Co.*, 99 Conn. 539, 97 Atl. 1020. In *Lynch v. Great Atlantic & Pacific Tea Co.*, 1 Conn. Comp. Dec. 163, where claimant, a boy of 17, had sustained injuries while assisting in the delivery of a barrel of flour which aggravated a disease of the spine and caused a breakdown, resulting in paralysis of the lower extremities of the spinal cord, he was awarded compensation for the period of his injury in advance of what the natural progress of the disease would have caused. In *Griffin v. A. Roberson & Sons*, *The Bulletin*, N. Y., vol. 1, No. 10, p. 18, where the injury brought into activity a partially latent case of Bright's disease and hastened it to its fatal close, compensation was awarded. In *Roman v. American Steel & Wire Co.*, 1 Conn. Comp. Dec. 566, where the claimant's traumatic neuritis, due to the injury, was aggravated by a malformation of the septum and his nervous condition, it was held that these disabilities did not bar or lessen compensation.

While compensation will in some cases be awarded where constitutional maladies are aggravated by an accident arising out of the employment, the Commission will be conservative in concluding that the injury was the proximate cause of such disability. *Ash v. Barker*, 2 Cal. I. A. C. Dec. 139.

Where a cook on a lighter overexerted himself while removing his effects from the sinking ship, and died soon after of heart disease hastened by such overexertion, the accident was the cause of his death, since any act which would have been reasonable for any one to do when leaving a sinking ship, which was his temporary home, was within the scope of his employment. In *re Brightman*, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321.

Even though a diseased condition of the workman's veins existed before the accident, compensation may be awarded if the injury hastens to a fatal close the disease with which he was afflicted. *La Fluer v. Wood*, *The Bulletin*, N. Y., vol. 1, No. 7, p. 7. Where there was medical evidence that death was due to typhoid fever, accelerated and hastened to a fatal close by the injury, compensation was awarded on the ground that the disease was one such as "may naturally and unavoidably result" from the injury. *Balks v. Adams Express Co.*, *The Bulletin*, N. Y., vol. 1, No. 7, p. 9. Where though a workman had a cancer prior to the accident, it was undeveloped, and he had been in good health and had passed an insurance examination shortly before, and the medical testimony was that such a cancer might have continued for a long time without causing illness, the workman having died very shortly after the accident from hemorrhage due to the cancer, it was held the accident increased the virulence of the cancer and caused death to occur

had been no accident, did not establish that the incapacity did not result from the injury.²⁶ Also, where an injury to a miner's right eye rendered that member practically useless, but he could have resumed his former work but for the fact that the other eye was affected by nystagmus, which was neither caused nor aggravated by the accident, the incapacity was one which resulted from the injury.²⁷ And, where an industrial accident causes a tubercular con-

sooner than it would otherwise have done, and therefore that the case was compensable. *Blatt v. Schoneberger & Noble*, *The Bulletin*, N. Y., vol. 1, No. 6, p. 10.

Where a workman, in a weakened condition on account of a previous operation, was struck in the side by a crane hook, the blow not being sufficient in itself to cause the empyema which followed, but exasperating or hastening the disease, the blow was the proximate cause of the injury. *Bakiewicz v. National Brake & Electric Co.*, *Rep. Wis. Indus. Com.* 1914-15, p. 11.

Death resulted from the accident where a workman suffering from nephritis was injured, and his death, which occurred some time later, was accelerated by the shock of the accident (*Golder v. Caledonian Ry. Co.* [1903] 5 F. 123, Ct. of Sess.), and where, although a workman's brain, liver, and stomach were diseased by excessive use of alcohol, and an accident which he suffered caused his death to occur sooner than it would probably otherwise have done (*Connell & Co. v. Barr* [1904] 116 L. T. 127, Ct. of Sess.). Incapacity likewise resulted from the injury where a workman, receiving part compensation for an injury, was incapacitated for work by the supervention of a cardiac affection not shown to have been connected with the injury (*Quinn v. McCallum* [1908] 46 S. L. R. 141, Ct. of Sess.), and where a workman had his hand jarred, and, largely because of his gouty constitution, it was injured (*Lloyd v. Sugg & Co., Ltd.* [1900] 2 W. C. C. 5, C. A.).

²⁶ *Harwood v. Wyken Colliery Co., Ltd.* (1913) 6 B. W. C. C. 225, C. A.

²⁷ *Lee v. Baird & Co., Ltd.* (1909) 1 B. W. C. C. 34, Ct. of Sess.

In *Hatch v. I. Newman & Sons*, 1 Conn. Comp. Dec. 65, where it was shown that an accidental fall aroused an inactive and latent condition of tuberculosis, so that the claimant was totally incapacitated thereby, but that the tubercular condition would have become active in about a year of itself, had not the accident occurred, compensation for one year of incapacity was awarded.

Where the workman had a latent tubercular condition from childhood, but had sufficient recuperative vitality to recover from two other accidents, after the latter of which he did not go back to work, but went to the home of his sister, where he rapidly declined and finally died of pulmonary tuberculosis, his death was the natural and unavoidable result of the injury.

dition, which has long been quiescent, to spring into renewed activity by reason of the shock and shaking up caused by the accident, the subsequent illness due to the renewed tubercular infection is proximately caused by the accident, and compensation can be awarded therefor.²⁸ Acceleration of death from delirium tremens, through an injury bringing on or aggravating the condition of alcoholism or tremens, has been held to sustain liability for the death as produced by the injury both in court actions and under the Compensation Acts.²⁹ On the other hand, if there previously existed a diseased condition which would of itself have soon resulted in a disability, an event that brings on such disability is not a proximate cause, but a mere incident thereof.³⁰ Where an em-

Nelson v. Thomas McLarnon & Co., Inc., *The Bulletin*, N. Y., vol. 1, No. 10, p. 19. Where the workman had tuberculosis prior to the injury, but his condition was accelerated by a blow on the chest from a piece of the grindstone, which broke while he was using it, the injury was held to be the cause of disability. Backman v. Dwight Devine & Sons, *The Bulletin*, N. Y., vol. 1, No. 10, p. 17.

²⁸ Maurmann v. Chirhart & Nystedt, 1 Cal. I. A. C. Dec. 499. An employé was afflicted with tuberculosis prior to the date on which he claimed he received a personal injury by reason of exposure in an unoccupied house in which he was employed as a painter, the temperature on that day being 32 degrees above zero. The windows were open and some of the doors were down during the period of his employment there. It was held that the tuberculosis was not materially accelerated by the alleged personal injury. Fralin v. U. S. Casualty Co., 2 Mass. Wk. Comp. Cases, 758 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

²⁹ McCahill v. New York Transportation Co., 201 N. Y. 221, 94 N. E. 616, 48 L. R. A. (N. S.) 131, Arn. Cas. 1912A, 961; Carroll v. Knickerbocker Ice Co., 169 App. Div. 450, 155 N. Y. Supp. 1; Winters v. New York Herald (Sup.) 155 N. Y. Supp. 1149; Sullivan v. Industrial Engineering Co. (Sup.) 158 N. Y. Supp. 970.

Compensation may be awarded for death due to delirium tremens, produced by injury to one whose system is in such a condition from the constant use of alcoholic liquor that an injury is likely to produce such result. Minnis v. Young, *The Bulletin*, N. Y., vol. 1, No. 10, p. 14.

³⁰ Allen v. Southwestern Surety Insur. Co., 1 Cal. I. A. C. Dec. 67.

Disability may properly be ascribed to a pre-existing condition or ailment, if the injury is slight and the condition or ailment is known to have existed

ployé sustains a very slight blow to his leg not sufficient to do more than bruise and break the skin of a normal person, but by reason of a syphilitic condition his bones have become very brittle, and he sustains a fracture because of the said slight blow, the employer is not liable.³¹ Likewise where the death of employé from heart disease is certain to occur within a comparatively short time, and such death is hastened by a fall received in the course of his employment, but no symptoms of heart shock appear until nine days after the fall, and after the noticeable physical injuries caused by the accident are healed, such accident cannot be said to be proximate cause of the death.³² To charge a disability to a pre-existing condition, such condition must be established to a reasonable certainty.³³

§ 134. Aggravation of injury after accident

The rule to be applied where it is charged that the workman has aggravated the injury thus causing his disability is that which governs in an action at law for damages for personal injuries. The injured workman must do nothing to aggravate his condition or prevent his recovery. In an action at law, when the plaintiff has proved the liability of the defendant and the resulting injury to the plaintiff, and defendant claims that the disability has been aggravated and a cure prevented by the neglect of the plaintiff, defendant must show those facts as matters of defense, and all doubts relative thereto should be resolved in favor of the plaintiff.³⁴ As said by Judge Rosenberry: "The proposition that an

at the time of the injury. *Snyder v. Pacific Tent & Awning Co.*, 3 Cal. I. A. C. Dec. 1.

³¹ *Spangler v. Philbin*, 2 Cal. I. A. C. Dec. 158.

³² *Waldman v. Hermann*, 1 Cal. I. A. C. Dec. 82.

³³ *Snyder v. Pacific Tent & Awning Co.*, 3 Cal. I. A. C. Dec. 1.

³⁴ *Corral v. William H. Hamlyn & Son* (R. I.) 94 Atl. 877.

In *City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253, the court said in reference to this question: "It is here claimed that the

applicant, under the provisions of the humane law, may create, continue, or even increase his disability by his willful, unreasonable, and negligent conduct, claim compensation from his employer for his disability so caused, and thereby cast the burden of his wrongful act upon society in general, is not only utterly repugnant to all principles of law, but is abhorrent to that sense of justice common to all mankind." ³⁵ Where a workman whose arm has been broken

negligence of the plaintiff contributed, not to the cause, but to the aggravation, of the injury, and is certainly not an element which the plaintiff should be required to prove to entitle her to recover, but it is clearly a matter of defense, and the burden of proving it should rest upon the defendant." This principle has been applied in cases under Employers' Liability Acts in *Marshall v. Orient Steam Navigation Co.*, 3 B. W. C. C. 15, and *Quinn v. McCallum*, 2 B. W. C. C. 339.

³⁵ *Lesh v. Illinois Steel Co.* (Wis.) 157 N. W. 539; *Smrakar v. Pacific Lumber Co.*, 2 Cal. I. A. C. Dec. 87.

The Industrial Accident Commission is not authorized by the Workmen's Compensation Act to award compensation to an employé who has sustained an injury by accident, arising out of and in the course of his employment for an additional injury sustained by him afterwards, and not in the course of his employment, by an accident or act which aggravates the first injury and prolongs the disability. *Head v. Head Drilling Co.*, 2 Cal. I. A. C. Dec. 973, 171 Cal. 728, 154 Pac. 834. Where the evidence shows that an employé had sustained a fracture of an arm and that before such fracture was healed he again broke the arm in the same place by an accident which did not occur in the course of his employment, he was entitled to compensation only for the normal period that he would have been disabled as a result of the first accident. *Woodruff v. Peterson*, 1 Cal. I. A. C. Dec. 516. Where an employé sustained an inguinal hernia in the course of his employment, and was operated on for its cure, and shortly after such operation discovered a lump or tumor in his groin, and a second operation was performed upon the supposition that the lump was due either to the prior operation having been unsuccessful or to other causes, and the second operation showed that the lump is in fact due to a varicocele, aggravated, but not caused, by the hernia, such condition having existed before it, such varicocele was not proximately caused by accident arising out of the employment, and the employé was entitled to a temporary disability indemnity for the period that he was disabled solely as a result of the second operation. *Jorgensen v. Healy-Tibbitts Constr. Co.*, 2 Cal. I. A. C. Dec. 46.

Where a workman in the hospital for an operation on an injured knee contracted scarlet fever, not, however, as a result of the injury, the fever

carelessly uses it too soon, and the broken bone, being only partly knit, slips, the additional injury is not compensable.³⁶ But where an employé is injured while at work, sustaining a fracture of the left leg, and is taken to a hospital for treatment for his injury, and while in the hospital slips and falls on arising from his bed because of clumsiness due to his disability, breaking the other leg, the second accident may properly be regarded as a continuation of the first, and is therefore compensable.³⁷ That the disability results from infection which sets in after the accident, which caused an abrasion of the skin, does not prevent it from being proximately caused by the injury.³⁸ Compensation cannot be recovered for prolongation of disability due to intoxication or violation of the physician's instructions.³⁹ A subsequent illness caused by overeating,

causing the wound to suppurate so that excision of the joint was necessary, and leaving the man with a stiff knee and shortened leg, it was held that the incapacity resulted from the accident. *Brown v. Kent* (1913) 6 B. W. C. C. 745, C. A.

³⁶ *Pacific Coast Casualty Co. v. Pillsbury Industrial Accident Commission*, 171 Cal. 319, 153 Pac. 24.

³⁷ *Block v. Mutual Biscuit Co.*, 2 Cal. I. A. C. Dec. 274.

³⁸ *Great Western Power Co. v. Pillsbury*, 171 Cal. 69, 151 Pac. 1136, L. R. A. 1916A, 281.

³⁹ In *Kearns v. New London Marine Iron Works Co.*, 1 Conn. Comp. Dec. 225, where the period of disability due to infection of an injured finger was unnecessarily prolonged by the failure of the workman to follow the instructions of his physician, and his intoxication during incapacity, the award was made only for the period of incapacity which would ordinarily result from an injury of like nature. In *Blackall v. Winchester Repeating Arms Co.*, 1 Conn. Comp. Dec. 183, it was held that where an injury received by a fall would not ordinarily have lasted over three weeks, but was aggravated by the deceased leaving her bed contrary to the physician's orders and seeking other employment before she was able, and she fell a second time from weakness on her return, which latter fall aggravated an existing disease and resulted in death, the death was not due to the first injury. Compensation was awarded for the three weeks the disability due to the first injury would normally have lasted.

But where a workman, while in the hospital for treatment for an injury, received considerable quantities of ale from his friends, the drinking of

indigestion, and unwonted inactivity following injury cannot be connected with such injury by the law of cause and effect.⁴⁰ Thus, where an employé cut his wrist, which became infected with germs, but healed, and would have produced no harmful results had he not engaged in a boxing contest, and thereby started the germs into activity, causing blood poisoning, the cutting of his wrist was not the proximate result of the disability caused by the poisoning.⁴¹

§ 135. Additional injury

Where there have been two accidents, the question whether the disability shall be attributed to the first or the second accident depends on the circumstances of the particular case.⁴² Where an

which aggravated his delirious condition, but did not produce it, it was held the aggravation was not sufficient to have been a producing cause of the death, and compensation was awarded. *Minnis v. Young*, *The Bulletin*, N. Y., vol. 1, No. 10, p. 14.

⁴⁰ *Simpson v. Paraffine Paint Co.*, 1 Cal. I. A. C. Dec. 76.

⁴¹ *Kill v. Indus. Com.*, 160 Wis. 549, 152 N. W. 148, L. R. A. 1916A, 14.

⁴² Where a permanently injured workman was re-employed at light work, and suffered a second accident of minor nature, the judge, in deciding whether further compensation was due, must decide whether the workman was still incapacitated from the first accident. *Wilkinson v. Frodingham Iron & Steel Co., Ltd.* (1913) 6 B. W. C. C. 200, C. A.

Where, on supplemental hearing, the Commission found upon medical testimony that, after disability arising from the dislocation of the semilunar cartilage of the knee has ceased and the joint to all intents is in a condition of complete cure, the dislocation may recur, the second injury should be regarded as a new one and compensable independently of the former injury. *Giampolini-Lombardi Co. v. Employers' Liability Assur. Co.*, 2 Cal. I. A. C. Dec. 1010. Where an employé breaks his kneecap by accident occurring in the course of the employment, and 11 weeks afterwards, after returning to work, sustains a fall and again fractures the same kneecap, and the medical evidence shows that in 11 weeks the kneecap should have become firmly united, and that the probabilities are against the union being so defective as to cause a reopening of the fracture upon slight sprain, the accident will be regarded as a new injury, and no compensation will be awarded for the first 14 days after the happening of said second accident. *Ryan v. California Baking Co.*, 2 Cal. I. A. C. Dec. 190.

employé previously crippled by a breaking of the hip bone slips down one step of a stairs, and an operation clearly shows that the former fracture had only mended by a fibrous union, now separated, the second injury, if any, was but a continuation of the former injury, and is not compensable.⁴³ But where an employé sustains by accident a broken leg, causing temporary total disability, for which compensation is awarded, and in the same accident a crushing of the chest, which, after the healing of the leg, develops a serious illness, he has suffered a continuous disability resulting from the accident, and is entitled to compensation therefor, even though the illness due to the chest injury did not arise until more than six months from the original accident.⁴⁴ It has been held that the incapacity did not result from the first accident, where a riveter had the index finger of his hand amputated as the result of an accident, and his hand became inflamed eight years later while he was using a pneumatic hammer, even if the first accident produced a physical injury which occasioned the second injury,⁴⁵ where a workman whose knee had been wrenched three years before, and pained him at intervals upon arising from a kneeling position, found he had ruptured the cartilage of his knee,⁴⁶ and where a carman's eye which had been weakened as the result of a former accident, was later struck by his horse's tail, and so injured that its removal was necessary.⁴⁷ The holdings were otherwise where an employé sustained a fractured collar bone which has been promptly treated and immobilized, but, the bandages being taken off twenty-eight days after the fracture, within two or three days thereafter, without any violent blow or strain, the frac-

⁴³ *Tarr v. Stockton State Hospital*, 2 Cal. I. A. C. Dec. 591.

⁴⁴ *Salvatore v. New England Casualty Co.*, 2 Cal. I. A. C. Dec. 355.

⁴⁵ *Noden v. Galloways, Ltd.* (1912) 5 B. W. C. C. 7, C. A.

⁴⁶ *Borland v. Watson, Gow & Co., Ltd.* (1912) 5 B. W. C. C. 514, C. A.

⁴⁷ *Martin v. Barnett* (1910) 3 B. W. C. C. 146, C. A.

ture came apart again,⁴⁸ where an employé suffered from dislocation of the shoulder and was discharged in two weeks by the physician as cured, and at once sustained another dislocation of the same member while bathing,⁴⁹ where a charwoman limped because of a fall on the office staircase of her employer, and the day following fractured her kneecap by a fall on her own staircase,⁵⁰ and where a workman recovering from a cerebral hemorrhage caused by overexertion was stricken, four days after the first attack and before he had returned to work, with a second, which resulted in paralysis and incapacity.⁵¹ Where one employed as a journeyman carpenter, while in the course of his employment, ran a splinter in the thumb of his hand, and, attempting to remove the splinter with a pin, blood poison resulted, from which the employé died, he was not guilty of injurious practices as tending to impair or retard his recovery when he attempted to remove the splinter from the flesh of his thumb.⁵²

§ 136. Treatment in general

Compensation will be awarded where death or prolongation of disability follows treatment, which, though dangerous, is apparently necessitated by a compensable injury, and is not unskilled.⁵³ Death

⁴⁸ *Stormont v. Bakersfield Laundry Co.*, 1 Cal. I. A. C. Dec. 533.

⁴⁹ *Kordellos v. Northwestern Pacific Railroad Co.*, 1 Cal. I. A. C. Dec. 586.

⁵⁰ *Hodgson v. Robins, Hay, Waters & Hay* (1914) 7 B. W. C. C. 232, C. A.

⁵¹ *McInnes v. Dunsmuir & Jackson, Ltd.* (1909) 1 B. W. C. C. 226, Ct. of Sess.

⁵² *Proulx v. Hudson & Sons*, Bulletin No. 1, Ill., p. 45.

⁵³ Where a surgeon, instead of amputating the injured hand of a workman, sought to save it by a "bold experiment," which involved two separate operations, and the workman, after passing safely through the first, died under the anæsthetic during the second, it was held that death resulted from the injury. *Shirt v. Calico Printers' Association, Ltd.* (1910) 2 B. W. C. C. 342. Where a workman who had ruptured himself was found to have another rupture of long standing, and the success of the operation on the later hernia demanded a double operation, and he died eight months later, the

resulting from disease caused by an operation necessitated by an injury is likewise compensable.⁵⁴ As a rule, the compensation recoverable cannot be augmented by the fact that the disabling effects of the injury were increased or prolonged by incompetent or negligent surgical treatment, though the employer was responsible therefor.⁵⁵ It has been held in some states, however, that

second operation was not a new intervening act, such as to bar compensation. *Mutter, Howey & Co. v. Thomson* (1913) 6 B. W. C. C. 424, Ct. of Sess.

In *Sirica v. Scovill Mfg. Co.*, 1 Conn. Comp. Dec. 171, it was held that where the employé, though rejecting the services of the employer's physician, goes to a physician in regular standing, compensation is not to be reduced because the treatment secured prolongs his incapacity longer than would have been the case if the employer's physician had treated the injury. Where an employé who fell through a trap door, but did not show any immediate serious results, was given first medical aid by the employer, and thereafter, without notice to the employer, went to a hospital and had her arm operated on, of which she lost all practical use, it may be fairly presumed that there is a partial permanent disability, and the employer is liable therefor. *Blake v. Herskovitz*, Bulletin No. 1, Ill., p. 161.

⁵⁴ A brewery worker in the bottling department of the subscriber slipped and fell, dislocating the clavicle. He was operated upon three days later and died of hypostatic pneumonia caused by the weakening of his system by the operation. The widow was entitled to compensation. *Cantwell v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 246 (decision of Com. of Arb.).

Where the deceased receives an accidental injury, including a laceration of one of his fingers, and gangrene sets in, necessitating amputation of the finger, and subsequently amputation of the forearm, and the second operation results in pneumonia, caused immediately by the effect of the anaesthetic and of the surgical shock, and the pneumonia causes death, the death is proximately caused by the accidental injury. *Favero v. Board of Public Library Trustees*, 1 Cal. I. A. C. Dec. 225. Where an employé sustains a fractured kneecap, and an operation is later performed upon him to wire the separated parts of the kneecap into apposition, so that the fracture might heal, and infection develops following the operation and causes the death of the patient, such death is proximately caused by the accident. *Peck v. San Francisco-Oakland Terminal Rys.*, 1 Cal. I. A. C. Dec. 462.

⁵⁵ *Ruth v. Witherspoon-Englar Co.*, 98 Kan. 179, 157 Pac. 403. A vicious union resulting to the broken arm of a workman because of unskillful treatment at the hospital is not incapacity resulting from the accident. *Rocca v. Stanley Jones & Co., Ltd.* (1914) 7 B. W. C. C. 101, C. A.

Where a bonesetter set the broken arm of a workman so poorly that there

death or incapacity resulting from negligent or unskillful treatment by a physician furnished by the employer or whom it is his duty to furnish will be attributed to the accident.⁵⁶

Under the California Act, the industry is liable for all legitimate consequences following from an accident, among which is the possibility of an error of judgment or unskillfulness on the part of any attending physician, whether called in by the employer or the employé.⁵⁷ But where, by reason of an oversight of the workman's physician in misunderstanding and misreporting the result of a Wassermann test at the time of a conference upon the condition of the injured employé, a very painful and unnecessary operation is performed upon a wrong theory of the cause of the illness, and by reason of such unnecessary operation the period of disability is greatly prolonged, and no cause appears, aside from this factor, by which he should be allowed compensation for his injury, he is not entitled to compensation by reason of this error in judgment and unnecessary operation, even though the insurance company acquiesced in the mode of treatment prescribed by the physician and sanctioned same.⁵⁸ Where medical testimony shows that the treatment given for the injury was not complete, and the injury for that reason recurs, then, in the absence of evidence that the patient was guilty of misconduct, the recurrence is considered a part of the original injury and compensable as such.⁵⁹ The causing of a hernia and the strangulation thereof are seldom due to the same

was a vicious union, and the workman refused to allow the breaking and resetting of the arm, the case must turn on, and the judge must decide, whether the incapacity was due to the accident or to the negligence of the lonsetter. *Humber Towing Co., Ltd., v. Barclay* (1912) 5 B. W. C. C. 142, C. A.

⁵⁶ *Pawlak v. Hayes*, 162 Wis. 503, 156 N. W. 464; *Ross v. Erickson Const. Co.*, 89 Wash. 634, 155 Pac. 153.

⁵⁷ *Salvatore v. New England Casualty Co.*, 2 Cal. I. A. C. Dec. 355.

⁵⁸ *Spangler v. Philbin*, 2 Cal. I. A. C. Dec. 158.

⁵⁹ *Kordellos v. Northwestern Pacific Railroad Co.*, 1 Cal. I. A. C. Dec. 586.

accident. Where some weeks intervene following an accident before strangulation becomes known, the responsibility for the strangulation does not rest upon the accident, but on failure to receive proper treatment for the hernia.⁶⁰

§ 137. Neglect and refusal of operation or medical services

Injury aggravated or extended in time by the employé's neglect or disobedience of his physician's instructions is not compensable as to the additional period.⁶¹ The question whether a refusal to submit

⁶⁰ *Kiernan v. Turlock Irrigation District*, 2 Cal. I. A. C. Dec. 259.

⁶¹ An injured workman cannot recover compensation for an increase of disability due to his failure to use ordinary care to avoid aggravating the injury. *Pacific Coast Casualty Co. v. Pillsbury, Industrial Accident Commission*, 171 Cal. 319, 153 Pac. 24. Flagrant disobedience and neglect by the injured employé of the instructions of the physician in charge of the case will be deemed a sufficient defense to further liability, where the period of normal recovery has expired. *Weaver v. Eyster & Stone*, 1 Cal. I. A. C. Dec. 563.

The period is not coextensive with the period of actual disability, where, as in this case, it is reasonably certain that the injury was aggravated, and the disability at least somewhat extended, by neglect on the part of the injured man to follow the specific directions of the physician in charge of his treatment. *Porter v. Noble*, 1 Cal. I. A. C. Dec. 588. Where the evidence shows that by the date of the filing of the application for compensation the injured employé should have been wholly cured, and would have been if he had given his injured leg the necessary exercise to get it back into commission, the applicant is not entitled to compensation thereafter. In such case there is no other way except to bear the pain of using the leg with what fortitude one may, to give the injured member the use that it must have to function properly. It would be unfair to charge the employer with a disability prolonged by the disinclination of the injured man to make the cure complete. *Mason v. Knight*, 1 Cal. I. A. C. Dec. 493. Where the neglect or refusal of the employé to demand or obtain medical treatment causes what might be a slight disability to become a serious disability, the rights of the employer are not as defined in section 20 of the Act, but rather as in section 16 (e), which limits the liability of the employer to that portion of the disability which is proximately caused by the injury. *Telford v. Healy-Tibbitts Cons. Co.*, 3 Cal. I. A. C. Dec. 41.

In *Bolton v. Bridgeport Brass Co.*, 1 Conn. Comp. Dec. 515, where the employé, by refusing to obey his physician's orders and refusing to submit to hospital treatment, lengthened the period of his disability, the employer was

to skilled treatment for the restoration, whole or partial, of capacity for work, is an unreasonable refusal such as will preclude recovery

held to have been prejudiced by his action, and the indemnity period was shortened to that time for which the claimant would have been incapacitated, had he submitted as requested. But in *Carlson v. Emanuelson*, 1 Conn. Comp. Dec. 139, it was held that the leaving on of one plaster bandage for two weeks, where the claimant was told by the physician to return for more treatment if she felt worse, but did not go because she lacked funds, was not such neglect of proper medical service as to forfeit compensation.

Where an employé refused to accept treatment from a physician of the employer, and did not follow directions and advice of the physician to whom he went for treatment, as a result of which his hand became somewhat stiff, the condition was the result of his failure to accept treatment, and not the injury. *Ianczewski v. Central Locomotive & Car Works*, Bulletin No. 1, Ill., p. 32.

Peritonitis.—Where the evidence shows that applicant's peritonitis was caused by the presence of a foreign body in the abdomen, which had been there for years without causing trouble, but that inflammation therefrom was precipitated by a blow upon, or strain to, the abdomen, caused by the injury received, and that there was no other factor which would have caused the inflammation at that time, the blow or strain was the proximate cause of the peritonitis. *Henne v. Hjul*, 1 Cal. I. A. C. Dec. 133. An employé was injured on January 5th by an elevator or hoist being lowered upon him while he was at work in the shaft in which the hoist was operated. He did not report his injury, nor did he consult a physician, but continued to work for 52 days thereafter; the only noticeable effect of the injury being black and blue spots upon his arm. On February 26th he suffered a collapse and died on March 1st. A post mortem examination disclosed that the immediate cause of death was the rupture of an aneurism of the ascending aorta. Held, that the death was not from an injury sustained in the course of the employment. In *re Orlena Stith*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 67. Where a workman contracted a disease of the heart from the continuous strain of his work, but it was argued that he was susceptible to the strain on account of a previous accident, it was held that, even if this was so, the incapacity did not result from the accident. *Paton v. Dixon, Ltd.* (1913) 6 B. W. C. C. 882, Ct. of Sess.

Meningitis.—Where an employé sustains the loss of a toe by accident, the wound apparently healing within a few weeks, and some months thereafter suffers a series of boils, the infection from these boils subsequently penetrating the blood system and causing death from meningitis, such facts are insufficient to establish the loss of the toe as the proximate cause of the death. *Stephens v. Clarke*, 2 Cal. I. A. C. Dec. 135. Where an employé was thrown from the wagon and run over in a runaway of his team and sus-

of compensation, is necessarily a question of degree. An injured workman need not in every case submit to any proposed medical or surgical treatment, under the penalty, if he refuses, of forfeiture of his right to payments, but he should submit to such treatment, medical or surgical, as involves no serious risk or suffering; he should submit to such an operation as a man of ordinarily manly character would undergo for his own good, in a case where no question of compensation due by another existed.⁶² The proposition that one

tained apparently no serious injury, but died six days later from the rupture of an aneurism of the left ventricle of the heart, the Commission held upon conflicting medical testimony that the death was proximately caused by the runaway. *Martin v. City of Sacramento*, 2 Cal. I. A. C. Dec. 701.

⁶² *Donnelly v. Baird & Co., Ltd.*, 45 Scottish Law Reporter 394. *Anderson v. Baird*, 40 S. L. R. 263; *Dowd v. Bennie & Son*, 40 S. L. R. 239. An employe's refusal to have a simple operation performed on request of the insurer may deprive him of his right to further compensation. *Vitale v. Fidelity & Deposit Co. of Md.*, 2 Mass. Wk. Comp. Cases 425 (decision of Indus. Acc. Bd.). Where the workman had received compensation for temporary disability, he was not entitled to compensation for permanent disability, which could have been avoided by a safe and simple surgical operation. *Lesh v. Illinois Steel Co. (Wis.)* 157 N. W. 539.

In a recent Michigan case the court (opinion by Judge Stone) said: "Under all the circumstances of the case, including the fact that Jendrus was a foreigner, unable to speak or understand the English language, that he was suffering great pain on the evening of the 14th, that he was unacquainted with his surroundings, and that he did consent to, and did submit to, an operation within 15 or 16 hours after it was first found necessary, in the judgment of the surgeons, we cannot hold, as a matter of law, that the conduct of Jendrus was so unreasonable and persistent as to defeat the claim for compensation by his widow. Neither can we hold that Jendrus by his conduct in the premises in causing a delay in the operation was guilty of intentional and willful misconduct. We cannot say, as matter of law, that the Industrial Accident Board erred in its conclusions of law in affirming the action of the Committee on Arbitration. * * * Counsel for appellants call attention to the English Act, which provides, as ours does, for the payment for injuries arising out of and in the course of the employment, but that Act does not provide for medical care by the employer, and it is urged that in Michigan, if the employe refuses the reasonable medical services tendered by the employer, he is refusing compensation, and should not be permitted to compel the employer to pay the money compensation, while at the

may continue, or even increase, his disability by his willful and unreasonable conduct, and then claim compensation from his employer for his disability so caused, is untenable.⁶³ There is, of course, no question of compelling him to submit to an operation. The question is whether on his refusal to undergo what would be described by experts as a reasonable and safe operation he is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and consequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment. In order to test the principle of decision, it will not be amiss to follow the lead of the able opinion in a Michigan case and suppose a more simple case. A workman whose trade requires the perfect use of both hands—a watchmaker or an instrument maker, for example—has the misfortune to break one of the bones of a finger, and from want of immediate assistance, or it may be from neglect, the bone does not unite in the proper way. The hand is disabled; but he is advised that by breaking the bone at the old

same time he is refusing to accept the medical compensation. It is urged that under the English decisions the rule has been universally laid down that, if the employé unreasonably refuses to accept the medical attention offered by the employer, he forfeits his compensation. And our attention has been called to the following English Cases: *Donnelly v. Baird & Co., Ltd.* (Court of Sessions, Scotland, 1908), reported in 45 *Scottish Law Reporter*, 394, and 1 *Butterworth's Workmen's Compensation Cases*, 95. The appellee has called our attention to the case of *Marshall v. Navigation Co.*, [1910] 1 *King's Bench Div.* 79, to the effect that, where an injured party refuses to undergo a surgical operation, the employer has the burden of showing that the operation would have accomplished its purpose. Attention is also called by appellee to the case of *Proprietors of Hays' Wharf, Ltd., v. Brown*, 3 *B. W. C. C.* 84, to the effect that the burden is upon the employer to show that the refusal of the workman was unreasonable. * * * In none of the cases cited by appellants' counsel was the operation anything more than a minor operation for a trifling injury. We think the cases clearly distinguishable from the instant case, which involved a major operation of a serious nature." *Jendrus v. Detroit Steel Products Co.*, 178 *Mich.* 265, 144 *N. W.* 563, *L. R. A.* 1916A, 381, *Ann. Cas.* 1915D, 476.

⁶³ *Lesh v. Illinois Steel Co. (Wis.)* 157 *N. W.* 539.

fracture and resetting it the use of his hand will be completely restored. This is a case where the operation is not attended with risk to health or unusual suffering, and where the recovery of the use of the hand is reasonably clear. If in such a case the sufferer, either from defect or moral courage, or because he is content with a disabled hand and is willing to live on what he is receiving under the Compensation Act, refuses to be operated on, his continued inability to work at his trade is the result of the refusal of remedial treatment, and he is not entitled to further compensation. Passing to the other extreme, it is easy to figure a case of internal injury where an operation, if successful, would restore the sufferer to health, but where the surgeon was bound to admit that the operation was attended with danger. In such a case it would be generally admitted that there was not only a legal, but a moral, right of election on the part of the injured person; and, if he preferred to remain in his disabled condition rather than incur the risk of more serious disablement or death, it could not be said that his inaction disentitled him to further compensation. In view of the great diversity of cases raising this question, no general principle can be laid down except this: "That if the operation is not attended with danger to life or health, or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power."⁶⁴ In the language of an English

⁶⁴ Lord McLaren, in *Donnelly v. Baird & Co., Ltd.* (Court of Sessions, Scotland, 1908) 45 *Scottish Law Reporter*, 394, and *Jendrus v. Detroit Steel Products Co.*, 178 *Mich.* 265, 144 *N. W.* 563, *L. R. A.* 1916A, 381, *Ann. Cas.* 1915D, 476. Where the applicant under the Workmen's Compensation Act unrea-

judge: "The test is not really whether on the balance of medical opinion the operation is one which might reasonably be performed. The test is whether the workman in refusing to undergo the surgical operation acted unreasonably."⁶⁵ It was held in an English

sonably refuses to undergo a safe and simple surgical operation, which is fairly certain to result in a removal of the disability, and is not attended with serious risk or pain, and is such as an ordinarily prudent and courageous person would submit to for his own benefit and comfort, no question of compensation being involved, the disability which the claimant suffers thereafter, a reasonable time being allowed for recovery, is not proximately caused by the accident, but is the direct result of such unreasonable refusal. No question of compelling the applicant to submit to an operation is involved. The question is: Shall society recompense a workman for a disability caused by his unreasonable refusal to adopt such means to effect a recovery as an ordinarily prudent person would use under like circumstances, and which would result in the removal of the disability within the rule as stated above? It is true that the compensation awarded under the terms of the Act is not damages in the technical sense, and that the rules relating thereto are not to be applied in cases arising under this Act, and cases have been cited simply for the purpose of showing that damages accruing as a direct result of the claimant's unreasonable refusal to submit to reasonable medical and surgical treatment where the results are fairly certain, were not even in tort cases held to be proximately caused by the accident. *Lesh v. Illinois Steel Co. (Wis.)* 157 N. W. 539. Where it reasonably appears that the result of an operation will be a real and substantial physical gain, and that the claimant will not be subjected to unusual risk from the anæsthetic to be employed or from the nature of the proposed operation, he should submit to the operation. *Floccher v. Fidelity & Deposit Co. of Maryland*, 221 Mass. 54, 108 N. E. 1032; *Tutton's Case* (1909) 2 K. B. 54; *O'Neill v. Brown & Co., Ltd.* (1913) S. C. 653.

⁶⁵ *Cozens-Hardy, M. R.*, in *Tutton v. Owners of S. S. Majestic*, 1910, 2 B. W. C. C. 346, C. A.

Where a workman refused to have an eye, the sight of which he had lost, removed in order to prevent the risk of injury to the other eye by suppurating from the dead one, his refusal was not unreasonable (*Braithwaite & Kirk v. Cox* [1912] 5 B. W. C. C. 77, C. A.); nor was it where a totally disabled workman refused to undergo an operation because his medical advisor said it would result in a stiff knee joint, and if successful would only have made his earning power half what it was before the accident (*Molamphy v. Sheridan et al.* [1914] 7 B. W. C. C. 957, C. A.); but where a miner's finger, after having been crushed, remained stiff, and its amputation—a simple operation involving no risk and but little pain—was advised by all his doctors,

case that, where a workman was injured by an accident in respect to which he was otherwise entitled to receive compensation, and re-

and would have enabled him to return to his old work, his refusal to submit unless given a "guarantee of success" was unreasonable. *Walsh v. Locke & Co., Ltd.*, (1914) 7 B. W. C. C. 117, C. A.

In *Krasmeski v. New Haven Clock Co.*, 1 Conn. Comp. Dec. 699, where the sight of claimant's eye had been destroyed, so that he had less than one-tenth vision, but it appeared that by an operation he might recover up to one-half vision by use of a cataract lens, which would, however, disable him from the use of the other eye, it was held that, while an operation was in the abstract advisable, it was so near the border line of reasonableness that the commissioner could not compel the employé to accept such operation, and compensation for disability was awarded. In *Sezerbowicz v. City of New Britain*, 1 Conn. Comp. Dec. 671, where the workman suffering from a hernia sustained by strain while at work refused an operation offered by the employer, compensation was awarded for the amount of incapacity which would have resulted had he accepted the operation, and the award made subject to being reopened in case he submitted to an operation within a certain time. In *Aquilano v. Lambo*, 1 Conn. Comp. Dec. 145, where the workman was awarded compensation for total incapacity due to an irreducible hernia, which might be cured by an operation not dangerous or very serious, the award was made contingent upon the employé's submission to an operation for his cure within a reasonable time. In *Slater v. New Britain Trap Rock Co.*, 1 Conn. Comp. Dec. 501, where it was shown that a claimant who had been receiving incapacity indemnity for an injury to his fingers would be practically certain to recover the normal use of the other fingers, if the second finger were amputated at the middle joint, and that the danger of the operation was not over one-half per cent., but the workman refused the operation because improvement was not absolutely certain, and because he did not want his hand mutilated, it was held the existing incapacity was due to his refusal, and not to the original injury, and compensation was suspended until he would submit.

Incapacity not resulting from the injury: Where a workman refused to submit to simple or minor surgical operations upon his injured hand which were not attended with appreciable risk or pain and which were apt to restore his capacity for work. *Donnelly v. Baird & Co., Ltd.* (1909) 1 B. W. C. C. 95, Ct. of Sess. Where a workman with an injured foot refused to undergo an operation to remove a piece of bone, the operation being simple and involving scarcely appreciable risk. *Warncken v. Moreland & Son, Ltd.* (1910) 2 B. W. C. C. 350, C. A. Where a workman refused to submit to a safe and easy operation upon his injured knee, although both his own doctors and those of his employers recommended it. *Paddington Borough Council v. Stack* (1910) 2 B. W. C. C. 402, C. A. Where a workman refused to submit to a

fused to submit to a surgical operation of a simple character involving no serious risk to life or health, and which, according to the unanimous professional evidence, offered a reasonable prospect of the removal of the incapacity from which he suffered, that under those circumstances he had debarred himself from any right to claim further compensation under the act for his continued disability, as such continuance was not attributable to the original accident, but to his unreasonable refusal to avail himself of surgical treatment. In that case the claimant had injured his foot and had two toes removed. He still suffered pain, and the X-ray

slight operation to break down adhesions which had formed in his injured arm. *Wheeler, Ridely & Co. v. Dawson* (1912) 5 B. W. C. C. 645, C. A. Where, after the amputation of a workman's injured thumb, a second operation seeking to remove the sensitiveness from the injured part, was performed, but unsuccessfully, and, although the operations were simple and without serious risk or pain, he refused to submit to a third, which would probably have accomplished the end sought. *Anderson v. Baird & Co., Ltd.* (1903) 5 F. 373, Ct. of Sess. Where an injured workman's doctors told him that a proposed operation would not lessen his incapacity at all, and he refused to submit to it, although it was admittedly a minor operation and unattended with risk. *O'Neill v. Brown & Co., Ltd.* (1913) 6 B. W. C. C. 428, Ct. of Sess.

Incapacity resulting from the injury: Where a workman who had been injured refused to undergo an operation which was attended with some risk, though it would probably have been successful. *Rothwell v. Davies* (1903) 5 B. W. C. C. 141, C. A. Where a ship's fireman refused to submit to a minor operation on his injured finger, but the medical testimony was conflicting as to whether the operation would have saved the finger, which was later taken off. *Marshall v. Orient Steam Navigation Co., Ltd.* (1910) 3 B. W. C. C. 15, C. A. Where a hospital doctor advised an operation on an injured workman who had sustained a double rupture, but his own doctor advised against it, because the workman had Bright's disease and so could not take the anæsthetic without risking his life. *Tutton v. Owners of S. S. Majestic* (1910) 2 B. W. C. C. 346, C. A. Where a workman ruptured by accident refused seven years later to submit to an operation, which was advised by three doctors and advised against by a fourth. *Ruabon Coal Co. v. Thomas* (1910) 3 B. W. C. C. 32, C. A. Where an injured workman was advised by two of his employer's surgeons to undergo an operation, but it was undisputed on the appeal that an eminent surgeon had recommended that no operation be performed. *Sweeney v. Pumpherston Oil Co., Ltd.* (1903) 5 F. 972, Ct. of Sess.

showed that a piece of bone was loose in the big toe. The doctors advised an operation; but the man refused. Moulton, L. J., said: "To hold the contrary would lead to this result that a workman who had an injury, however small, might refuse to allow it to be dressed, and let a trivial burn, say, become a sloughing sore, and lead to partial or total incapacity. * * * The distinction is between being reasonable and unreasonable."⁶⁶ This case was followed by a case wherein it was held that a workman injured by an accident arising out of and in the course of his employment within the meaning of the Act, who refuses, on the advice of his own doctor, to submit to the surgical operation, which in the opinion of such medical man, involved some risk to his life, is not acting unreasonably in such refusal, and is not thereby precluded from claiming compensation from his employer under the Act in respect of his continued disability to work. There the court said: "I altogether decline to say that, in case of an operation of this kind, a workman can be said to act unreasonably in following the advice of an unimpeached and competent doctor, even though on the balance of medical evidence given at a subsequent date the learned county court judge might hold that the operation was in its nature one which might reasonably and properly be performed."⁶⁷ In the Michigan case above mentioned it was held that it was not a matter of law whether a foreign laborer who spoke no English was so unreasonable in his refusal to consent to an immediate operation for an injury to the intestines that a recovery for his death should be defeated; it appeared that he consented to the operation on the following day, and that as a result he contracted pneumonia, which, together with the peritonitis from the injury to his intestines, resulted fatally, and it not appearing that an earlier operation would

⁶⁶ *Warneken v. Moreland & Son, Ltd.* (Court of Appeal, England, 1908) 100 *Law Times*, 12, 2 B. W. C. C. 350.

⁶⁷ *Tutton v. Owners of Steamship Majestic* (Court of Appeal, 1909) 100 *L. T.* 644, 2 B. W. C. C. 346.

absolutely have saved his life, or that a recovery would have been impossible if there had been no operation.⁶⁸

Whether refusal or neglect of medical treatment or care will prevent the result from being attributed to the accident depends, as in case of refusal of an operation, on whether the workman's conduct is reasonable or unreasonable.⁶⁹

Lord Justice Clerk, in *Donnelly v. Baird & Co., Ltd.*, said: "The question whether a refusal to submit to a skilled treatment for the restoration, whole or part, of capacity for work, is an unreasonable refusal, is necessarily a question of degree. For it cannot be maintained that, no matter what the severity of the operation recommended, or how great soever the risk to life or general health of the treatment, the workman loses his right to compensation unless he brings himself to undergo the treatment or take the risk." It must be concluded that a workman who has been incapacitated is not bound in every case to submit to any treatment. Unreasonable neglect or refus-

⁶⁸ *Jendrus v. Detroit Steel Products Co.*, 178 Mich. 265, 144 N. W. 563, L. R. A. 1916A, 381, Ann. Cas. 1915D, 476.

⁶⁹ Where a workman who injured his ankle did not adopt proper measures for its cure, and after paying compensation for three years the employers applied for review, it was held that the incapacity resulted from the workman's own fault and neglect, and not from the injury. *Dowd v. Bennie & Son* (1903) 5 F. 268, Ct. of Sess. Where, on review, the judge found that the disobedience of a workman, who had fractured his shoulder, to instructions of his surgeon that he exercise his arm, was due to his nervous condition, and was not an unreasonable action, his decision was a correct finding within his duty. *Smith v. Cord Taton Colliery Co., Ltd.* (1900) 2 W. C. C. 121, C. A. Where a workman, suffering with pneumonia contracted as a result of an injury, refused to heed his doctor's warning, but insisted that he be taken home from the hospital, and died two days later, it was held that his action was reasonable, and that the death resulted from the injury. *Dunnigan v. Cavan & Lind* (1911) 4 B. W. C. C. 386, Ct. of Sess. On application of the employers for review in a case where a workman was advised by his employer's doctor to exercise his injured hand, but was advised by his own doctor that such exercise would do no good, and he did not exercise it, it was

al will ordinarily preclude or limit recovery; ⁷⁰ but, as said by Commissioner Russell: "A claimant, particularly one having slight fa-

held that his incapacity resulted from the injury. *Moss & Co. v. Akers* (1911) 4 B. W. C. C. 294, C. A.

⁷⁰ In *Crofut v. Bredow & Bohm*, 1 Conn. Comp. Dec. 524, where it appeared that, if claimant's slight injury had been properly and promptly cared for and treated with antiseptics, chance of its causing incapacity would have been very slight, but that because claimant, without giving his employer any opportunity to furnish treatment, treated the injury himself, infection had resulted, incapacitating him for 8 weeks, compensation was denied. In *De Rosa v. Fred T. Ley & Co.*, 1 Conn. Comp. Dec. 75, where it was determined that claimant's incapacity subsequent to 26 weeks was due to neglect and failure to procure proper medical treatment, it was held he could not recover compensation beyond that period. In *Eccles v. Scovill Mfg. Co.*, 1 Conn. Comp. Dec. 241, where the workman did not notify his employers that some steel slivers had punctured his thumb, nor avail himself of hospital emergency treatment provided by the employers to prevent infection, which was shown to have prevented infection in all but 3 of over 2,500 cases, but neglected to secure any treatment whatever until the infection was well advanced, such workman being a skilled mechanic of more than ordinary intelligence, it was held his conduct was so unreasonable and negligent of proper treatment that it deprived him of the right to compensation. In *Sebestini v. Fred T. Ley & Co., Inc.*, 1 Conn. Comp. Dec. 569, where it appeared that, had the workman submitted to proper medical treatment furnished by his employer, the injury to his finger would not have caused incapacity for more than 4 weeks, but that, due to his refusal of proper treatment, he would probably lose the use of two phalanges of the finger, compensation was awarded on the basis of 4 weeks' incapacity. But in *Costa v. C. W. Blakeslee & Sons*, 1 Conn. Comp. Dec. 457, where the workman did not think the abrasion of his eye was of sufficient importance to require medical care, and an agent of the employer, who was notified the day after the accident and who examined the eye and offered medical services, acquiesced in this view, until infection had set in, causing loss of sight, it was held the claimant's conduct was not such as to bar recovery. And in *Barton v. N. Y., N. H. & H. R. R. Co.*, 1 Conn. Comp. Dec. 227, where the workman considered a scratch on his hand of no consequence, and did not procure medical treatment for some time, but it was not shown that the employer had ever cautioned him as to the danger of infection from slight wound, nor ever actively provided any emergency treatment for injured employes, it was held there was no serious or unreasonable neglect such as would forfeit compensation.

Where a workman with an infected thumb, after having it treated at a hospital where he was working, was urged by the nurse to remain in the hospital for treatment, but refused the free medical services offered him and

miliarity with our language, and of slight means, is held only to a reasonable degree of diligence in taking steps to see that efforts are made toward effecting a cure. Mankind in general is careless in matters of this nature, and that fact is to be taken into account in determining rights growing out of injuries requiring treatment. Great diligence is not to be looked for or expected."⁷¹

The provisions of the California Act that compensation shall not be paid for disability so far as it is caused, continued, or aggravated by an unreasonable refusal to submit to medical or surgical treatment the risk of which is inconsiderable in view of the seriousness of the injury does not exclude all other exceptions and authorize the commission to award compensation for subsequent injuries not occurring during the employment.⁷² The above-stated test of reasonableness has apparently been used in applying this statute to the particular cases.⁷³ The California Commission has stated that

went home, where the infection developed seriously before he sought a physician, the resulting incapacity was not the proximate result of his injury, but of his failure to accept the proper treatment. *Christiansen v. St. Mary's Hospital*, Rep. Wis. Indus. Com. 1914-15, p. 20.

⁷¹ *Carlson v. Emanuelson*, 1 Conn. Comp. Dec. 139.

⁷² (Wk. Comp. Act, § 16, par. "e"). *McCay v. Bruce*, 2 Cal. I. A. C. Dec. 975, 171 Cal. 319, 153 Pac. 24.

⁷³ The employé, a native of Turkey, refused to undergo an operation because he and his family and countrymen would be distressed at the appearance of his hand with the finger removed, when he returned home. The medical testimony showed that, if a simple operation were performed, he would be recovered therefrom and able to resume his regular work in six weeks thereafter. It was held that the employé's refusal to undergo the operation was unreasonable, and that his compensation for total or partial incapacity should terminate at the end of six weeks from date of hearing. *Ollie v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 676 (decision of Com. of Arb.). The employé received a personal injury while lifting a bale of scrap metal, by reason of which a hernia developed in the right inguinal region. Compensation having been paid for two months, the insurer offered an operation for the radical cure of the hernia without cost to the employé. This was declined by the employé after time had been given in which to consider the offer, and after having been informed that a refusal would be regarded as unreasonable by the Committee. The Commission held that the employé was

it will apply to employés who neglect or refuse to have themselves properly cared for the same principles regarding such neglect that

not incapacitated for work by reason of the injury. *Yukanovitch v. Mass. Employés' Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 787 (decision of Com. of Arb.).

The workman suffered an injury which necessitated an operation, but refused to allow an operation until the next day, although he was told that it was necessary. While the operation was being performed, he vomited, and some of the vomit was drawn into his lungs, causing pneumonia, which resulted in his death. The Board held that the refusal to be operated on when first requested was not so unreasonable as to defeat the claim for compensation, since the employé finally consented when convinced that the operation was absolutely necessary. *Detroit Steel Products Co. v. Jendrus, Op. Mich. Indus. Acc. Bd.*, Bul. No. 3, p. 21.

Where, because of the employé's refusal to have performed an operation tendered, his disability was thereby prolonged beyond a normal period, the refusal of the employer to pay compensation beyond such normal period was justifiable. *Wheatley v. Smith*, 2 Cal. I. A. C. Dec. 910. Where, under medical advice, an employer offered an operation to break up adhesions and improve a deformity resulting from an accidental fracture of the shoulder of his employé, 59 years of age, and the employé, upon advice received from her physicians that improvement from such an operation was doubtful, refused to submit to the operation on this ground and on that of her age and the requirement of anesthetics, such a refusal was justified. *Leonard v. Fremont Hotel*, 2 Cal. I. A. C. Dec. 998. Where an employé is suffering from hernia caused by injuries received in the course of his employment, and the employer offers to make arrangements for, and defray all expenses of, an operation by a skilled physician at a reputable hospital to cure said hernia, and the employé refuses such operation, because he does not like the hospital chosen, and wished the operation to be performed by his own family physician, such refusal is unreasonable, and the employé is not entitled to compensation in so far as his disability is caused, continued, or aggravated by such refusal. (Wk. Comp., etc., Act, § 16) *McNamara v. United States Fidelity & Guaranty Co.*, 1 Cal. I. A. C. Dec. 138. The employer and the industry should not be chargeable with a disability prolonged by unreasonable and inexcusable neglect to secure treatment from a competent physician. Where the evidence shows that, had the applicant been properly treated, he would certainly have recovered within 12 weeks from the date of the accident, and that his disability was prolonged by unreasonable failure to secure medical treatment, compensation will not be allowed for a greater period than 10 weeks' disability following the waiting period of 2 weeks. *Brown v. Corona Citrus Ass'n*, 2 Cal. I. A. C. Dec. 144. Where a partial disability is shown, which may continue indefinitely, and competent medical authorities advise that it can be removed by

it applies to employers who neglect or refuse to furnish requisite treatment to their injured workmen.⁷⁴ The Commission has fur-

operation without serious risk, and it may be cheaper for the employer to pay all costs of such operation, instead of paying the weekly disability benefits indefinitely, the Commission will make the same award as has heretofore been made for hernia, namely, that the employer may tender all proper costs and arrangements for such operation by competent surgeons, with hospital facilities, nursing, and compensation for loss of time while totally disabled by such operation, in lieu of weekly disability benefits, and if the employé refuses to undergo such operation, all compensation payments shall cease pending such refusal. *Mitchell v. McNab & Smith*, 1 Cal. I. A. C. Dec. 116. Where as the result of accidental injury the workman is suffering from internal disability of doubtful nature, but probably kidney trouble, and after months of medical treatment, with continuing disability, the physicians advise an exploratory operation as the only chance of improvement and recovery, and it appearing that the risk was inconsiderable in view of the seriousness of the injury, the employer, after offer of such operation at its own expense and the refusal of applicant to submit thereto, is released from further liability for the continuance of the disability. *Jaco v. Los Angeles Gas & Electric Co.*, 2 Cal. I. A. C. Dec. 512. Where, after the Commission has determined that an operation will be advisable to relieve the disability of an injured employé, and that its risk is inconsiderable in view of the seriousness of the injury, the injured employé continues to refuse to accept it, his insurance carrier is authorized to terminate payments of disability compensation during the period of such refusal to submit to proper medical or surgical treatment. Upon request, the Industrial Accident Commission will also give notice to the employé that, if he fails to accept such offer within a short period from the date of said notice, all his rights to compensation will be forever barred, and will thereafter enter its order terminating payments of compensation in the event of continued refusal. *Aylward v. Oceanic Steamship Co.*, 2 Cal. I. A. C. Dec. 95. Where medical treatment or appliances are tendered by employer or insurance carrier upon the advice of the surgeon in charge, the Commission can require the injured person to accept such treatment or forego further compensation, and will use its power to facilitate recovery of the patient from his injury. *Burkard v. San Francisco Breweries, Ltd.*, 2 Cal. I. A. C. Dec. 365. Where an injured employé is suffering from a disability which can be cured by operation, and a temporary total disability award was made in his favor, the payments to continue until the termination of his disability, the Commission will provide in the award that such payments shall be suspended upon the offering to the applicant of an operation to cure his injury at the expense of the employer or insurance carrier and its refusal by such employé. *Printy*

⁷⁴ *Brown v. Corona Citrus Ass'n*, 2 Cal. I. A. C. Dec. 144.

ther said that where an employé, following an accident causing hernia, is offered his choice of an operation or a truss, and because of pressing family reasons at the time he accepts a truss, and within a reasonable time thereafter requests an operation, such operation will be awarded if the applicant is otherwise entitled thereto. The act of the employé in endeavoring to settle his claim by the receipt of a truss instead of having an operation performed is not binding unless and until approved by the Commission. Settlements by injured employés waiving a necessary operation will not be approved where the best interests of all parties concerned dictate that the employé be cured of his condition, if the law otherwise authorizes such relief.⁷⁵ Where the employé's refusal of an operation or medical treatment is due to ignorance or mistake, he may be given another chance to accept such treatment.⁷⁶

v. Jacobsen-Bade Co., 1 Cal. I. A. C. Dec. 519. If an employé is offered medical treatment at the expense of his employer after the expiration of 90 days from the date of the accident and refuses to accept it, and also refuses to procure adequate treatment elsewhere, his right to compensation under section 16 (e) of the Compensation Act is lost as to any aggravation of his disability which may occur by reason of such refusal to accept proper treatment. *Parini v. Selby Smelting & Lead Co.*, 2 Cal. I. A. C. Dec. 192.

⁷⁵ *Taylor v. Spreckels*, 2 Cal. I. A. C. Dec. 62.

⁷⁶ Where the employé has before the filing of his application, or before the hearing thereof, in ignorance of the requirements of the law, refused a proper offer of an operation, and such operation is still advisable, the Commission may require the employer or his insurance carrier to renew such offer at the time that the award is made, such offer to be in accordance with the usual conditions as to prospective operations. *McNamara v. United States Fidelity & Guaranty*, 1 Cal. I. A. C. Dec. 138. Where an injured employé is tendered an operation at the expense of his employer's insurance carrier, and refuses such operation upon the ground that his own physician has advised him that such operation would be futile, and it is subsequently determined by the Commission, upon the advice of medical experts appointed by it, that such operation would be advantageous and that its risk would be inconsiderable in view of the seriousness of the operation, such employé has not lost his right to compensation up to the date of the award of the Commission, upon the ground that the continuation of his disability was caused by his unreasonable refusal to submit to medical or surgical treatment. *Aylward v. Oceanic Steamship Co.*, 2 Cal. I. A. C. Dec. 95.

ARTICLE IV

OCCUPATIONAL DISEASES

Section

138. Occupational diseases.

139. Massachusetts.

§ 138. Occupational diseases

The legislative tendency abroad and in this country has been to deal with industrial accidents distinct from occupational diseases. None of the Acts in this country expressly include disease. Of the ten Acts which on their face do not exclude occupational diseases, three, the Acts of Ohio and Michigan and Connecticut, have been construed by the courts to exclude them,⁷⁷ and two, the Acts

⁷⁷ In 1912 the constitutional convention submitted to the people of the state of Ohio what is now section 35 of article 2, which provided that: "For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational diseases, occasioned in the course of such workmen's employment, laws may be passed," etc. This proposition was ratified by the people by a most decisive majority and gave the authority necessary to the Legislature for the enactment of the present Act. In 1913 the existing compulsory Act was passed. Act March 14, 1913 (103 Ohio Laws, p. 72). It is to be observed that the constitutional amendment differentiates between injuries and occupational disease. It clearly recognizes three distinct classes for which provision may be made: (1) Injuries resulting in death; (2) non-fatal injuries; and (3) occupational diseases—and all are to be limited to such as might be occasioned in due course of employment. In *Industrial Commission of Ohio v. Brown*, 92 Ohio St. 309, 110 N. E. 744, L. R. A. 1916B, 1277, the court (opinion by Nichols, C. J.) said: "It is no difficult matter to bring within the purview of the words 'personal injuries sustained in the course of employment' occupational diseases incurred in the course of employment. It can be further conceded that, had the Legislature, in enacting either the original or the present law, desired to make plain its intention to exclude occupational disease from participation in the fund, the exclusion could readily have been made by adding to the words 'personal injuries,' the qualifying phrase 'by accident.' As against all this the court feels impelled to follow both the executive and the legislative construction of the word 'injury' as employed in this Act, and to limit recovery of compensation to such as may have suffered injury otherwise than through disease. The victims

of California and Iowa, have received a similar administrative construction.⁷⁸ On the other hand, the Massachusetts Act has been

of modern industrialism springing from disease incident thereto are only less numerous than those arising from pure accident, and no sound policy can be suggested that should protect the one class and ignore the other, especially when the compensation system becomes firmly established. Until this is done the court will continue to construe the law as it was obviously intended by the Legislature that it should be construed."

In *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916B, 283, the court (opinion by Judge Stone) says: "We are of the opinion that in the Michigan Act it was not the intention of the Legislature to provide compensation for industrial or occupational diseases, but for injuries arising from accidents, alone. If it were to be held that the Act was intended to apply to such diseases, it would, in so far as it does, be unconstitutional and in violation of section 21 of article 5 of the Constitution of this state, which provides that: 'No law shall embrace more than one object, which shall be expressed in its title.' That the Act, if it were held to apply to and cover occupational diseases, is unconstitutional in so far as it does so, is shown by the fact that the body of the Act would then have a greater breadth than is indicated in the title. A careful analysis of the title of the Act shows that the controlling words are, 'providing compensation for accidental injury to or death of employés.' No compensation is contemplated, except for such injuries. The prefatory words are generally dependent upon the above-quoted clause. The only compensation provided is for 'accidental injury to or death of employés,' and the last clause of the title restricts the right to compensation or damages in such cases 'to such as are provided by this Act.' The Massachusetts decisions having no bearing upon this branch of the case for two reasons: One is that the titles of the respective Acts differ materially; and the other reason is that the Massachusetts Act has no such constitutional provisions as ours above quoted. * * * Manifestly, the terms 'personal injury' and 'personal injuries' * * * refer to common-law conditions and liabilities, and do not refer to and include occupational diseases, because an employé had no right of action for injury or death due to occupational diseases at common law, but, generally speaking, only accidents, or rather accidental injuries, gave a right of action. We are not able to find a single case where an employé has recovered compensation for an occupational disease at common law. Certainly it can be said that in this state no employer has ever been held liable to the employé for injury from

⁷⁸ 1 Cal. I. A. C. Dec. No. 5, p. 11. The words "injury" and "personal injury," as used in the Iowa Act, do not include a disease except as it shall result from the injury. (Code Supp. 1913, § 2477m16). Op. Sp. Counsel to Iowa Indus. Com. (1915), p. 26.

construed to include occupational diseases, and the original federal Act has received a similar construction, as will be hereinafter

an occupational disease, but only for injuries caused by negligence. It seems to us that the whole scheme of this Act negatives any liability of the employer for injury resulting from an occupational disease."

The provision authorizing compensation for "personal injury arising out of and in the course of the employment" does not authorize compensation for occupational diseases. *Miller v. American Steel & Wire Co.*, 90 Conn. 349, 97 Atl. 345.

In an English case, *Brinton's, Lim., v. Turvey*, 74 L. J. K. B. 474, it was decided that lead poisoning could not be described as an "accident" in the popular and ordinary use of that word, so as to entitle the applicant to compensation for personal injury by accident arising out of, and in the course of, his employment, within the meaning of section 1 of the Workmen's Compensation Act of 1897. The court in this case reasoned that, under the Act, a date must be fixed as that on which the injury by accident occurred, and it was said: "It has been suggested that there was a series of accidents by the continuous absorption of lead by one or the other of the three processes named; but this suggestion does not meet the difficulty which arises from the provisions of the Act as to notice of the particular date of the accident or injury." As a result of this case, it was found necessary to change the Act, if cases like this were to be included; so in 1906, less than a year later, the Act of 6 Edw. VIII, c. 58, was passed, entitled, "An act to amend the law with respect to compensation for workmen for injuries suffered in the course of their employment." The body of the Act again provides compensation for "personal injury by accident," but it also (section 8) provides that: "Where the disease is due to the nature of the employment * * * he or his dependents shall be entitled to compensation under this Act as if the disease * * * were a personal injury by accident, arising out of and in the course of employment if it be one of the diseases in schedule 3 of the Act." In that schedule "lead poisoning" and its sequels are therein scheduled. As said in *Encyclopedia of Laws of England*, vol. 5, p. 227: "The extension by this Act of the principle of workmen's compensation to industrial diseases is a new departure. Disease, if contracted industrially, is not an accident in the ordinary acceptance of the terms." It was also said of the Act that a new phase in workmen's compensation—compensation for disease arising out of employment—was a new feature in this type of legislation. The language of the Act should be particularly noted. It does not attempt to declare an industrial disease an "accident," but gives compensation therefor "as if the disease * * * were a personal injury by accident." Not before, but since, the passage of this amendment to the English Act, the English courts have sustained the rights of recovery in cases of lead poisoning.

noticed.⁷⁹ Among those states which may be classed as doubtful, the preponderance of opinion, so far as expressed, seems to be against importing occupational diseases into Workmen's Compensation Acts by judicial construction.⁸⁰ A disease contracted in the course of employment is not a personal injury by accident, unless it arises from an event capable of being identified with respect to time, place, and circumstances.⁸¹ It follows that, where an "accident" is made essential either in the body or by reference to the title of an Act,⁸² to the right to recover compensation, and no exception is made in respect to diseases as in the present English Act, there can be no recovery for diseases contracted by gradual process, commonly known as industrial or occupational diseases,⁸³

⁷⁹ *Miller v. American Steel & Wire Co.*, 90 Conn. 349, 97 Atl. 345.

⁸⁰ *Id.*

⁸¹ *Liondale Bleach Dye & Paint Works v. Riker*, 85 N. J. Law, 426, 89 Atl. 929; *Adams v. Acme White Lead & Color Wks.*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283.

Where a workman, whose employment necessitated the handling of white and red lead, gradually accumulated lead in his system, with the result that he suffered from lead poisoning, which produced partial paralysis and incapacity for work, he was held not to have been injured by accident; the reason seeming to be because it was not possible to indicate a time at which there was an accident which caused the injury. *Steel v. Cammell, Laird & Co., Ltd.* [1909] 2 K. B. 232.

The disability resulting from the inhalation of cyanide fumes was not caused by a sudden occurrence, but by a gradual process, and was an occupational disease, and not an accident. *Hindman v. Acme Universal Joint Mfg. Co.*, Mich. Wk. Comp. Cases (1916), 56.

⁸² Made essential by title. *Adams v. Acme White Lead & Color Wks.*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283.

⁸³ An occupational disease is not an industrial accident, and a disability resulting therefrom, although it may appear suddenly, is not proximately caused by an accident, and is therefore not compensable. *Johnson v. Bauer Pottery Co.*, 1 Cal. I. A. C. Dec. 72. While most of the so-called occupational diseases meet all of the requirements for compensation as industrial accidents, and in several countries and states no distinction is drawn between the two in Workmen's Compensation Acts, at the time of the adoption of the present California statute the Legislature did not include under "industrial

such as lead poisoning among painters,⁸⁴ ptomaine poisoning, typhoid fever, or enteritis contracted from long continuous work

accidents" the well known and generally recognized list of occupational diseases, such as lead poisoning, tuberculosis, etc., and the Commission will not extend its jurisdiction to cover them. *De Witt v. Jacoby Bros.*, 1 Cal. I. A. C. Dec. 170.

⁸⁴ Century Dictionary and Cyclopedia defines an "occupational disease" as "a disease arising from causes incident to the patient's occupation, as lead poisoning among painters." The court held in *Adams v. Acme White Lead & Color Wks.*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283, that lead poisoning was not compensable, saying in an opinion by Judge Stone: "In the instant case the undisputed medical evidence shows that lead poisoning does not arise suddenly, but comes only after long exposure. 'It is a matter of weeks or months or years.' It is brought about by inhalation, or by the lead coming into the system with food through the alimentary canal, or by absorption through the skin. In any case it is not the result of one contact or a single event. 'In occupational diseases it is drop by drop, it is little by little, day after day, for weeks and months, and finally enough is accumulated to produce symptoms.' It also appears that lead poisoning is always prevalent in the industries in which lead is used, and a certain percentage of the workmen exposed to it become afflicted with the disease. Elaborate precautions are taken against it in the way of instructions to the men, masks to protect respiratory organs, etc. Whether the workman will contract it or not will depend upon the physical condition, care, and peculiarity of the individual, and the amount of time it will take to produce ill effects or death also varies."

Where there had been a gradual accumulation over a considerable period of time of poison by working in or about a room where molten lead, fumes resulting from molten lead, and small particles of lead and its composites were present on the floor or throughout the room, and it was impossible to fix any day, or probably even upon any week or month, at or during which the injury was sustained, the workman being prostrated by the gradual creeping on of the disease popularly known as lead poisoning, it was held that compensation for incapacity or death caused by such a disease could not be had. *Miller v. American Steel & Wire Co.*, 90 Conn. 349, 97 Atl. 345.

"Personal injuries sustained in the course of employment," within Workmen's Compensation Act June 15, 1911 (102 Ohio Laws, p. 524), authorizing compensation for such injuries, do not include lead poisoning contracted in the course of employment. *Industrial Commission of Ohio v. Brown*, 92 Ohio St. 309, 110 N. E. 744, L. R. A. 1916B, 1277. The condition known as lead poisoning is an "occupational disease." In *re Wm. Peters*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 25.

about a sewer or drain,⁸⁵ and other diseases or ailments contracted under similar circumstances.⁸⁶

⁸⁵ Ptomaine poisoning, contracted by a workman while working on drains, was not personal injury by accident. *Eke v. Hart-Dyke* (1910) 3 B. W. C. C. 482, C. A. A disease (enteritis) contracted by inhaling sewer gas was not a personal injury by accident. *Broderick v. London County Council* (1909) 1 B. W. C. C. 219, C. A. Where a workman had been engaged for several years in removing sewage, and contracted typhoid fever and died, there was no evidence of accident. *Finlay v. Tullamore Guardians* (1914) 7 B. W. C. C. 973, C. A.

⁸⁶ Where a workman, after ten days' service in a bleachery, was affected with a rash, which was pronounced to be a condition of eczema, caused by contact with the dampened goods, he was not injured by accident. *Liondale Bleach Dye & Paint Works v. Riker*, 85 N. J. Law, 426, 89 Atl. 929.

Whether carbon monoxide poisoning is an accidental injury or an occupational disease depends on whether the attack is sudden or gradual. Such poisoning may occur in one of two ways: (1) By suffocation; if an individual who has been thus overcome is removed early enough to pure air, the carbon monoxide will be eliminated in the course of eight to twelve hours, and the patient will be fully recovered. (2) Where there had been no suffocation, but the oxygen has been withheld for a long enough period from the blood, due to carbon monoxide, degeneration will be produced in the cells of the nervous system, which may have been exposed to lack of oxygen. In this event there can be no regeneration of the cells, and the function of the nerve tissue is either entirely lost or suffers permanent disorder. If it should be shown that the applicant had suffered over a long period of time from exposure to carbon monoxide gas, producing a slow and insidious degeneration of his nervous system over a long period of time, the Industrial Accident Commission would hold his malady to be an occupational disease, and not covered by the Workmen's Compensation, Insurance and Safety Act in its present form. *Burgess v. Star*, 2 Cal. I. A. C. Dec. 269.

In *Cochran v. Fenton*, 1 Conn. Comp. Dec. 690, where the injury consisted of eye strain caused by the continuous use of claimant's eyes, required by her employment, not attributable to anything which happened at any definite time, but being the gradual result of the use of her eyes, extending over a period of several weeks, it was held no compensation could be awarded.

While a porter in a fever hospital was cleaning out the mortuary, he felt sick and dizzy. He became worse, and finally developed a case of scarlet fever; but it was held that there was no accident. *Martin v. Manchester Corporation* (1912) 5 B. W. C. C. 259, C. A. It was not a personal injury by accident, where a canvasser and collector, who was hurrying in an effort to get his work done in a certain time, developed pleurisy from becoming over-

The Solicitor of the Department of Labor, altering his previous rulings on the subject, held that the federal act covers lead poisoning an occupational disease.⁸⁷ The Attorney General, in a case wherein the employé contracted a severe cold in the course of his employment, resulting in pneumonia, decided that the employé was not entitled to compensation, and said in the course of his opinion that "the word 'injury' however, as used in the statute, is in no sense suggestive of disease, nor has it ordinarily any such significance."⁸⁸

heated and then chilling, and was incapacitated. *McMillan v. Singer Sewing Machine Co., Ltd.* (1913) 6 B. W. C. C. 345, Ct. of Sess. A hairdresser's assistant, whose hands began to smart on a certain date, contracted dermatitis, which he alleged was caused by his using a dry shampoo, but there was held to be no evidence of accident. *Petschelt v. Preis* (1915) 8 B. W. C. C. 44, C. A. It was not a personal injury by accident where a workman, who was employed at dipping rings in a chemical, gradually contracted eczema on his hands (*Evans v. Dood* [1912] 5 B. W. C. C. 305, C. A.); where a second officer, who superintended the loading of his ship for several days for 17 hours a day, dropped dead 6 days later from heart failure being brought on by the continuous strain (*Black v. New Zealand Shipping Co., Ltd.* [1913] 6 B. W. C. C. 720, C. A.); where paralysis was gradually contracted through riding a carrier tricycle (*Walker v. Hockney Bro.* [1910] 2 B. W. C. C. 20, C. A.); where a miner, who was engaged in heavy work and felt a sudden pain in his chest, was found to be suffering from cardiac breakdown, which was caused, not by a sudden strain, but by overexertion for a period of several days (*Coe v. Fife Coal Co., Ltd.* [1910] 2 B. W. C. C. 8, Ct. of Sess.); where a workman contracted heart disease because of the continuous strain of work which he was not physically able to do (*Paton v. Dixon, Ltd.* [1913] 6 B. W. C. C. 882, Ct. of Sess.); where "beat hand" and "beat knee," contracted by miners, were caused by the gradual process of continued friction (*Marchall v. East Holywell Coal Co., Gorley v. Backworth Collieries* [1905] 7 W. C. C. 19 [Act of 1897]); or where a workman's boot shrank and became so tight as to injure one of his toes (*White v. Sheepwash* [1910] 3 B. W. C. C. 382, C. A.).

⁸⁷ Claimant was a painter and in the course of his employment contracted lead poisoning. Distinguishing this disease from pneumonia, malaria, typhoid, or the like, it was held that the incapacity was due to an injury in the course of employment. (This opinion alters the previous ruling in the *John Treiman* and *C. L. Schroeder* Cases on this subject.) In re *Jule*, Op. Sol. Dept. of L. 261.

⁸⁸ In re *Sheeran*, 28 Op. Atty. Gen. 254.

§ 139. — Massachusetts

An "accident" not being essential under the Massachusetts Act, an occupational disease is compensable as an "injury," though not expressly made so by statute;⁸⁹ the date of injury in such case be-

⁸⁹ *Johnson v. London Guarantee & Accident Co., Ltd.*, 217 Mass. 388, 104 N. E. 735.

Afflicted employés held entitled to compensation: An employé incapacitated by lead poisoning. *Johnson v. London Guarantee & Accident Co., Ltd.*, 2 Mass. Wk. Comp. Cases, 108 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Court, 217 Mass. 388, 104 N. E. 735). An employé who received a personal injury by reason of his occupation as a cigar maker, which caused a condition of neurosis in his hands and arms, with consequent inability to use them in the making of cigars, this condition being brought about by the unusual degree of strain upon certain groups of muscles for a long period of time, and by the rapidity with which he performed his work. *Lee v. Employers' Liability Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 753 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.). An employé injured by the extreme pressure from the shears which he used in cutting a coil of wire, a septic hand and palmar abscess resulting without visible external wound. *Erickson v. Mass. Employés Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 149 (decision of Com. of Arb.). A stone grinder, injured by inhaling small particles of stone and dust, by reason of which he contracted fibroid tuberculosis, usually spoken of as "stone grinder's phthisis." *Kalanquin v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 748 (decision of Com. of Arb.). An employé incapacitated for work by a personal injury due to infection. *Vitale v. Fidelity & Deposit Co. of Md.*, 2 Mass. Wk. Comp. Cases, 425 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.). An employé injured by the falling of a door, and incapacitated for work subsequently by an attack of chorea minor (St. Vitus' dance). *Cristoforo v. Employers' Liability Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 364 (decision of Com. of Arb.). An employé injured by the blistering of his hand in using a wheelbarrow, the wound becoming infected and two operations being performed, in consequence of which the previously impaired nervous state of the employé was accelerated to the point of insanity, the connection between the personal injury and the insanity being unbroken. *Whalen v. U. S. Fidelity & Guaranty Co.*, 2 Mass. Wk. Comp. Cases, 318 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.). An employé injured by a blow from a 12-pound sledgehammer which he was using, the sledgehammer missing the drill at which it was aimed and striking him with considerable force on the left ankle, thus lighting up an inflammatory condition which has been described as a mild chronic osteomyelitis and afterwards necessitating amputation of the leg. *Gariella v. American Mutual Liability Insur. Co.*, 2 Mass. Wk. Comp. Cases, 237 (decision of

ing the date when the workman becomes sick and unable to perform labor.⁹⁰ It is not essential to compensability that there be any visible external wound.⁹¹

Com. of Arb., affirmed by Indus. Acc. Bd.). An employé unable to continue her work as a wire drawer, by reason of an attack of irritative eczema, the result of the use of a chemical in connection with her occupation. *Dolan v. Mass. Employés' Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 259 (decision of Com. of Arb.). An employé so injured as to cause dislocation of the cœcum, general adhesions in the abdomen, and constipation, resulting in traumatic peritonitis, which condition necessitated an operation for the removal of the appendix. *Gregg v. Frankfort General Insur. Co.*, 2 Mass. Wk. Comp. Cases, 581 (decision of Com. of Arb.).

⁹⁰ Where a lead grinder became incapacitated from lead poisoning, the date of injury was when he became sick and unable to perform labor, though the previous absorption of lead into his system for more than a year produced the conditions which finally terminated in the injury. (St. 1911, c. 751, as amended by St. 1912, c. 571) *Johnson v. London Guarantee & Accident Co., Ltd.*, 217 Mass. 388, 104 N. E. 735. This case is supported by *Sheerin v. F. & J. Clayton Co., Ltd.*, 3 B. W. C. C. 418; *Ismay Imrie & Co. v. Williamson*, 1 B. W. C. C. 232; *Martin v. Manchester Corporation*, 5 B. W. C. C. 259 (1912); *Alloa Coal Co., Ltd., v. Drylie*, 6 B. W. C. C. 398 (1913).

⁹¹ *Erickson v. Mass. Employés' Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 149 (Dec. of Com. of Arb.).

CHAPTER VI

DEFENSES TO COMPENSATION CLAIMS

Section

- 140. Serious and willful misconduct—Purposely self-inflicted injury.
- 141. Disobedience—Violation of rules.
- 142. Drunkenness.
- 143. Burden of proof—Question of fact.
- 144. Estoppel and *res judicata*.
- 145. Negligence, contributory negligence, and assumption of risk.
- 146. Defenses under federal Act.

§ 140. Serious and willful misconduct—Purposely self-inflicted injury

While even willful negligence on the part of the workman constitutes no defense under the compensatory provisions of some Workmen's Compensation Acts,¹ the defense that the employé has been guilty of intentional, or serious, and willful misconduct, is saved in many of the Acts by an express provision (qualified in the English Act by the words "unless it results in serious and permanent disability or death");² but, for such misconduct to be available as a defense, the injury must be attributable to it,³ and

¹ *West Jersey Trust Co. v. Philadelphia & R. Ry. Co.*, 88 N. J. Law, 102, 95 Atl. 753; *Taylor v. Seabrook*, 87 N. J. Law, 407, 94 Atl. 399.

² The injury amounted to serious and permanent disablement, where a boy lost the top joints of the first and third fingers while he was cleaning a machine in motion, contrary to orders. *Hopwood v. Olive & Partington, Ltd.* (1910) 3 B. W. C. C. 357, C. A. Also where a machinist in the joinery trade suffered an accident causing him to lose the top joint of the middle finger of his right hand. *Brewer v. Smith* (1913) 6 B. W. C. C. 651, C. A.

If the deceased met with his injury by reason of his serious and willful misconduct, no compensation can be awarded. *In re Von Ette*, 223 Mass. 56, 111 N. E. 697.

³ "The first thing required is that the employer must prove that the injury was 'attributable' to the misconduct; the second is that he must prove the misconduct to have been 'serious and willful,' in the sense of being far be-

the misconduct must have been within the scope of the employment.⁴ Serious and willful misconduct cannot assist in bringing

yond mere negligence, and more than bare misconduct." Lord Stormonth-Darling, in *Wallace v. Glenboig Union Fireclay Co., Ltd.* (1907) S. C. 967 (Act of 1897). Where there was a statutory provision forbidding miners to carry a naked light in a place where inflammable gas was likely to be, and an oversman, who, though carrying a naked light, remained in a safe place, was killed by an explosion which resulted from another man, who was with him, wandering into a dangerous place, the accident was not attributable to serious and willful misconduct. *Id.* Where a miner was killed by a stone which fell from the roof of the mine upon him, while he was riding on a loaded hutch, which action was contrary to statutory regulation, the accident was not attributable to the misconduct. *Glasgow Coal Co., Ltd., v. Sneddon* (1905) 7 F. 485, Ct. of Sess. (Act of 1897). Where a miner, after doing some "holing," by neglecting to put in the supports, left a mass of shale overhanging in a dangerous position, which was in violation of a statutory regulation, and later, while about a different piece of work, was killed by its falling down upon him, the accident was not attributable to serious and willful misconduct. *Tennant v. Broxburn Oil Co., Ltd.* (1907) S. C. 581, Ct. of Sess. Where a workman was injured when a lorry, which he had run upon a wrong line and contrary to the rules of the railway company, collided with a special train of which no warning had been given, the accident was attributable to his serious and willful misconduct. *McCafferey v. Great Northern Ry. Co.* (1902) 36 Ir. L. T. 27, C. A. Where a miner so far disregarded his own safety as to attempt to cross an incline upon which hutches were ascending and descending, his injury was the result of serious and willful misconduct. *Condron v. Gavin Paul & Sons, Ltd.* (1904) 6 F. 29, Ct. of Sess. (Act of 1897).

⁴ As the Michigan Act provides compensation only for such injuries as are received in the course of the employment, and then only when they grow out of the employment, and as injuries received outside the employment are not within the provisions of the act at all, it must follow that the "intentional and willful misconduct" which operates to debar the employé from the compensation which he might otherwise receive refers to such misconduct within the scope of his employment. If the injury to the employé was not received "in the course of his employment," it is immaterial whether it was caused by his "intentional and willful misconduct" or not. *Bischoff v. American Car & Foundry Co.* (Mich.) 157 N. W. 34.

Where a collier, seeking to increase the amount of coal to his credit, cut coal at intervals in a dangerous place, where he had been forbidden to work, and was killed by a fall of coal, the question of whether there was serious and willful misconduct is irrelevant, because the accident did not arise out

an accident within the words "arising out of and in the course of" the employment.⁵

"Serious" refers, not to the actual consequences, but to the misconduct itself.⁶ Mere misconduct is not sufficient. Willfulness is the essential element, and must be established.⁷ The word "willful" imports deliberate misconduct, not merely a thoughtless act on the spur of the moment.⁸ It means more than mere negligence, or even gross or culpable negligence. It involves conduct which is of a quasi criminal nature; the intentional doing of something either with the knowledge that it will result in serious injury or with

of the employment. *Weighill v. South Hetton Coal Co., Ltd.* (1911) 4 B. W. C. C. 141, C. A. But where a collier, going to work in a train furnished by his employers, went out onto the platform before the train had stopped, and, falling, was permanently disabled, riding on the platform of the trains being expressly forbidden, the accident was not outside the scope of his employment. *Watkins v. Guest, Keen & Nettlefolds, Ltd.* (1912) 5 B. W. C. C. 307, C. A. In this case the court (opinion by Fletcher Moulton, L. J.) said: "We have the difficulty of finding out a line between something that takes the accident entirely out of the employment, and something which within the employment is a serious and willful misconduct, which leads to the accident. It is a difficulty which I do not think will ever be solved by phrases. I think in each case we shall have to draw the line, and I think that that line ought to be drawn generally by the judge of first instance." *Id.*

⁵ *Price v. Tredgar Iron & Coal Co.* (1914) 7 B. W. C. C. 387. "Serious and willful misconduct within the sphere of the employment does not prevent his dependents—in that case it was death—from claiming compensation; but willful misconduct outside the sphere of his employment does not bring the accident within the sphere of the employment." *Cozens-Hardy*, in *Harding v. Brynddu Colliery Co.*, 4 B. W. C. C. 271.

⁶ *Johnson v. Marshall, Sons & Co., Ltd.* (1906) 8 W. C. C. 10, H. L. (Act of 1897).

⁷ *Kraljivich v. Yellow Aster Mining & Milling Co.*, 1 Cal. I. A. C. Dec. 554.

⁸ *Johnson v. Marshall, Sons & Co., Ltd.* (1906) 8 W. C. C. 10, H. L. (Act of 1897). Where an employé impulsively and without reflection attempts to clear sand off from a moving belt without first stopping the motor, such conduct is not such a violation of general rules of safety as to constitute willful misconduct. *Swank v. Chanslor-Canfield Midway Oil Co.*, 2 Cal. I. A. C. Dec. 330.

a wanton disregard of its probable consequences;⁹ conduct closely resembling the wanton or reckless misconduct which will render

⁹ (Code Supp. 1913, § 2477m1) Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 36. An employé may do something through thoughtlessness or inattention, may act imprudently or even negligently, or may go about his work in a way contrary to the rules and instructions of his employer, without having "a willful intention to injure himself." *Id.*; St. 1911, c. 751, pt. 2, § 2. "Serious and willful misconduct" is a very different thing from negligence, or even from gross negligence. In *re Nickerson*, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790; *Johnson v. Marshall, Sons & Co.*, [1906] A. C. 409. "Serious and willful misconduct" is much more than mere negligence (*Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35), or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its serious consequences (In *re Burns*, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787; *Johnson v. Marshall, Sons & Co.*, [1906] A. C. 409, 411; *Lewis v. Great Western Ry. Co.*, 3 Q. B. D. 195, 206, 213). Compensation is awarded without regard to the negligence of the employé, except where the injury results from serious and willful misconduct, in which case no compensation is given. In *re Murphy* (Mass.) 113 N. E. 283. Mere negligence or carelessness of an employé, causing his death or injury, does not preclude right of compensation under said statute. *Archibald v. Ott* (W. Va.) 87 S. E. 791. Death benefits are to be awarded, where otherwise deserved, "without regard to negligence"; i. e., negligence of any character. Even gross negligence does not constitute willful misconduct. The term "willful misconduct," as used in the Compensation Act, means much more than negligence, and more than gross negligence. To be guilty of willful misconduct, the party so guilty must consciously do a wrong. In other words, the wrong done must be intentionally done—it must be an intentional wrongdoing. The mere doing of a thing in a careless manner, or the mere doing of a thing in a wrong way, without intention to violate a necessary rule of safety or to do injury, is not "willful misconduct." *Nevadjic v. Northwestern Iron Co.*, Bul. Wis. Indus. Com., vol. 1, p. 93; *Id.* 1912-13, p. 21, affirmed in 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877; *Hedges v. City of Los Angeles*, 1 Cal. I. A. C. Dec. 394; *Coelho v. Rideout Co.*, 2 Cal. I. A. C. Dec. 773. Where the hazard is manifest, and the experiment premeditated, and the act not required by his duties nor the interests of his employer, such act amounts to a willful disregard for the employé's own life and bodily safety, and constitutes willful misconduct. *Downer v. Lasky Feature Play Co.*, 2 Cal. I. A. C. Dec. 316. "Willful misconduct" means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be willful. It has been said, and I think correctly, that perhaps one condition of 'willful misconduct' must

one liable to a trespasser or bare licensee;¹⁰ conduct exceeding the furthestmost limits of negligence and amounting to a willful ex-

be that the person guilty of it should know that mischief will result from it. But to my mind there might be other 'willful misconduct.' I think it would be willful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told: 'Now this may or may not be the right thing to do.' He might say: 'Well, I do not know which is right, and I do not care. I will do this.' I am much inclined to think that that would be 'willful misconduct,' because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be willful misconduct." Bramwell, L. J., in *Lewis v. Great Western Ry. Co.* (1877) 3 Q. B. D. 206. The consideration of mere negligence is out of place, and it is sufficient if the claimant can show that the accident arose out of and in the course of the employment, though the workman may have been negligent at the time. *McNicholas v. Dawson* (1899) 1 W. C. C. 86, 87.

The applicant was working under a car in the process of construction in such a position that he would be seriously injured by the moving of the car while so engaged. The usual signals preceding such movement were given, and applicant had been instructed in the same. It was held the failure of the applicant, through inattention, lack of mental alertness, or on account of the noise, to hear and comprehend the signals, did not, under the facts in this case, constitute intentional and willful misconduct. *Jankowski v. American Car & Foundry Co.*, Mich. Wk. Comp. Cases (1916), 327.

The proof that a farm servant tied the reins to the brake wheel of the lorry he was driving, instead of holding them in the proper way, and that in consequence he was injured by the horse pulling around and upsetting the lorry, was evidence of serious and willful misconduct. *Vaughan v. Nicoll* (1906) 8 F. 464, Ct. of Sess. (Act of 1897).

Acts not constituting willful misconduct: Where a night watchman in the employ of a construction company, knowing that escaping robbers were in the vicinity, through a mistake fired on deputy sheriffs, who returned the fire and injured him. In *re Harbroe*, 223 Mass. 139, 111 N. E. 709. In *Barksdale v. Fidelity & Deposit Co. of Md.*, 2 Mass. Wk. Rep. of Comp. Cases, 214 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.), wherein it appeared that the insurer declined to pay compensation on the ground that the employé had unreasonably neglected to obtain proper medical attention, and that such neglect constituted serious and willful misconduct, and the evidence showed that the employé had not neglected to obtain such attention, compensation was allowed. *Michigan*. Where a delivery boy injured a bicycle caught on the

¹⁰ In *re Nickerson*, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790.

rear end of a motor truck, which turned suddenly, causing him to be thrown to the pavement and injured. (Wk. Comp. Act, pt. 2, § 2) *Beaudry v. Watkins* (Mich.) 158 N. W. 16. Where the injured workman stated, in response to the question of his physician, that he was not an alcoholic, when he was in fact addicted somewhat to the use of liquor, there being nothing to show that he understood that his answer would affect the treatment given, or to what extent he needed to be addicted to the use of liquor to become an alcoholic. *Ramlow v. Moon Lake Ice Co.* (Mich.) 158 N. W. 1027. Where an employé, coming down off a roof on which he was working, descended by means of a rope, and was killed by losing his hold and falling, there being no proof that any order or rule forbidding the use of a rope in descending was communicated or made known to decedent, and it appearing that other employés used the rope method in descending, and that deceased used much care in letting himself down over the edge of the roof with such rope. *Clem v. Chalmers Motor Car Co.*, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 40, 178 Mich. 340, 144 N. W. 848, L. R. A. 1916A, 352. *California*. Where a miner was instructed by his foreman to complete his work in the shaft where he was and then go to another shaft, and, after finishing his work and sending word to the foreman that he was awaiting another assignment, went to the surface of the ground, and stopped temporarily to rest and obtain relief from the extreme heat in the shade of an ore bin, a place commonly used for that purpose by the miners, and was killed by the collapse of the bin. *Brooklyn Mining Co. v. Indus. Acc. Com. of State of Cal.* (Cal. Sup.) 159 Pac. 162. Where an employé removed a sliver from his finger with a pocket knife, after warning of danger of infection, even though infection developed in the finger, unless it could be shown that the knife was the means of introducing the infection. *Blaine v. McKinsey*, 1 Cal. I. A. C. Dec. 641. Where a bartender was shot dead upon his refusal to throw up his hands at the order of two hold-up men attempting to rob a saloon at midnight, and while the bartender was trying to reach the adjoining room to get a revolver. *Henning v. Henning*, 2 Cal. I. A. C. Dec. 733. Where the man was injured by the explosion of dynamite caps which he was holding in his hand at the time, caused by sparks from a lighted fuse which he held in his other hand while his foreman was testing it with a lighted match to see whether it was defective; the fuse not being attached to the caps, and he being an experienced powder man and under the direct supervision of his foreman at the time. *Andreucetti v. California Brick Co.*, 2 Cal. I. A. C. Dec. 284. Where there were no life preservers and no fire extinguishers on a burning launch, and there was on board a quantity of gasoline, which might have ignited and exploded, and the occupants attempted with fatal results to swim to a boom 300 feet away; their fault being an error of judgment, not amounting to suicidal intent nor willful misconduct. *Ruprecht v. Red River Lumber Co.*, 2 Cal. I. A. C. Dec. 864. Where a deck hand on a stormy night was last seen by a fellow employé leaning over a post fixed in the deck about one foot from the edge of the barge, and was

posure to a hazardous situation.¹¹ Wanton and reckless disregard of danger, equivalent to foolhardiness, or a perverse and obstinate

warned, "Frank, are you crazy? Stand up. Come on inside," to which he replied, "No, leave me alone," and continued to remain in his perilous position, his body afterwards being found washed upon the shore, and there being no evidence of any safety rule given by the employer or broken by the employé. *Coelho v. Rideout Co.*, 2 Cal. I. A. C. Dec. 773. *Connecticut*. Where the shaping of a piece of wood, necessary for his work, on a machine, was rendered especially hazardous by its small size and because the grain ran crosswise, making it more easy to break, but the workman did not know this. *Lane v. Aeolian Co.*, 1 Conn. Comp. Dec. 32. Where, according to their usual custom, the decedent, a motorman on a passenger car, arranged orally with the motorman of an express car where they should pass on the return trip, and decedent, after running nine or ten miles, ran by the switch designated and into a collision with the express car, which resulted fatally for him, and it further appeared that the switch designated by number bore a resemblance to the next one, just past the place of accident. *Dalton v. Connecticut Co.*, 1 Conn. Comp. Dec. 142. *England*.. Where a miner on a haulage road, knowing that trams were coming, tried to reach a manhole, and while so doing, perhaps negligently, had his leg broken when the haulage rope slipped. *Rees v. Powell Duffryn Steam Coal Co., Ltd.* (1900) 4 W. C. C. 17, C. A. (Act of 1897). Where an engine driver, walking down the tracks after his day's work to report at the station before going home, walked between the rails, although to his knowledge a down train had already been signaled, and was struck and killed by the train. *Tod v. Caledonian Ry. Co.* (1899) 1 F. 1047, Ct. of Sess. (Act of 1897). Where a farm servant fastened the reins to his cart, instead of holding them in his hands, it occurring that the horse bolted, upsetting the cart, and fatally injured the servant. *Lyll v. Whitton* (1907) S. C. 1267, Ct. of Sess. Where a workman, watching for land slips on a railway line, went along the line 300 yards to a fire, where another workman was posted, where he was run over and killed. *Glasgow & Southwestern Ry. Co. v. Laidlaw* (1900) 2 F. 708, Ct. of Sess. (Act of 1897).

¹¹ *Clark v. Los Angeles County*, 1 Cal. I. A. C. Dec. 623.

Excessive speed.—Where an employé was killed while driving an automobile at from 35 to 45 miles an hour, he was guilty of willful misconduct, though such speed was not unusual or so excessive as to amount to foolhardiness or in violation of his employer's instructions. *Fidelity & Deposit Co. of Md. v. Industrial Accident Commission*, 171 Cal. 728, 154 Pac. 834. Where proof offered in support of the defense of willful misconduct in speeding an automobile does not show that the driving was extraordinary or unnecessarily dangerous, the defense is not established. *Phillips v. Chanslor-Canfield Mid-*

breach of safety rules, must be established to prove willful misconduct.¹² Where an employé, unnecessarily and in the exercise

way Oil Co., 1 Cal. I. A. C. Dec. 580. In determining whether or not the fast driving of an automobile constitutes willful misconduct, the Commission must be guided by such fundamental facts as the condition of the road, the time of day, and the character of the car. Driving an automobile at a speed of 35 to 45 miles in the dark, over a fairly good and straight road, by a driver familiar with it, in a heavy, powerful car, equipped with strong lights, may be hazardous, but does not exceed gross negligence, nor constitute willful misconduct. *Head v. Head Drilling Co.*, 2 Cal. I. A. C. Dec. 279. Where an employé is violating a municipal ordinance at the time of his injury, this fact does not by itself establish willful misconduct, where the act in violation of the ordinance would not constitute misconduct, in the absence of such ordinance. Undoubtedly there are laws founded upon principles of morality or public policy, the breach of which is so far contrary to the public welfare as to deprive the wrongdoer of any claim to compensation for injuries sustained by such breach; but this is not the case where the breach is of a minor statute or ordinance, whose only function is more conveniently to regulate intercourse in crowded communities, where the act involved is not *malum in se*, but merely *malum prohibitum*. Traffic ordinances fall in the latter class, and their violation does not by itself constitute willful misconduct. *Hedges v. City of Los Angeles*, 1 Cal. I. A. C. Dec. 394. Riding a motorcycle along a crowded thoroughfare in a large city at a rate estimated at about forty-five miles per hour, without extreme necessity, constitutes such a flagrant disregard for the rider's own life and limb and bodily safety as to amount to willful misconduct. *Bohma v. Western Union Telegraph Co.*, 2 Cal. I. A. C. Dec. 246. Where the applicant, an employé of a firm dealing in racing motorcycles, took a motorcycle out on a race track to test its engine and speed, as instructed by the employer, and, while speeding at 62 miles an hour, crashed into a fence, resulting in serious injury, such accident was compensable. *Lawson v. Stockton Motorcycle & Supply Co.*, 2 Cal. I. A. C. Dec. 649.

¹² *Haffemayer v. United Keanograph Film Mfg. Co.*, 1 Cal. I. A. C. Dec. 620. Willful misconduct consists either in the willful disregard of rules made by the employer for the protection of his employés, or in the unnecessary taking of risks by the employé to an extent so far exceeding the requirements of negligence as to amount to foolhardiness or dare-deviltry. *Hedges v. City of Los Angeles*, *supra*.

Dangerous place.—In an action under the Workmen's Compensation Act (Laws 1911, c. 218), the admitted facts showed that plaintiff was injured by being caught in the revolving cylinders of a machine while standing in or upon it and applying compressed air for the purpose of cleaning the cylinders. Covers or hoods were provided for use when the machine was in operation,

of bad judgment, resorts to a dangerous machine, instead of using the regular tools, but has not been forbidden to use the machine, injuries received are not caused by willful misconduct.¹³

but in order to clean the machine the covers had to be removed. The plaintiff could have stood on the ground and applied the air without danger of coming in contact with the revolving cylinders. The court held that plaintiff was not barred from the right to recover compensation by the provision of section 1 of the Compensation Act, on the ground that his injury resulted from his deliberate intent to cause the injury, or from his willful failure to use a guard provided for him as protection against accident. *Messick v. McIntire*, 97 Kan. 813, 156 Pac. 740. *California*. Where the employé was directed to polish brass rails in the engine room of the vessel and went inside a railing the better to fulfill his task, but his going inside the railing was attended by some danger, and no specific instructions were issued, either to go inside the railing or not to do so, and such employé was injured by falling into the machinery, such employé was not guilty of willful misconduct, and was entitled to compensation for his injury. *Rose v. North Pacific Steamship Co.*, 2 Cal. I. A. C. Dec. 57. Where there were no fixed means of ingress, and instead of climbing over a lumber pile to board the ship, a stevedore used the hoisting gear to get aboard, and was thrown upon the deck and injured through the carelessness of a winchman, it appearing that the hoisting gear was frequently used by stevedores and others for that purpose, and that it was sometimes the least dangerous method, its use by the applicant did not constitute willful misconduct. *Soderstrom v. Hart-Wood Lumber Co.*, 2 Cal. I. A. C. Dec. 688. *England*. Where a miner in getting a tool crossed the bottom of the shaft just after the cage had been raised, and was injured by its being lowered upon him without warning, considering that, although there was no specific rule forbidding such action, it was known notoriously among the employés to be a dangerous act, and that a pass was provided, so that such action was not necessary, there was evidence of serious and willful misconduct. *Leishman v. Dixon, Ltd.* (1910) 3 B. W. C. C. 500, Ct. of Sess. Where a miner, leaving his work by the main haulage road, was advised to get into a manhole because trams were coming, and continued on his way unheeding, passing six other manholes, and was finally struck and killed by the trams, his action was serious and willful misconduct. *John v. Albion Coal Co., Ltd.* (1902) 4 W. C. C. 15, C. A. (Act of 1897). Where a miner, disregarding the danger, attempted to cross rails upon an incline, where hutches were running up and down, instead of waiting until they were no longer running, he was guilty of serious and willful misconduct. *Condron v. Gavin Paul & Sons, Ltd.* (1904) 6 F. 29, Ct. of Sess. (Act of 1897).

Foolhardiness.—A carpenter, employed to construct the necessary scenery

¹³ *Ponder v. Adams & McBratney*, 1 Cal. I. A. C. Dec. 207.

A distinction should be drawn between the intentional operation of a machine without a safety guard provided, and the careless removal of such safety guard too soon after the shutting off of the power; such removal being necessary for the purpose of repair. The former is willful misconduct, as it is done solely for an improper purpose, namely, the operation of the machine in a forbidden manner; the latter is merely negligent, as done for a proper purpose, but carelessly.¹⁴

An assistant foreman, who could have escaped in safety from the place where he was working upon warning of danger, but remained to rescue a fellow workman in peril, and lost his life in consequence, was not guilty of willful misconduct in so remaining. Even though he deliberately exposed himself to the danger of injury and death, his action cannot be said to be willful in the sense of being stubborn, perverse, or as evidencing a state of mind opposed to the orders or instructions given him, or as opposed to the action that reasonably should have been taken by him, both as a fellow employé and in his official capacity.¹⁵

for the production of a motion picture, touched off the fuse of a bomb used in the play with a lighted match, "to see what it would do." His action amounted to willful misconduct. *Downer v. Lasky Feature Play Co.*, 2 Cal. I. A. C. Dec. 316. Where an aviator was at the time of the accident performing no especial feats and taking no extra risks, but was engaged in straightaway flying, and a vacuum created in the air by the explosion of a bomb below his machine caused his precipitation to the earth, and death, there was no foolhardiness or dare-deviltry which could be construed as constituting willful misconduct. *Stites v. Universal Film Mfg. Co.*, 2 Cal. I. A. C. Dec. 670.

Where a workman, traveling on a barge in the course of his employment, but having no duties to perform during the trip, was seen leaning against a post near the edge of the barge, but on the inside of the post, shortly before he disappeared, his body being later washed ashore, the court holding that he was not guilty of such reckless foolhardiness as to bar compensation, though his conduct was not careful. *W. R. Rideout Co. v. Pillsbury* (Cal. Sup.) 159 Pac. 435.

¹⁴ *Southern Cal. Hardwood & Mfg. Co. v. Adams*, 1 Cal. I. A. C. Dec. 406.

¹⁵ *Mihaica v. Mlagenovich*, 1 Cal. I. A. C. Dec. 174.

An attempt to save the life of a fellow employé, even though intensely hazardous, is not willful misconduct. *Maffia v. Aquilino*, 3 Cal. I. A. C. Dec. 15.

The words "purposely self-inflicted," as used in the Ohio Act, imply the unquestioned design of self-injury—an inward purpose of injuring one's self—that must be shown by evidence.¹⁶ Proof of acts which at common law constitute gross negligence raises no presumption that a resulting injury to an employé guilty of such negligence was "purposely self-inflicted."¹⁷

§ 141. — Disobedience—Violation of rules

That the injury was occasioned by the employé's intentional disobedience of an order is not conclusive against him. To have that effect the disobedience must have been willful;¹⁸ it must have been intentional, and premeditated, and must have proceeded from a conscious motion of the will in opposition to the authority of the

¹⁶ (Wk. Comp. Act 1913, §§ 21, 25, and 27) *Stopyra v. U. S. Coal Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 92.

¹⁷ *Id.*

¹⁸ In *re Nickerson*, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790; *Johnson v. Marshall, Sons & Co., Ltd.*, [1906] A. C. 409, 411. "It must have been with the intention of being guilty of serious misconduct." Lord James of Hereford, in *Bist v. London & Southwestern Ry. Co.* (1908) 9 W. C. C. 24. Convincing proof of the deliberate, intentional violation of a rule, formulated, brought to the attention of those whom it is designed to govern, and diligently enforced, will establish willful misconduct. An infraction of rules and orders issued and promulgated with less form, and enforced with little or no diligence, will not establish willful misconduct as a defense. *Fisco v. Hazel Gold Mining Co.*, 1 Cal. I. A. C. Dec. 30. Where it appears that the disobedience of an oral instruction was not actuated by willful desire to disobey an order, but by a wish to further the employer's interests, the misconduct, if any, is not willful, so as to defeat a claim for compensation for the disability resulting from the accidental injury suffered by the employé. *Sugar v. Atlas Taxicab Co.*, 1 Cal. I. A. C. Dec. 34.

Where it was part of the duties of the applicant to load lumber upon an automobile truck, and he had been instructed not to get out over the wheel in getting off the truck, and did get off over the wheel, and received injuries thereby, but there was also evidence to show that at the time of the accident the other means of leaving the truck were blocked, while such evidence establishes misconduct, it fails to establish willful misconduct, as required by the act. *Van Lanker v. County of Los Angeles*, 1 Cal. I. A. C. Dec. 107.

employer.¹⁹ But an employé who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and if he deliberately violates a rule or order, with knowledge of its existence and of all the dangers accompanying its violation, he is guilty of willful misconduct.²⁰ In the cases where neglect of a rule has been held not to amount to serious and willful

¹⁹ *Winter v. Johnson-Pollock Lumber Co.*, 1 Cal. I. A. C. Dec. 387. Mere disobedience of an order does not necessarily constitute willful misconduct, in the absence of a showing that the disobedience was willful and premeditated, and was prompted by a bad state of mind. *Collins v. Bodin*, 2 Cal. I. A. C. Dec. 153. A definition of "willful misconduct" applicable to all cases cannot be formulated. It may be stated in a general way that the willful violation of a rule or order made for the employé's own safety, or the safety of others, and made by a power having authority to make such rule or order, and enforced with diligence, will constitute willful misconduct. There must be a rule or order, as distinguished from a warning. It must have been diligently enforced. It must appear that the employé is refractory, or intentionally and premeditatedly disobedient, in order to constitute willfulness. *Lutz v. Gladding, McBean & Co.*, 1 Cal. I. A. C. Dec. 8. Where a workman, hired to oil machinery, was forbidden to oil it while it was in motion, and disobeyed his instruction in this respect, and as a result was fatally injured, his action did not amount to willful misconduct. *Mawdsley v. West Leigh Colliery Co., Ltd.* (1912) 5 B. W. C. C. 80, C. A.

²⁰ *Coelho v. Rideout Co.*, 2 Cal. I. A. C. Dec. 773. "I think that we clearly expound the intention which the Legislature had in framing the statute if we hold that that which is 'serious and willful misconduct' must be clearly established against the plaintiff who seeks damages. Also it occurs to me that the word 'willful' must not only mean a mere intentional breach of a rule, but it must also mean willful with the intention of being guilty of misconduct. * * * If there may be such a case of a breach of the rule, where the person through whose act the cause of action arises has done an intentional act, we must, before we give effect to the words 'serious and willful misconduct,' see what was in the man's mind at the time that he did so break the rule. In this case, when we look at the effect which is to be given to the word 'serious,' as controlling it, I do not think that we can find that it is 'serious' in consequence of the unfortunate man being killed. He did not contemplate that for a moment." Lord James of Hereford, in *Bist v. London & Southwestern Ry. Co.* (1908) 9 W. C. C. 19, H. L. (Act of 1897). Where the employer has published a great number of safety rules of a general character, and no one of which has been brought to the special attention of an employé with reference to his specific duty, the refusal to obey said rules must be premeditated,

deliberate, and designed, in order to constitute willful misconduct. *Swank v. Chanslor-Canfield Midway Oil Co.*, 2 Cal. I. A. C. Dec. 330.

Violation of safety rules.—Where an experienced lineman disobeyed a rule of the employer and handled a "hot wire" without the rubber gloves provided by the employer, and at hand, he was guilty of "willful misconduct." (St. 1911, p. 796) *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35. Where a lineman at work at the top of a pole had a safety belt on his person, but neglected to use it, thereby violating a printed rule of his employer that a safety belt must be used when working on any structure, and the use of the belt would have prevented the injury, such neglect to wear the belt was willful misconduct, although the risk involved in such disobedience under the circumstances was considered by him and other linemen and their foreman to be negligible, and the accident was due to an undisclosed and unusual defect peculiar to the pole on which he was working. *Lockwood v. Pacific Gas & Electric Co.*, 3 Cal. I. A. C. Dec. 26. Except where a violation of safety rules laid down by the employer is shown, acts of the employé imperiling his own safety do not constitute willful misconduct, unless they so far exceed extreme negligence as to constitute foolhardiness or dare-deviltry. *Hedges v. City of Los Angeles*, 1 Cal. I. A. C. Dec. 394. Where an employé was in the service of a municipal corporation and received an injury in the course of his employment, but while breaking a municipal ordinance, it cannot be said that he was guilty of violation of a safety rule imposed by his employer for the safety of its employés, where such ordinance was enacted for the regulation of the general public, and not for the guidance of municipal employés only. *Id.* Where an employé failed to use a safety device placed for his own protection on the machine he was working at, and it was a rule of his employer, diligently enforced, that employés must never use the machine without using the protection provided, but the employé had dispensed with the safety device because he wished to get the work he was upon done more quickly, and was injured by the machine because of his failure to use said protection, the injuries were caused by the willful misconduct of the employé, and he was not entitled to compensation therefor. *Gordon v. San Francisco-Oakland Terminal Rys.*, 1 Cal. I. A. C. Dec. 232. Where a person moving flour in sacks was twice instructed on the morning of his injury to take the sacks from the top of the pile, and not out of the middle, on account of danger involved in removing them from the middle of the pile, and where he was injured by the pile falling over upon him, due to his taking the sacks out of the middle, such injury was caused by the willful misconduct of the employé, and compensation should be denied. *Curless v. Peninsula Warehouse*, 1 Cal. I. A. C. Dec. 354. Where an electric lineman, while at work on the top of a pole carrying high current wires, received a shock causing him to fall, resulting in his death, and it appeared that he was working at the time without rubber gloves or safety belt, which would have prevented the accident, and which, under the rules of the employer, well known to the employé, were required, and that

he had been expressly warned by both his foreman and fellow workman almost immediately prior to the accident, such neglect and refusal constitutes willful misconduct, and was the cause of the accident. *Lines v. Pacific Gas & Electric Co.*, 2 Cal. I. A. C. Dec. 837. Where an employé, during working hours, sat down to rest in the shade under an ore bin, and was killed by the collapse of the bin, this fact does not establish willful misconduct, in the absence of evidence tending to show that deceased had been forbidden to rest in the shade under this bin for brief periods of time during working hours, especially where the evidence fails to show that there was reason to anticipate danger in resting in the place where the accident occurred. *Goering v. Brooklyn Mining Co.*, 2 Cal. I. A. C. Dec. 141. Where foreigners, who were engaged in breaking a rock in which dynamite had been used, had been generally warned of danger, but it is not shown that the warning was understood, or that the act resulting in the accident was a willful breach of rules, an employé injured by an explosion of dynamite, which had remained in the rock, was not guilty of willful misconduct, although he immediately caused the explosion by striking the rock. *Kraljivich v. Yellow Aster Mining & Milling Co.*, 1 Cal. I. A. C. Dec. 554. Where an employé, engaged to operate a rotary rip saw which had a safety guard fixed to it, and having strict orders from his employer that the saw was not to be run without the guard being in place, and where, desiring to clean out the sawdust container under the saw, he caused the power to be shut off, and, after waiting the usual time for the saw to cease revolving, removed the safety guard and was injured by the saw, which was still revolving, he was not barred from compensation on the ground of willful misconduct. *Southern Cal. Hardwood & Mfg. Co. v. Adams*, 1 Cal. I. A. C. Dec. 406. There was no serious and willful misconduct where it was not proven that the applicant was forbidden to ride back to the studio on horseback, because she was regarded as unable to control the horse and would be in some danger if she rode it, as contended, but merely that she misunderstood the instructions given her, which does not prove the willful violation of a safety rule. *Jansen v. Balboa Amusement Producing Co.*, 1 Cal. I. A. C. Dec. 477. A rule that employés working with certain machines are not to repair them, but must leave the repairing to be done by a special mechanic, is not usually a safety rule for the protection of employés, but rather a rule for the division of the work among them. Its violation, therefore, does not usually constitute willful misconduct; the act being interpreted to mean that only violation of safety rules imposed by the employer for the protection of his workmen shall constitute such willful misconduct. *Winter v. Johnson-Pollock Lumber Co.*, 1 Cal. I. A. C. Dec. 387. *Michigan*. A workman received injuries to his hand from the gears in a carding machine in appellant's factory. Gangrene set in and he died sixteen days after the injury. Appellant contended that the injury was the result of the willful and intentional misconduct of decedent, by his disregarding the signs warning employés to keep their hands off the machines and not to clean machines while in motion. But

the Board found that the decedent at the time of his injury was picking off some cotton which had collected on the carding cylinder, and that such action was necessary and ordinarily performed by and required of the operator of the machine. *Mich. Workmen's Comp. Mutual Insur. Co. v. Redfield, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 34. Wisconsin.* Where a conductor on a street car exchanged places with the motorman and undertook to run the car in at night, without there being an emergency requiring such action, and knowing that he was wrongfully violating a safety rule of his employer, made for his and the public's protection, and was killed when the car jumped the track, his death was the result of serious and willful misconduct. *Neumann v. Milwaukee Electric Ry. & Light Co., Bul. Wis. Indus. Com., vol. 1, p. 92. England.* Where one breaks a rule, knowing at the time that he is breaking it, and is not compelled to break it by some superior power which he cannot resist, he is guilty of a willful breach of it. An engine driver, contrary to a posted rule of which he knew, climbed upon the tender of an engine while it was in motion, and was killed while it was passing under a bridge; his action constituted serious and willful misconduct. *Bist v. London & South Western Ry. Co. (1908) 9 W. C. C. 19, H. L. (Act of 1897).* Where a workwoman disobeyed the rules and practice of the factory, and tried to clean some machinery while it was in motion, she was guilty of serious and willful misconduct. *Guthrie v. Boase Spinning Co., Ltd. (1901) 3 F. 769 (Act of 1897).* Where employers posted a notice forbidding the use of a lift by any of their employes unless they were in charge of a load, and a workman who had no load was found fatally injured in the lift, his act did not constitute serious and willful misconduct. *Johnson v. Marshall Sons & Co., Ltd. (1906) 8 W. C. C. 10, H. L. (Act of 1897).*

Violation of mining rule.—"It appears to me that to disobey a special rule, such as that here in question, is serious and willful misconduct in the sense of the statute; and it does not seem to me to be any excuse, or to make any difference, that, the rule being duly published, the particular miner does not choose to read it, or make himself acquainted with its terms. I should perhaps add that I do not myself see how it could be any excuse, or make any difference, although the rule should have been commonly disobeyed, or even disobeyed with the knowledge of the employers." Lord Kyllachy, in *Dobson v. United Collieries, Ltd. (1906) 8 F. 241, Ct. of Sess.* Lord McLaren has said: "I think it is now determined that the infraction of a mining rule amounts to serious and willful misconduct where it is the cause of the accident. But I think there may be an exception to that principle where the workman is either excusably ignorant of the mining rule, or where he breaks the rule through some paramount necessity." *Id.* Where, in order to make his work easier, a miner took away the props which supported a dangerous part of the roof of a cut, replacing them with other supports, which, being insufficient, allowed a stone to fall and injure him, although his action was contrary to statutory rules, it was not serious and willful misconduct. *Rumboll v. Nun-*

nery Colliery Co., Ltd. (1899) 1 W. C. C. 29, C. A. (Act of 1897). Where, while the fireman of a squad of blasters was absent, the foreman of the squad, upon the charge being made ready, tried to render the detonator harmless by taking out the wires, and was killed in the effort, his action was not contrary to the Coal Mines Act, and was not serious and willful misconduct. *Queen v. Baird & Co., Ltd.* (1904) 6 F. 271, Ct. of Sess. (Act of 1897). Recovery was barred by serious and willful misconduct where a miner was injured by an explosion of a shot he had lighted, and to which, upon the cartridge not exploding, he returned in three minutes, whereas a special rule forbade his returning under such circumstances within thirty minutes (*Waddell v. Coltness Iron Co., Ltd.* [1913] 6 B. W. C. C. 306, Ct. of Sess.); where a miner disregarded a special rule forbidding miners to have a naked light in a position where it could set off explosives, and was injured by an explosion resulting as a consequence of his placing a naked light on the ground near some powder charges he was counting (*Donnachie v. United Collieries, Ltd.* [1910] S. C. 503, Ct. of Sess.); where, in breach of a special rule, a miner opened the gate between the seam and the shaft, without determining whether the cage he had called for had arrived or not, and, the cage not being there, he and the hutch he was pushing were precipitated down the shaft, and he seriously injured (*George v. Glasgow Coal Co., Ltd.* [1910] 2 B. W. C. C. 125, H. L., and [1909] 1 B. W. C. C. 239, Ct. of Sess.); where there was a statutory rule forbidding miners to have a naked lamp in their caps while carrying cartridges which were not inclosed, and a miner was fatally injured by an explosion which resulted from his breaking the rule (*Dailly v. Watson, Ltd.* [1900] 2 F. 1044, Ct. of Sess. [Act of 1897]); and where a miner, who was "holing," broke a statutory rule in neglecting to prop the roof, and was killed by head coal falling upon him (*O'Hara v. Cadzow Coal Co., Ltd.* [1903] 5 F. 439, Ct. of Sess. [Act of 1897]).

Disobedience of orders.—Where there is a deliberate and unmistakable act of disobedience to an express order, or where there is a deliberate breach of a law or rule, which is framed in the interests of the workingman, it will be held that such a breach or such disobedience amounts to serious misconduct. *Head v. Head Drilling Co. (Fidelity & Deposit Co. v. Industrial Acc. Commission)* 2 Cal. I. A. C. Dec. 973; 171 Cal. 728, 154 Pac. 834. Where a miner deliberately and against the known and enforced orders of the employer takes a dangerous position on the bucket ascending from the mine, from which he falls and is killed, this is willful misconduct, and the employer is not liable for any death benefit. *Lopez v. Harvard Mine*, 2 Cal. I. A. C. Dec. 593. Evidence that where a ship had gone upon the rocks and was in imminent danger of going to pieces, and the order was given by the captain to desert the vessel, and the first mate, knowing of such order, for some reason which cannot be ascertained, remained on the ship, and, failing to reach his boats, was lost in the wreck when the ship broke up a few minutes later, it being impossible to obtain evidence as to why he failed to leave the ship with the other

members of the crew, such evidence is insufficient to establish the defense of willful misconduct on the part of such officer. *Bolger v. North Pacific Steamship Co.*, 2 Cal. I. A. C. Dec. 268. Where an employé upon a building under construction had fastened a hod of mortar to the bucket used to hoist it, and his employer, seeing it, had called down to him not to have the bucket sent up, but that other workmen standing near by shouted that it was all right, and for the driver of the horse to go ahead, and the workman was injured by the hod falling from the bucket in being taken out at the upper story, such facts are insufficient to establish willful misconduct of the injured employé contributing to his accident. The accident was in fact due to others causing the bucket to be hoisted, directly assented to by the employer by failing to stop them. *Collins v. Bodin*, 2 Cal. I. A. C. Dec. 153. *Connecticut*. In *Sanford v. Connecticut Co.*, 1 Conn. Comp. Dec. 485, where, after deliberate disregard and disobedience of several safety rules he knew and understood, decedent conductor was fatally injured in picking up a live wire from the high-way without using any insulation, contrary to the rules and the direct cautioning of his motorman, it was held he was guilty of serious and willful misconduct. *Massachusetts*. An employé was engaged to do general cleaning, painting, and whitewashing, and some of his work, having to be done near machinery and shafting in motion, was dangerous. He had been directed to do this work during the noon hours, when the machinery was stopped. On the day of the injury the superintendent told the employé about 11:30 a. m. that the work on a wall near the moving shafting should be done at noon, when the machinery was stopped. The employé started to work at this place about five minutes later, expecting to finish the job when the machinery was stopped. His clothing was caught by a projection from the collar of the shafting, and he was fatally injured. The insurer pleaded serious and willful misconduct on the part of the employé in failing to obey the instructions of the superintendent, but the Committee of Arbitration held that the widow was entitled to compensation, the injury not having occurred by reason of the employé's serious and willful misconduct. *Nickerson v. New England Casualty Co.*, 2 Mass. Wk. Comp. Cases, 379 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct., 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790). *England*. Lord Trayner has said: "I cannot figure anything more serious or willful than positive and intentional disobedience to a strict and positive order." *Powell v. Lanarkshire Steel Co., Ltd.* (1904) 6 F. 1039, Ct. of Sess. (Act of 1897). Where a carpenter tried to put back a belt which had slipped off the wheel of the grindstone upon which he was sharpening a tool, although he had had orders not to touch the machinery, his misconduct was not willful. *Whitehead v. Reader* (1901) 3 W. C. C. 40, C. A. Where a miner, following the frequent practice of his fellow workmen, although it was dangerous and against orders, ascended to a higher level in the cage of a sump shaft which was used for raising ore, and was killed while so doing, his action was not serious and willful misconduct. *Douglas v. Unit-*

misconduct, there have generally been extenuating circumstances leading up to the neglect.²¹ It is not serious misconduct to break a rule, violations of which have been tacitly permitted by the employer,²² or to break a rule not properly posted or brought to the

ed Mineral Mining Co., Ltd. (1900) 2 W. C. C. 15, C. A. Where a boy, who had been forbidden to put his hand across the saw upon which he was cutting screws, was injured by leaning across it while in motion, in an effort to pick up a screw which had fallen, he was guilty of negligence, but not serious and willful misconduct. *Reeks v. Kynoch, Ltd.* (1902) 4 B. W. C. C. 14, C. A. It was serious and willful misconduct where a girl, working on a threshing machine, tried to step across the machine so that she might talk to a fellow servant, when she had been warned that to do so was dangerous (*Callaghan v. Maxwell* [1900] 2 F. 420, Ct. of Sess. [Act of 1897]); where a collier was ordered to bore from above into the top hole of a seam for the purpose of drawing off the gas, and although forbidden to enter the top hole, which was marked off as dangerous, nevertheless did so, seeking to see if the drill was working properly, and was suffocated (*Harding v. Brynddu Colliery Co., Ltd.* [1911] 4 B. W. C. C. 269, C. A.); where some boys employed in a steel works, who had been continually warned not to go near certain wagons which were standing on a steep incline, did so (*Powell v. Lanarkshire Steel Co., Ltd.*, supra); and where a workman was killed while operating a circular saw without any guard, although he had been ordered several times to use one, because it was dangerous not to (*Brooker v. Warren* [1908] 9 W. C. C. 26, C. A. [Act of 1897]). In the last-named case *Collins, M. R.*, said: "He was guilty of misconduct in deliberately and intentionally refusing to obey the order to use the guard, and the misconduct was willful, and that misconduct was serious, because it produced a condition of danger to himself and others. He was therefore guilty of serious and willful misconduct."

²¹ *United Collieries, Ltd., v. McGhie* (1904) 6 F. 810.

²² It must be shown that orders given by the employer were accompanied by such disciplinary measures as were necessary to entitle them to respect. Where discipline is unreasonably lax by the employer, and his orders are habitually disregarded by his employés, disobedience of such orders will not constitute willful misconduct. *Collins v. Bodin*, 2 Cal. I. A. C. Dec. 153. Where safety instructions are given merely as cautions, and repeated violations thereof are known and permitted without penalty, disregard of such cautions does not constitute such opposition to the employer's will as to amount to willful misconduct. *Haffemayer v. United Keanograph Film Mfg. Co.*, 1 Cal. I. A. C. Dec. 620. To constitute willful misconduct there must be a violation of a rule imposed by the employer for the protection of an employé, which is diligently enforced. Where such rule is not enforced, its disobedience being notorious and allowed to continue without any penalty being imposed, a vio-

lation of it which results in injury does not constitute willful misconduct. *Cleveland v. Hastings*, 2 Cal. I. A. C. Dec. 15. Lord Atkinson said: "I agree that an employer should not be permitted to shield himself from liability by merely posting up a notice prohibiting some practice in his works, where he has tacitly permitted the practice to be followed, 'winked,' as it is called, at the disregard of his orders." In *Barnes v. Nunnery Colliery Co., Ltd.* (1912) 5 B. W. C. C. 199.

It was not serious and willful misconduct on account of the employer's acquiescence where the exhibiting of a "Gila monster" by a "spieler" to attract a crowd was not positively forbidden, and any objection was not because he or his employer believed the bite of the reptile to be dangerous, and the continuation of such exhibition was tacitly acquiesced in (*Merritt v. Clark & Snow, Inc.*, 2 Cal. I. A. C. Dec. 983); where an employé, with a previously excellent reputation for obedience to instructions given by his superiors, was injured while emptying a bin, because of his failure to place a proper grating beneath it, and the evidence showed that the employés had been in the habit of emptying the bin without using such grating, and that they were not cautioned or reprimanded or discharged on account of this neglect (*Cruz v. Cal. Portland Cement Co.*, 2 Cal. I. A. C. Dec. 155); where a brakeman on a railroad train was injured as a result of using his foot to aid in making a coupling, which was a slightly dangerous act and in violation of instructions, neither peremptory, nor specific, nor vigorously enforced, and often violated without protest or discipline (*Connors v. Sugar Pine Ry. Co.*, 2 Cal. I. A. C. Dec. 879); where the injury to a girl, caused by the explosion of a bottle into which she was bottling mineral waters, might have been prevented by the wearing of gauntlets, but the regulation requiring them was not strictly enforced (*Casey v. Humphries* [1913] 6 B. W. C. C. 520, C. A.); or where, there being a sump shaft in a mine which was used for raising ore, in which it was dangerous and against orders for miners to ascend or descend, although they habitually did so when no officials were watching, a miner was killed while he was ascending in a cage in the shaft (*Douglas v. United Mineral Mining Co., Ltd.* [1900] 2 W. C. C. 15, C. A. [Act of 1897]).

In *Grandfield v. Bradley Smith Co.*, 1 Conn. Comp. Dec. 479, where there was a rule in a candy factory requiring girls to get empty boxes from the boy who supplied their table, and forbidding them to get boxes from any other boy, which rule was, however, not uniformly enforced, and the violation of which was attended with no danger, it was held a girl injured while violating the rule, by the act of the boy in resisting an effort to keep her from getting a box, was not guilty of serious and willful misconduct. In *Forbes v. Brown*, 1 Conn. Comp. Dec. 202, where the deceased, engaged in "scoring" logs in the woods, and working in sight of his employer, diverted from the usual and proper method of standing on the log, and was scoring while standing on the ground beside the log, and was warned by his employer to stand on the log, but did not, and the employer gave no further suggestions or or-

employé's attention.²³ Ignorance of a statutory rule which has been properly posted is no excuse.²⁴ There is a difference of opinion as to whether violation of a rule is *prima facie* serious and willful.²⁵

ders, and the employé five minutes later was struck on the leg by the ax, he was not guilty of serious and willful misconduct.

²³ Lord President said, in *Dobson v. United Collieries, Ltd.* (1906) 8 F. 246: "I think it goes without saying that a rule not properly posted is really no rule at all; it is merely a piece of paper in the employer's pocket, so to speak, and no question of breach can arise until the rule is posted."

Where a large building contained two widely separated freight elevators, and the employer of young errand boys made and enforced a rule that his boys should not operate "the elevator" by themselves, but his rule did not refer specifically to operating the elevator more distant from his loft, which was frequently operated by the boys, though without the knowledge of the employer, and the fact that the rule was for their protection was not made plain to them in a manner suited to their intelligence, and the risk of injury or death involved was not apparent enough to make the act of more than ordinary negligence, and one of the boys, while attempting to operate the more distant elevator, though aware of his employer's rule, in some manner fell to the bottom of the elevator shaft and was killed, the Commission held he was not guilty of willful misconduct, as having deliberately violated a rule made for his own protection. *Cassell v. Simon Millinery Co.*, 2 Cal. I. A. C. Dec. 1071. Where an employé is killed by electric shock from climbing upon a crane within close proximity to power lines, and it is shown that the employé had been cautioned not to go upon such part of the crane without shutting off the power, but such caution did not amount to any regularly enforced safety rule or regulation, and it appears in evidence that the employés were

²⁴ Where a miner was injured by an explosion caused by his carrying a naked light in his cap, contrary to a statutory rule, at the same time as he was carrying an uninclosed cartridge, his action was serious and willful misconduct, although he had no knowledge of the regulation, and was following the usual practice. *Dobson v. United Collieries, Ltd.* (1906) 8 F. 241, Ct. of Sess.

²⁵ Lord Loreburn has said: "In my opinion it is not the province of the court to lay down that a breach of a rule is *prima facie* evidence of serious and willful misconduct. That is a question purely of fact, to be determined by the arbitrator as such." *George v. Glasgow Coal Co., Ltd.* (1910) 2 B. W. C. C. 129. But Lord Trayner expressed the opinion that *prima facie* any breach of a rule is willful and serious. *United Collieries, Ltd., v. McGhie* (1904) 6 F. 808.

§ 142. — Drunkenness

Whether drunkenness is willful misconduct depends on the facts of the particular case.²⁶ It is quite possible for a person to be in an intoxicated condition which proximately caused the accident,

accustomed without rebuke to make repairs light in character, near the said power wires, without turning off the power, that no danger signals had been erected or warning notices posted, that work had previously been done upon this machine without throwing the switch, and that no one had been reprimanded, suspended, or discharged for failure to do so, the evidence is insufficient to establish that the death of the employé was caused by willful misconduct. *Freid v. Smith Lumber Co.*, 2 Cal. I. A. C. Dec. 117. Where a special rule forbade miners, who had lighted trains to fire shots, to return to the train sooner than thirty minutes after, but such rule was not properly posted and was not obeyed very generally, and a miner was injured when he returned within six minutes to see why there had been no explosion, his action cannot be said to be serious and willful misconduct. *McNicol v. Speirs, Gibb & Co.* (1899) 1 F. 604, Ct. of Sess. (Act of 1897). Where a workman, seeking something for his work, mounted a furnace platform on a hoist which it was dangerous and against the rules to use, but proof that he knew of the regulation was lacking, it was held there was evidence to justify a finding that his action was not serious and willful misconduct. *Logue v. Fullerton, Hodgart & Barclay* (1901) 3 F. 1006, Ct. of Sess. (Act of 1897).

²⁶ (St. 1911, § 2394—4) *Nekoosa-Edwards Paper Co. v. Industrial Commission*, 154 Wis. 105, 141 N. W. 1013, L. R. A. 1916A, 348, Ann. Cas. 1915B, 995. Where an indulgence in intoxicants results in the impairment of the workman's faculties, which he would ordinarily use to safeguard himself against danger when he is working with dangerous appliances or necessarily working in a dangerous place, and it is plain that the impairment of those faculties as the result of intoxication is the major contributing cause of the accident, such intoxication will be held to be the proximate cause of the accident and compensation will be denied. *Arnold v. Benjamin*, 1 Cal. I. A. C. Dec. 412. Compensation cannot be collected for an injury sustained on account of the intoxication of the injured employé. (Code Supp. 1913, § 2477m1a) *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 24. Lord McLaren said in *McGroarty v. Brown & Co., Ltd.* (1906) 8 F. 809, Ct. of Sess. (Act of 1897): "Of course there are degrees of intoxication, but in this case the appellant was dismissed for being drunk and unfit for work. I cannot doubt that drunkenness to the extent of unfitting a man for his work is 'serious and willful misconduct,' and disentitles the applicant to compensation under the Act of Parliament."

Because of the extraordinary hazard of the occupation of an electric line-man and his need of full possession of his faculties, the California Commis-

which in turn proximately caused the death, and yet not be guilty of willful misconduct. Though the drinking of intoxicating liquors

sion will deny compensation if the evidence is sufficient to show any considerable degree of intoxication. *Hewitt v. Red River Lumber Co.*, 2 Cal. I. A. C. Dec. 286.

In *Filliger v. Allan*, 1 Conn. Comp. Dec. 35, brought by the widow of a driver who fell from his wagon and broke his neck, it appeared that he had often been drunk before, had drunk at three saloons on the day of the accident, and had admitted drinking, being told by a bystander he was in no condition to drive, the injury was due to the employé's serious and willful misconduct. In *Boyington v. Stoddard*, 1 Conn. Comp. Dec. 103, where the deceased workman in building a silo used no staging, but stood on upright staves and held himself in position by the projecting staves, and fell, receiving injuries which caused his death, there being evidence that he had drunk a quantity of whisky and showed evidence of intoxication, such as inability to hit a nail, dropping the staves, and a boisterous and argumentative spirit, his death was held due to intoxication, and no recovery was allowed. In *Spencer v. Scanlon*, 1 Conn. Comp. Dec. 280, where it appeared that a painter, who fell from a ladder while painting, sustaining serious injuries, had drunk freely of liquor the night before, and showed evidence of being still under the effects of it next morning, a fellow workman telling his employer he was in no condition to work, and the doctor who was called testifying he observed the odor of alcohol on claimant's breath, the injury was held due to intoxication, precluding recovery. In *Cooper v. New Haven Rigging Co.*, 1 Conn. Comp. Dec. 157, where a workman's fall was caused either by the assault of his foreman or by his attempting to escape a real or supposed assault, which was caused either by the workman's serious and willful misconduct or his intoxication, it was held his injury was due to either serious and willful misconduct or intoxication, and hence was not compensable.

The employé was intoxicated when he started to drive, and when he drove his horses and wagon up the incline into the barn; he was so intoxicated that he had lost his normal and ordinary senses of observation, understanding, and judgment, so that he could not appreciate the operation of ordinary causes and effects with which he was fully familiar, and his injury was caused by this intoxicated condition. He had voluntarily drunk the liquor to the extent of causing such intoxication while on duty, and was therefore not entitled to compensation. *White v. Fidelity & Deposit Co. of Md.*, 2 Mass. Wk. Comp. Cases, 567 (decision of Com. of Arb.).

Where an employé, shown to have been very much under the influence of liquor, was seen by the engineer of the train which ran over him sitting on the track with his head bent over and paying no attention to the whistle, which was sounded continuously, his death was due either to his willful intention to cause his own death, or to his intoxication, and therefore his widow

is willful, in the sense of intentional, the mere fact of drinking is not misconduct.²⁷ There are many cases where, though the drinking is intentional, the intoxication is not, as where one, by reason of fatigue, hunger, sickness, or some abnormal condition, becomes intoxicated in consequence of imbibing a quantity of liquor which ordinarily would not so affect him. To be available as a defense, intoxication must contribute to the happening of the accident or the disability resulting therefrom.²⁸ Where intoxication is pleaded as a defense, the burden of proof rests upon the defendant to affirmatively establish the fact of such intoxication.²⁹ Under some

could not recover. *Dowling v. New York Central & H. R. R. Co.*, *The Bulletin*, N. Y., vol. 1, No. 10, p. 17.

Where a laborer on a ship came to his work drunk, and was ordered home, and was later found injured at the foot of a ladder, he was guilty of serious and willful misconduct. *McGroarty v. Brown & Co., Ltd.*, *supra*.

²⁷ *Nekoosa-Edwards Paper Co. v. Industrial Commission*, *supra*.

Though an employé is to some extent intoxicated, and is injured while in the course of his employment, he is entitled to compensation. *Hanson v. Commercial Sash Door Co.*, *Bulletin* No. 1, Ill., p. 30.

²⁸ Where an employé sustained a fracture of the skull by falling from a wagon, caused by the kingbolt of the wagon bending and allowing the front wheels to pull from under it, and it was shown that, though the employé was intoxicated at the time of said accident, his intoxication was in no wise connected with the cause of the accident or fall, the employer is not relieved from liability for such accident because of such intoxication. *Summerville v. De Bella & Co.*, 2 Cal. I. A. C. Dec. 122.

²⁹ *Hewitt v. Red River Lumber Co.*, 2 Cal. I. A. C. Dec. 286; *Potts v. Pacific Stevedoring & Ballasting Co.*, 1 Cal. I. A. C. Dec. 630; *Phillips v. Chanslor-Canfield Midway Oil Co.*, 1 Cal. I. A. C. Dec. 580; *Ruprecht v. Red River Lumber Co.*, 2 Cal. I. A. C. Dec. 864.

Sufficiency of proof of intoxication.—The Commission does not accept as conclusive of intoxication the mere evidence of the odor of alcohol upon the breath of the injured man and testimony that he had taken three or four drinks of beer within six hours prior to the accident. *Potts v. Pacific Stevedoring & Ballasting Co.*, *supra*. Where the defense of intoxication is not substantiated by direct evidence, but is only a surmise, the defendants have not discharged the burden upon them, and the defense is not established. *Phillips v. Chanslor-Canfield Midway Oil Co.*, *supra*. The finding of a bottle resembling a whisky bottle, containing a fluid that looks like whisky, upon the

Acts, it must be the sole cause, and not merely the contributing cause, of the injury.³⁰

Drunkenness by an applicant during his period of disability is not a defense to his application for compensation, unless it aggravated or prolonged his disability, and then only to that extent.³¹

§ 143. — Burden of proof—Question of fact

The burden of proof is upon the defendant affirmatively to establish that the accident and injury were caused by the willful misconduct of the injured employé,³² and this burden is not met where

body of an employé killed in an accident, and the statement of a fellow employé that another employé had told him he had been drinking with the deceased the morning of the accident, does not furnish evidence sufficient to establish the alleged intoxication of the deceased. *Hewitt v. Red River Lumber Co.*, *supra*. Where the insurer claimed that the injury which caused employé's death was due to his own serious and willful misconduct, to wit, intoxication, but the evidence failed to maintain his claim, and showed that the deceased was in a normal condition and well able to perform his customary work, the dependent mother was awarded compensation. *Shea v. United States Casualty Co.*, 2 Mass. Wk. Comp. Cases, 481 (decision of Com. of Arb.).

³⁰ *American Ice Co. v. Fitzhugh* (Md.) 97 Atl. 999.

³¹ *West v. City of Pasadena*, 1 Cal. I. A. C. Dec. 274.

³² *Kraljivich v. Yellow Aster Mining & Milling Co.*, 1 Cal. I. A. C. Dec. 554; *Ruprecht v. Red River Lumber Co.*, 2 Cal. I. A. C. Dec. 864; *Maffia v. Aquilino*, 3 Cal. I. A. C. Dec. 15. The burden is upon the employer to show that the injury was attributable to the workman's serious and willful misconduct. *Logue v. Fullerton, Hodgart & Barclay* (1901) 3 F. 1010.

Proof of intoxication, see § 142, *ante*.

Sufficiency of proof.—Where the deceased employé was subordinate to another employé, who was in command of and was running a launch in a manner violating the rules of the employer, by reason of which violation it is alleged the subordinate employé was killed, the burden of proof resting upon the employer to show *ipso facto* willful misconduct on the part of the subordinate employé was not sustained. *Ruprecht v. Red River Lumber Co.*, 2 Cal. I. A. C. Dec. 864. In *Sirica v. Scovill Mfg. Co.*, 1 Conn. Comp. Dec. 171, where the employer showed that an employé, whose hand was crushed in an automatic punch while he was oiling it, could easily have stopped the machine, but the evidence was conflicting as to whether he had

the element of willfulness is left in doubt.³³ Where injuries result in death, the evidence to establish the fact of such willful misconduct must be clear and unequivocal, and of the highest character. It must approach the point of proof beyond a reasonable doubt, for the reason that the workman's lips are closed by death and he cannot be heard in his own defense.³⁴

The existence of willfulness under any particular circumstances is usually a question of fact.³⁵

In the absence of substantial evidence to the contrary, it will be presumed that an employé's death was not occasioned by his willful intention, and did not result solely from intoxication while on duty.³⁶

§ 144. Estoppel and res judicata

Where an employé, injured while performing work in the usual line of his employer's business, ignorantly supposes that the work

been instructed to do so, it was held the employer had not discharged the burden of proof upon him to sustain his charge of serious and willful misconduct. In *Pelham v. Burstein*, 1 Conn. Comp. Dec. 49, it was held that, while the use of kerosene oil in kindling or replenishing a fire, contrary to clear and explicit orders of the employer, if established, constitutes serious and willful misconduct, barring compensation, the evidence of such facts was not sufficient in this case to justify such a finding. In *Keyser v. Gilbert & Bennett Mfg. Co.*, 1 Conn. Comp. Dec. 636, where, though conflicting stories of the accident were told, it was found that on either story the claimant had jumped from a moving elevator, falling into the shaft, and had violated a strict rule in leaving his machine to get supplies, he was held guilty of serious and willful misconduct.

³³ *Hedges v. City of Los Angeles*, 1 Cal. I. A. C. Dec. 394.

³⁴ *Freid v. Smith Lumber Co.*, 2 Cal. I. A. C. Dec. 117.

³⁵ *In re Nickerson*, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790; *Leishman v. Dixon*, 3 B. W. C. C. 560; *George v. Glasgow Coal Co.*, [1909] A. C. 123; *Bist v. London & Southwestern Ry.*, 96 L. T. 750.

Whether a railroad employé was guilty of intentional and willful misconduct in climbing over the bumpers of a train to which a live engine was attached was a question for the jury. *Gignac v. Studebaker Corporation*, 186 Mich. 576, 152 N. W. 1037.

³⁶ *American Ice Co. v. Fitzhugh* (Md.) 97 Atl. 999.

is done for his employer, when as a matter of fact it is done in pursuance of an independent contract of the employé's foreman with the understanding of the employer, the employer is estopped to deny liability for compensation.³⁷ A corporation will be estopped to plead the defense of *ultra vires* against liability for injuries to its employés. A laboring man ought not to be obliged to inquire as to the power of his general manager to direct him to do different kinds of work, concerning which directions are given.³⁸ Payment of compensation to the injured workman under an agreement does not estop the employer from claiming that the workman's subsequent death is due to disease and not to the accident.³⁹

The *ex parte* action of an employer in causing judgment to be rendered against itself does not affect the right of the employé to further compensation.⁴⁰

§ 145. Negligence, contributory negligence, and assumption of risk

At common law the master was not liable for an injury to his servant, caused by the negligence of a fellow servant, on the ground that the servant assumed the risk. Under the Workmen's Compensation Acts the master assumes all risks "incidental to the employment";⁴¹ that is, risks incidental to or connected with what a workman has to do in fulfilling his contract of service.⁴² Such risks may be either ordinary risks, directly connected with the employment, or extraordinary risks, which, owing to the special nature of

³⁷ *Summers v. National Tent & Awning Co.*, 2 Cal. I. A. C. Dec. 968.

³⁸ *English v. Cain*, 2 Cal. I. A. C. Dec. 399.

³⁹ *Cleverley v. Gaslight & Coke Co., Ltd.* (1909) 1 B. W. C. C. 82, H. L.

⁴⁰ *Bacik v. Solvay Process Co.*, Mich. Wk. Comp. Cases (1916) 48.

⁴¹ *Hulley v. Moosbrugger*, 87 N. J. Law, 103, 93 Atl. 79.

⁴² *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *Pope v. Hill's Plymouth Co.* (1912) 102 L. T. R. 632, 3 B. W. C. C. 339, and on appeal (1912) 105 L. T. R. 678, 5 B. W. C. C. 175.

the employment, are only incidentally connected with it.⁴³ Contributory negligence on the part of the injured person is not ordinarily a defense to a claim for compensation,⁴⁴ nor is it any defense that the employer was without fault and not negligent, and that he could not by the exercise of reasonable care and caution have prevented the injury.⁴⁵

⁴³ *Bryant v. Fissell*, 84 N. J. Law, 76, 86 Atl. 458.

⁴⁴ *Rainey v. McClain*, 1 Cal. I. A. C. Dec. 57; *McCrystle v. Enos*, 2 Cal. I. A. C. Dec. 43. Negligence of an employé contributing to his injury cannot be relied upon by the employer as a defense to the claim of such employé for compensation. *Woodruff v. Peterson*, 1 Cal. I. A. C. Dec. 516. When the scope of the employment is once ascertained, any injury arising out of and in the course of it is to be compensated for, although the employé acted in a negligent or unusual way. *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368. Under the Illinois Act, an employé is entitled to compensation even though he violates orders given him, or for injury sustained as a result of negligence. *Reynolds v. Mound City Water & Light Co.*, Bulletin No. 1, Ill., p. 123. Compensation will not be denied because of contributory negligence of the employé. *American Ice Co. v. Fitzhugh* (Md.) 97 Atl. 999. Where it appeared that there were more than four employés working in a common employment, the defense of contributory negligence was not available. (St. 1915, § 2394—1 [3]) *Sullivan v. Chicago, M. & St. P. Ry. Co.* (Wis.) 158 N. W. 321.

⁴⁵ *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276; *Sexton v. Newark District Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 451; *Taylor v. Seabrook*, 87 N. J. Law, 407, 94 Atl. 399. The employé's right to compensation does not depend on negligence of the employer. *American Ice Co. v. Fitzhugh* (Md.) 97 Atl. 999; *In re Murphy* (Mass.) 113 N. E. 283. It is no defense in an action for compensation that the accident is one which the employer could not by the exercise of reasonable care and caution prevent, as compensation is payable under the act without regard to want of reasonable care. *Johnston v. Mountain Commercial Co.*, 1 Cal. I. A. C. Dec. 100. An employer's liability to an injured employé is in no way predicated upon any fault or negligence of the employer, or control of the cause thereof by the employer. *Douglas v. Kimbol*, 1 Cal. I. A. C. Dec. 543. That the employer was in no way negligent or at fault is not open to him as a defense. *McCrystle v. Enos*, 2 Cal. I. A. C. Dec. 43. In a proceeding before the Industrial Commission of Ohio under the Workmen's Compensation Act of 1913 it is not necessary for the claimant to prove that his injury was caused by the negligence of his employer. It is sufficient to prove that the injury for which compensation is claimed occurred while

§ 146. Defenses under federal Act

The original federal Act provided that no compensation shall be paid under it where the injury is due to the negligence or misconduct of the employé injured, nor unless the injury shall continue more than fifteen days. Negligence under this act involves the idea of misconduct, or voluntary and unnecessary exposure to obvious danger, and means more than mere inadvertence or error of judgment, under circumstances not suggesting danger.⁴⁶ Failure to exercise incessant vigilance in avoiding a known danger is not negligence.⁴⁷ Nor is one chargeable with negligence because he is slower to think and act than another,⁴⁸ or because in a sudden emergency, and seemingly called upon to act at once, the action taken leads to an injury which would not have occurred otherwise.⁴⁹ A laborer called upon to perform a task out of his regular

"in the course of employment." *Biddinger v. Champion Iron Co.*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 70.

⁴⁶ *In re Dieselman*, Op. Sol. Dept. of L. 401; *In re Strafer*, Op. Sol. Dept. of L. 446; *In re Taylor*, Op. Sol. Dept. of L. 411.

Proof of negligence.—An injury to a printer's back, incurred while working a hand press, was not due to negligence merely because the printer had continued working the press, although it worked hard and required extra exertion. *In re Hutton*, Op. Sol. Dept. of L. 408. The employé was engaged in painting machinery while same was in motion. No orders had been given to the contrary, so he was held not guilty of negligence or misconduct. *In re Butler*, Op. Sol. Dept. of L. 502. The workman was employed as fire guard in the Forest Service, occupying quarters furnished by the government. In attempting to shoot a rat in his cabin he accidentally shot himself. There was nothing in this to show negligence or misconduct. *In re McDonald*, Op. Sol. Dept. of L. 502.

⁴⁷ *In re Reinburg*, Op. Sol. Dept. of L. 398. A laborer engrossed in his work, who momentarily forgets a known danger, is not guilty of negligence. *In re Glass*, Op. Sol. Dept. of L. 393.

⁴⁸ No man can be assumed to be indifferent to impending and apparent danger; it is fair to assume that he will endeavor to avoid it. That he is slower to think or slower to act than another is not negligence. *In re McFadden*, Op. Sol. Dept. of L. 396.

⁴⁹ *In re Lyte*, Op. Sol. Dept. of L. 397.

line of work is not chargeable with negligence because he adopts, through ignorance, a method dangerous in fact, but not obviously dangerous to an inexperienced man.⁵⁰ Artisans are not necessarily negligent because, as they become proficient and dextrous, they naturally make use of movements more or less mechanical or involuntary, which might be regarded as negligent if it were reasonable to expect men never to relax their vigilance and to be constantly on guard.⁵¹

The violation of a positive rule or instruction directly resulting in injury amounts to negligence or misconduct,⁵² if the violation is willful or wanton.⁵³ But, in order that the violation of a rule or regulation shall constitute negligence or misconduct, it must appear that reasonable efforts have been made to enforce the same.⁵⁴ A workman called upon to perform a task out of his regular line of employment is not chargeable with negligence for violation of a rule requiring the wearing of goggles while performing this class of work.⁵⁵

⁵⁰ In re Turner, Op. Sol. Dept. of L. 406.

⁵¹ In re Robinson, Op. Sol. Dept. of L. 389.

⁵² In re Pagliarulo, Op. Sol. Dept. of L. 503.

⁵³ Willful or wanton disobedience of orders is necessary to constitute negligence or misconduct under the federal Act. In re Horn, Op. Sol. Dept. of L. 504.

⁵⁴ In re Wilhelm, Op. Sol. Dept. of L. 508.

⁵⁵ In re Duer, Op. Sol. Dept. of L. 507.

CHAPTER VII

COMPENSATION

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| Section | |
| 147-154. | Article I.—Earnings as basis of compensation. |
| 155-166. | Article II.—Disability and incapacity for work. |
| 167-174. | Article III.—Death benefits. |
| 175-192. | Article IV.—Payment, release, and related matters. |
| 193-201. | Article V.—Treatment and funeral expense. |
| 193-200. | Division I.—Expenses of medical, surgical, and hospital treatment. |
| 201. | Division II.—Funeral expenses. |

ARTICLE I

EARNINGS AS BASIS OF COMPENSATION

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|---------|-------------------------------------|
| Section | |
| 147. | What constitutes earnings. |
| 148. | Loss of earning capacity. |
| 149. | Massachusetts. |
| 150. | Computation of earnings in general. |
| 151. | Determination of average earnings. |
| 152. | Average weekly earnings. |
| 153. | Daily wages. |
| 154. | Federal Act. |

§ 147. What constitutes earnings

"Earnings," which by these Acts are made the basis for computation of the amount of compensation, include, not only money, whether received as regular wages, as "extra wages,"¹ or as gratuities, called "tips,"² or deducted from the employé's wages for

¹ "Extra wages," paid the steward of a ship over and above his ordinary wages, if his work on the trip was satisfactory, and profits made by selling whisky, were part of his remuneration. *Skailes v. Blue Anchor Line, Ltd.* (1911) 4 B. W. C. C. 16, C. A.

² An employé in a hotel received a monthly wage of \$30 in cash and meals to the value of \$30 more. These earnings were increased by tips or gratui-

equipment or material,³ but also anything having a money value,

ties from the guests of the hotel, an average monthly income of \$80, because of the polite and attentive treatment accorded them in accordance with the conditions of his employment. The insurer claimed that compensation should be based on a monthly wage of \$60, but it was held that tips or gratuities are earnings, and that the employe's compensation should be based upon all his earnings. *Hatchman v. New England Casualty Co.*, 2 Mass. Wk. Comp. Cases, 419 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

Where tips which amounted to from 10s. to 12s. a week were received by a waiter in a railway dining car, such tips were a part of his earnings. *Penn v. Spiers & Pond, Ltd.* (1909) 1 B. W. C. C. 401, C. A. Tips received by a carman in collecting and delivering goods, for special services in leaving or getting the packages at some place other than the entrance, were part of his earnings. *Knott v. Tingle, Jacobs & Co.* (1911) 4 B. W. C. C. 55, C. A.

But it has been held that gratuities received by employes incident to the services performed by them are not to be treated as earnings upon which to base a computation of compensation, unless the contract of hire is made between the employer and employé with reference to such gratuities as the whole, or a part, of the remuneration to the employé for the performance of the services which he is engaged to perform. *Reynolds v. Smith*, 1 Cal. I. A. C. Dec. 35.

³ Where a miner obtained his explosives at the mine, and their cost was subtracted from his wages, the sum he paid for them was a part of his earnings. *McKee v. Stein & Co., Ltd.* (1910) 3 B. W. C. C. 544, Ct. of Sess. Sixpence, which was kept out from a miner's pay each week to pay for the oil he used in his lamp, was part of his earnings. *Houghton v. Sutton Heath & Lea Green Collieries Co., Ltd.* (1901) 3 W. C. C. 173, C. A. (Act of 1897). Money deducted from a miner's wages for things furnished him, and for other equipment expenses, was part of his earnings. *Abram Coal Co. v. Southern* (1903) 5 W. C. C. 125, H. L. (Act of 1897). But where employers of a gang working in ironstone and sand paid each one the average sum earned per hour by the gang, keeping out the average cost per man of the explosives they used, the cost of the explosives was held not to be a part of the earnings of a member of the gang. *Shipp v. Frodingham Iron & Steel Co., Ltd.* (1913) 6 B. W. C. C. 1, C. A. Buckley, L. J., said in the last-named case: "There is a difference, material to the present case, between—first, earnings and a right in the employer to make a deduction from those earnings; and, secondly, earnings arrived at by finding a sum which is the difference between two sums. The present case is one of the latter kind. * * * There is no deduction as between the employer and any one of the employed. The deduction is made as between the employer and all the employed in the aggregate. The remuneration payable as between any one of the gang and the employer is that man's proportionate part of the sum, ar-

such as board, lodging, and washing,⁴ and use of a uniform.⁵ They do not include payments not received in the employment,⁶

rived at after deduction of the cost of the powder used, not by himself alone, but by himself and others."

⁴ Where the injured employé received in wages \$15 a week and his board, worth \$3 a week, 50 per cent. of his earnings amounted to \$9, instead of \$7.50, a week. (Wk. Comp. Act, P. L. 1911, p. 134) *Baur v. Court of Common Pleas*, 88 N. J. Law, 128, 95 Atl. 627.

The value of the use of bedroom, kitchenette, and bath by a hotel manager, where the same are furnished as a part of the contract of employment, should be included in the computation of average annual earnings. *Fowler v. Zellerbach-Levison Co.*, 1 Cal. I. A. C. Dec. 609.

In *Wallack v. Sorensen*, 1 Conn. Comp. Dec. 197, it was held that where there is no direct evidence of the value of board received by the employé as part of his earnings, except as to a few of the things served, the commissioner can take judicial notice of the cost of board and room ordinarily. In this case, having regard to the appearance of the family and of the employé, board and room was fixed at \$3 per week; the commissioner holding it proper to take the lower limit, since the burden is on the claimant to establish his case.

Where a workman was earning \$30 a month besides his board, which was acknowledged to be worth \$15 a month, his average monthly wage was \$45. *Lewandowski v. Crosby Transportation Co.*, Rep. Wis. Indus. Com. 1914-15, p. 9. Where a workman was paid \$23 per month during the winter months and \$30 per month during the fall, together with board, washing, and lodging, estimated at \$10 per month, the Commission found his average annual earnings, including the board, to be \$452, and his average weekly earning \$8.70. *Vojacek v. Schlaefer*, Rep. Wis. Indus. Com. 1914-15, p. 8.

The value of board and lodging of a seaman while aboard his ship is the cost to the employers (here 1s. 7d. a day), notwithstanding that it would have cost the seaman more ashore (16s. a week), and in determining his earnings its value must be added to the money compensation of 21s. a week. *Rosenquist v. Bowring & Co., Ltd.* (1909) 1 B. W. C. C. 395, C. A. Free food and washing, supplied to the captain of a ship in addition to his salary of £216 per year, is part of his earnings, and its value is the cost of it to the employers. *Dothie v. MacAndrew & Co.* (1909) 1 B. W. C. C. 308, C. A. *Fletcher Moulton, L. J.*, said in the above case: "It is incontestable that you must reckon the value of the food as part of the remuneration which he

⁵ The use of a uniform is part of the earnings of a railway guard, although it is owned by his employers. *Great Northern Ry. Co. v. Dawson* (1905) 7 W. C. C. 114, C. A. (Act of 1897).

⁶ *Duberly v. Mace* (1913) 6 B. W. C. C. 82, C. A.

such as compensation for a prior injury,⁷ charity,⁸ the value of assistance necessarily procured by the employé, whether furnished gratuitously or paid for by him,⁹ or business profits,¹⁰ or payment for the use of the employé's horse in his work,¹¹ or the rent of a house supplied by his employer under the terms of a lease, and not

gets. It is remuneration in the sense that it is something which he receives for his labor; it is remuneration in the sense that it is something the expense of which has to be borne by his master to procure that labor."

⁷ Where an injured workman, who was receiving compensation for his injury under the agreement that his pay each week for light work as a battery carrier, divided by two, should be subtracted each week from the amount of compensation, met with a fatal accident while doing the light work, only his wages as battery carrier are to be considered in computing his earnings. *Gough v. Crawshay Bros., Ltd.* (1909) 1 B. W. C. C. 374, C. A.

⁸ Where a blind man, working in a charitable institution, was supplied with board, lodging, clothing, and 5s. a month besides, and the part exceeding what he earned was made up by charity, compensation must be based on his weekly earnings, excluding the contributions of charity. *MacGillivray v. Northern Counties Institute for the Blind* (1911) S. C. 897, Ct. of Sess.

⁹ The wages of a drawer, paid by a miner who was compelled to employ him, were not part of the miner's earnings. *McKee v. Stein & Co., Ltd.* (1910) 3 B. W. C. C. 544, Ct. of Sess. Where a miner was assisted by his son without remuneration, although the work was worth 2s. 9d. per day, there being no money paid, there could be no reduction in earnings. *Nelson v. Kerr & Mitchell* (1901) 3 F. 893, Ct. of Sess.

¹⁰ Where a workman, who was paid £94 a year before his accident, made £98 a year clear profit on a public house which he bought after the injury, this amount cannot be taken as a criterion of his earning capacity. *Pater-son v. Moore & Co.* (1910) 3 B. W. C. C. 541, Ct. of Sess. Where a teamster worked under an agreement for 5s. a week, provided that, if he ever earned more than 10s. a week, his wages were to be submitted to arbitration, and employed his father and a lad on a farm he owned, paying his father 13s. a week, the decision of the judge reducing his compensation for loss of his left thumb to 1d. a week was not disturbed. *Duberly v. Mace* (1913) 6 B. W. C. C. 82, C. A.

¹¹ Where an employé is hired at \$5 a day, and required to furnish his own horse without additional pay, it would be manifestly improper to allow as wages the value of the hire of the horse, that being an income from the capital invested, and not for the personal services of the rider. While there is no absolute standard of wage for man and horse separately, the evidence here established as a reasonable division the daily wage of \$3 for the serv-

as a part of the salary,¹² or wages possible under a contract, but not in fact received,¹³ or a pension from the government.¹⁴ Where an employer pays to an employé having general charge of the affairs of the business a fixed sum of money each month, from which the employé is required to pay an assistant, if one is employed by him to assist in the work, such sum as may be agreed upon between the employé and the assistant, the sum so paid the assistant forms no part of the salary or compensation of the employé, and in determining the salary of such employé the amount paid the assistant must be deducted from the total amount paid by the employer.¹⁵

§ 148. Loss of earning capacity

Compensation is based upon the loss of earning power or capacity to earn,¹⁶ as to which the claimant has the burden of proof.¹⁷ The

ices of the man and \$2 for rental of the horse. *Kid v. New York Motion Picture Co.*, 1 Cal. I. A. C. Dec. 475.

¹² Where, as an inducement to enter the employment, an employé secures a lease of a tract of land of his employer upon which is located the house in which the employé lives while performing the work of his employment, the rent of the house cannot be included as a part of the salary of the employé. *Olson v. Olson Winery Co.*, 2 Cal. I. A. C. Dec. 325.

¹³ Where the contract of employment of a wine maker provided for the payment of a salary and also for an increase of \$25 for each 100 tons crushed in excess of 700 tons, with the assurance that the winery would run at its full capacity of 2,000 tons, but the evidence showed that no grapes in excess of 700 tons were crushed, the sum specified in the contract constituted the annual earnings of the employé. *Olson v. Olson Winery Co.*, 2 Cal. I. A. C. Dec. 325.

¹⁴ A pension from the United States government on account of service rendered in the army or navy, or on account of disability incurred in the military or naval service, will not be considered in ascertaining the "average weekly wage." *In re Harriet Horn*, vol. 1, No. 7, *Bul. Ohio Indus. Com.*, p. 35.

¹⁵ *State ex rel. Gaylord Farmers' Co-op. Creamery Ass'n v. District Court*, 128 Minn. 486, 151 N. W. 182.

¹⁶ Without such loss there is no provision for compensation. (*Wk. Comp. Act*, c. 831, art. 2, § 11) *Weber v. American Silk Spinning Co.* (*R. I.*) 95

¹⁷ See note 17 on following page.

object of this legislation, broadly stated, is to compensate for loss of capacity to earn, measured by what the workman can earn in

Atl. 603. The scheme of the Compensation Acts makes compensation almost inseparable from wages. *Porton v. Central (Unemployed) Body for London* (1910) 2 B. W. C. C. 301.

Farwell, L. J., has said: "The Acts do not give compensation for a loss such as the loss of a limb, but for the loss of earning capacity actually caused by the loss of such limb. During the continuance of such incapacity the loss of the limb diminishes the capacity to earn, but the court has to measure the compensation by the loss of earnings. Therefore, if the workman has learned as a one-armed man to earn, and earn as high or higher wages than he got as a man with both arms, he cannot then get compensation, for there is no loss. * * * Physical incapacity due to the loss of a limb is doubtless strong and probably conclusive evidence, in the absence of anything else, of incapacity to earn full wages on an application to award compensation." *Calico Printers' Association, Ltd., v. Higham* (1912) 5 B. W. C. C. 110.

The evidence showed that the employé, manager for the subscriber, received a cut from a circular saw which necessitated the amputation of the forefinger and caused material damage to the second finger of the right hand. The employé claimed that his earning capacity had been lessened by the injury, stating that, whereas he was able to earn \$27 weekly before the injury, he was able to earn only \$13.50 afterward. The record of the meeting of the corporation by which he was employed showed that by vote of the corporation at its annual meeting, seven months after the injury, the employé's wages were fixed at \$27 for the ensuing year, but despite this vote it was claimed that the earning capacity of the employé was only \$13.50 weekly. The employé was held not entitled to compensation. *Grady v. Fidelity & Deposit Co. of Md.*, a Mass. Wk. Comp. Cases, 678 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

Computation of loss of earning power.—In *Carlson v. Emanuelson*, 1 Conn.

¹⁷ The burden is on the claimant to show with reasonable definiteness the extent of the loss of earning capacity. *Weber v. American Silk Spinning Co.* (R. I.) 95 Atl. 603.

In *Jacobs v. American Steel & Wire Co.*, 1 Conn. Comp. Dec. 100, it was held that the claimant could not be allowed incapacity compensation on account of an injury to his eye which incapacitated him for work as a printer, when he had not worked at this trade for 18 years previous, did not secure printing work after voluntarily leaving his other employment, and did not produce any evidence of the prevailing wages in the printing trade at the time, though experts agreed that he was incapacitated for such work approximately 10 per cent. The claimant must show his earning power after the injury, in order to recover for loss of earning power.

the employment in which he is, under the conditions prevailing therein before and up to the time of the accident. That he takes a

Comp. Dec. 139, where a woman, employed to do washing, ironing, house-cleaning, and similar duties for several employers, sustained an injury, after which she was only able to work two days a week, instead of six, as before, she was awarded one-half her loss of wages during such partial incapacity. Where the claimant has recovered sufficiently to be able to work one-half of the time, he is to be awarded one-half the difference between his wages at the time of the injury and what he is able to earn now by reasonable effort. *Hurlowski v. American Brass Co.*, 1 Conn. Comp. Dec. 6. In *Field v. N. Y., N. H. & H. R. R. Co.*, 1 Conn. Comp. Dec. 199, it was held that the Commissioner, in awarding for partial incapacity, can determine as a matter of judicial knowledge, considering evidence of the workman's capabilities and health, what a man partially incapacitated can reasonably earn. The employé was in a nervous condition, and it was found that the only practical way to regain his capacity was for him to begin on light work, and gradually increase the work until he entirely recovered; the Commissioner awarding compensation until a time sufficient to effectuate a complete recovery. In *Bristol v. Bristol*, 1 Conn. Comp. Dec. 368, where the employé, partially incapacitated, worked for the same employer, receiving \$20 less per month than before, one-half that amount was awarded him as compensation; in this case the employer had already paid more than that amount, and so was discharged from liability. In *Margolin v. Union Hardware Co.*, 1 Conn. Comp. Dec. 334, where because of the injury to his eye the claimant was unable to do his previous work, or any other which he could find, he was awarded for total incapacity, provided that, if his employers found him work, the wages he then earned should be taken as his earning capacity. In *Baggonski v. Clayton Bros., Inc.*, 1 Conn. Comp. Dec. 299, where it appeared that the claimant had been taken back by his employer, but whereas he earned \$1.75 per day before the injury, he was then earning but \$1.50, compensation for partial incapacity was awarded on the basis of the difference of earnings before and after the injury. (Wk. Comp. Act, pt. B, § 12) In *Penfield v. Town of Glastonbury*, 1 Conn. Comp. Dec. 637, where a janitor who had been injured continued to work and draw full wages, but had to employ assistants he would not otherwise have needed, compensation for loss of earnings, based upon the amounts so expended, was awarded. *New York*. In determining the amount of an award for compensation, the fact that the vocation of blacksmith helper is not a vocation which requires much time or talent to acquire, and that the workman can without loss take up some other vocation that is as remunerative as that of a blacksmith helper, will be considered. *Saccoccio v. Bradley Contracting Co.*, *The Bulletin*, N. Y., vol. 1, No. 5, p. 11. That a stockholder would not have received so large a salary, but for the fact that he was a stockholder, and that if he were to go into the employ of

holiday and forfeits his wages for a month does not interfere with what he can earn. It is only that for a month he did not choose to earn. So, too, where there is a casualty accidentally stopping the work. But where it is part of the employment to stop for a month in each year, he cannot earn wages for that time in that employment, and his capacity to earn is less for the year.¹⁸ Under the Ohio Act it has been held that, inasmuch as the purpose of the Act is to compensate the employé for impairment of his earning capacity and not for pain and suffering¹⁹—the rule prevailing under many of the Acts, including that of California²⁰—a workman who

any other person his salary would be greatly reduced owing to his injury, did not form a basis for allowing compensation where his salary in fact continued the same as before the accident. *Kennedy v. Kennedy Mfg. Co.*, *The Bulletin*, N. Y., vol. 1, No. 5, p. 12. It was later held (vol. 1, No. 8, p. 8) that, in view of fact that his salary had been reduced by the company which succeeded his former employer, he should be allowed compensation based on his loss of earnings.

¹⁸ *Anslow v. Cannock Chase Colliery Co., Ltd.* (1910) 2 B. W. C. C. 361, C. A., and 365, H. L.

Where an injured workman, who had returned to work in a different capacity, was earning as much as before the accident, but later, during a general fall in wages, had his pay reduced, the reduction was not due to incapacity, and cannot be considered a loss of earning power. *Merry & Cuninghame, Ltd., v. Black* (1910) 2 B. W. C. C. 372, Ct. of Sess.

The Industrial Accident Board was not prevented from awarding additional compensation for impairment of earning capacity in the workman's trade by the fact that the claimant, when filing his petition for additional compensation and when the testimony was taken, was earning as much or more wages in another employment than he did before the accident. *Foley v. Detroit United Ry.* (Mich.) 157 N. W. 45.

Awards made are according to a surgical scale of relative impairment of earning capacity. Previous wages or specialized value of lost members cannot be considered. While the workman may not get full "compensation," he will always get some compensation, without expense to him and at a time when he most needs it. (Wk. Comp. Act Wash. § 5) *Rulings Wash. Indus. Ins. Com.* 1915, p. 17.

¹⁹ In re *David Burns*, vol. 1, No. 7, *Bul. Ohio Indus. Com.*, p. 5.

²⁰ Compensation is not allowed for pain and discomfort following injury, but only for disability to labor at any form of employment which the injured

receives an injury resulting in temporary disability, and who enters other employment before he has fully recovered at a wage equal to or greater than he was receiving at the time of his injury, is not entitled to compensation after engaging in the latter employment, even though he was not at that time able to resume the employment in which he was engaged at the time of his injury.²¹ But it must not be assumed that an injured employé will remain in the same employment always, and if by reason of permanent injury or disfigurement he is handicapped in seeking other employment, or exercising his physical powers to the utmost, compensation should be awarded for this loss of earning capacity.²² Award

man might, by the exercise of reasonable diligence, be able to do. Consequently, when nature has remedied the injuries as far as it can, and whatever remains to make the cure complete is to be supplied by the applicant himself in going to work and giving his limbs the use which alone would effect his complete restoration, compensation should be discontinued. *Kid v. New York Motion Picture Co.*, 1 Cal. I. A. C. Dec. 475. Where an employé has sustained an injury, such as a fracture, which has healed as far as nature can repair the damage without the hearty co-operation of the injured party in getting the member back into use, the employé is not entitled to further compensation because of stiffness and pain in using it. The law does not contemplate compensation for mere pain and inconvenience, but only for disability to labor. *Wolff v. Levison & Zellerbach*, 1 Cal. I. A. C. Dec. 347. The California Commission regards "disability," within the meaning of the Act, as referring to inability to earn, and no form of temporary disability is compensable under the Act, except and in so far as it involves inability to earn. Every injured employé is expected to make every effort to earn a living, either at the old or a new occupation. *Larnhart v. Rice-Landswick Co.*, 1 Cal. I. A. C. Dec. 557. Where, as often happens in the healing of a broken rib, a nerve is caught in the callous thrown around the fracture, and the injured person feels pain whenever it is moved or touched, but the pain is not aggravated nor his physical condition harmed in any way by working at his occupation, and the condition of the nerve would be relieved sooner by resuming work and forgetting about it, such condition, though painful, does not constitute disability, and no compensation will be awarded during its continuance after the rib has knit together sufficiently to allow his return to work. *Semi v. Rolandi*, 1 Cal. I. A. C. Dec. 184.

²¹ *In re David Burns*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 5.

²² *Greenock v. Drake*, 2 Cal. I. A. C. Dec. 379.

must be made with reference to the effect of the injury upon the power to secure employment in the open market.²³ Where the injury is incurable, the temporary increase or decrease in earnings need not be considered. This is so, even where the injured employé continues to earn his wages following the accident in an amount equal to or in excess of his former earnings.²⁴

§ 149. — Massachusetts

The Massachusetts Act provides that the Massachusetts Employés' Insurance Association shall pay to the injured employé, where the injury is partial, "a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than \$10 a week; and in no case shall the

²³ A dismemberment of the body, although slight, and although the injured person has returned to his employment at his former wages, creates a partial disability; it causes an inability to compete with other men in obtaining employment, and, in the average man, results in a lower earning power. *Bassett v. Thomson Graf Edler Co.*, 1 Cal. I. A. C. Dec. 60. The loss of the forefinger of the left hand affects a carpenter and cabinet maker very differently from a sewer digger. The California Commission, in making its permanent disability ratings, cannot take into consideration the fact that the present employer of the applicant may always retain him in its employment. Ratings and awards must be made with reference to the effect of the injury upon a man's securing employment in an open labor market. *Immel v. American Beet Sugar Co.*, 2 Cal. I. A. C. Dec. 385. Where the ability to compete is seriously impaired, an award for a total disability indemnity will be made, subject to the condition that, if the employer or insurance carrier shall find and offer to the injured person employment suitable to his physical condition at a fair wage, the injured employé shall be entitled to receive only 65 per cent. of the difference between the wage he was receiving at the time of his injury and the wage which he was offered for doing the light work tendered by the employer or his insurance carrier. *Raily v. Island Transportation Co.*, 2 Cal. I. A. C. Dec. 608.

The mere fact that an employer gives an employé employment after an injury is not binding or conclusive as to the character of the earning capacity of the employé. *Waters v. Kewanee Boiler Co.*, Bulletin No. 1, Ill., p. 169.

²⁴ *Greenock v. Drake*, 2 Cal. I. A. C. Dec. 379.

period covered by such compensation be greater than 300 weeks from the date of the injury.”²⁵ In determining the compensation payable under this provision, no deduction should be made from the employé's average weekly wages earned prior to the injury because of subsequent business depression, but the award should be based on the difference between the wages which he actually earned prior to the injury and the wages which he is able to earn subsequent thereto.²⁶ The compensation given is not properly considered as a payment of wages. The quantum of compensation is measured by the amount of wages; but the payment is in place of all the rights of action that belonged to the injured employé and covers suffering as well as loss of wages.²⁷

§ 150. Computation of earnings in general

In computing the average earnings for a particular period, microscopical accuracy is not required, and indeed is seldom possible. The nature of the employment, its terms, its actual duration, and the personal qualifications of the workman may all be taken into consideration.²⁸ What is to be considered in determining the amount of wages is not the recompense in fact received, but the rate which the contract of hiring fixed, whether that rate was in fact

²⁵ St. 1911, c. 751, pt. 2, § 10.

²⁶ *In re Durney*, *In re Revere Rubber Co.*, *In re American Mut. Liability Insur. Co.*, 222 Mass. 461, 111 N. E. 166.

²⁷ (St. 1911, c. 751, pt. 2, §§ 3, 11) *King v. Viscoloid Co.*, 219 Mass. 420, 106 N. E. 988.

²⁸ *Barnett v. Port of London Authority* (1913) 6 B. W. C. C. 111. Where a man worked odd days before and after pay day, when he began and was leaving the employment, the judge, in computing his average weekly earnings, should have added these odd days together, instead of counting them two full weeks. *Turner v. Port of London Authority* (1913) 6 B. W. C. C. 23, C. A. In computing the average weekly earnings for a year and a half work, the judge properly refused to consider two periods of four days each when the workman was sick and unable to work. *Id.*

realized for the whole time or not.²⁹ The amount to be awarded is not to vary according to the employé's age, or the character of his work, or his expectancy of life; the only variance between the cases of different employés is that caused by a difference in wages earned.³⁰ In the case of concurrent contracts of service—that is, contracts running concurrently in respect to successive and separate employment—the computation of weekly earnings as a basis of an award is to be made as if all the earnings were earned in the employment of the one who was employer at the time of the injury,³¹ provided the services are performed in the same occupation.

²⁹ In an employment and in a community where the regular working week was six days of ten hours each, and the workman was paid 25 cents an hour, the hourly rate reduced to a weekly rate was \$15 a week. (P. L. 1913, p. 313) *Smolenski v. Eastern Coal Dock Co.*, 87 N. J. Law, 26, 93 Atl. 85. Where petitioner had worked only part of a day at the time of his injury, and up to 11 o'clock had earned \$1.60, it could be properly found that he was earning \$4 per day. *Schaeffer v. De Grottola*, 85 N. J. Law, 444, 89 Atl. 921.

³⁰ (P. L. 1911, § 2) *Bateman Mfg. Co. v. Smith*, 85 N. J. Law, 409, 89 Atl. 979.

³¹ Where a night watchman works for six independent employers at the same time, his earnings, upon which compensation is to be computed, are the total amount received from all six, and not just the amount received from the employer on whose premises he was injured. (Wk. Comp., etc., Act, § 17) *Western Metal Supply Co. v. Pillsbury* (Cal.) 156 Pac. 491. Where a night watchman is employed by a number of employers severally, and is paid a certain amount by each for watching their premises, his average annual earnings are to be fixed at the amount earned by him from all of such employers in his occupation of night watchman during the year preceding his injury. Compensation is not primarily determined between the employer and his injured employé, but between the state and the industries of the state. It is rated upon the average amount necessary to tide injured persons over periods of adversity consequent upon accident. The accident has deprived the widow of the whole of the earnings of the deceased from all sources as night watchman, and she is entitled to an award computed upon the whole of her husband's earnings. *Mason v. Western Metal Supply Co.*, 1 Cal. I. A. C. Dec. 284.

There were concurrent contracts of service, upon which to compute earnings, where a charwoman worked regularly certain days of the week for one employer, and on other days worked for other people (*Dewhurst v. Mather* [1909] 1 B. W. C. C. 328, C. A.); where a railway company's rule that their employés must "devote themselves exclusively to the company's service" meant

Where a person is employed as a night watchman, and also earns a small amount acting as janitor in the daytime, the sums earned as janitor in the employment of others cannot be included in his average annual earnings for the purpose of ascertaining the amount of death benefit, where he is killed while acting as night watchman. It was as night watchman that he was employed by the defendant, and his earnings in that occupation only are to be considered.³²

In determining the amount of compensation due for a temporary disability, compensation is based upon the present total or partial loss of earnings.³³ The probable loss of wages will be determined by computation and estimate from all the evidence, and cannot be established definitely by evidence of earnings at any particular time.³⁴

§ 151. — Determination of average earnings

In California, where a workman has worked substantially the whole of the preceding year in the same employment, his average

that they must do so only during the hours of the day they were working for the company, and a plate layer worked evenings in a theater (*Lloyd v. Midland Ry. Co.* [1914] 7 B. W. C. C. 72, C. A.); and where the stoker on a merchant ship received in addition to his earnings there a retainer of £6 per year as a member of the Royal Naval Reserve (*Owners of S. S. Raphael v. Brandy* [1911] 4 B. W. C. C. 307, H. L., and 6, C. A.); but not where a casual laborer worked at two different times for two different employers (*Cue v. Port of London Authority* [1914] 7 B. W. C. C. 447, C. A.). Where a workman, in conjunction with his three years' continuous employment by the respondents, worked as a sorter in the post office, and was killed, his earnings under the concurrent contract were not considered. *Buckley v. London & India Docks* (1910) 2 B. W. C. C. 327, C. A.

³² *Mason v. Western Metal Supply Co.*, 1 Cal. I. A. C. Dec. 284.

³³ *Greenock v. Drake*, 2 Cal. I. A. C. Dec. 379.

Where one employed at a yearly salary sustains an injury resulting in temporary disability only, he is not entitled to compensation if, under his contract, no deduction from his salary is to be made for loss of time. In *re A. Costello*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 54.

³⁴ *Saunders v. Oxnard Home Telephone*, 1 Cal. I. A. C. Dec. 636.

annual earnings are to be taken at three hundred times his average daily wage. The average daily wage is to be ascertained by dividing the whole amount earned by the employé during the number of days worked in earning such amount, and not by the number of working days in the year.³⁵ Where the employé has worked steadily for more than a year under the same conditions, it is improper to determine his average annual earnings by multiplying his average daily wage by three hundred; this method applying only where the employé has worked substantially less than a year.³⁶ Earnings can be computed on the basis of the average annual earnings, or twelve times the average monthly earnings during the year preceding the injury, only where the employé has worked substantially all of the year,³⁷ except possibly where he belongs to a class not accustomed to put in full time throughout the year, and it is possible to arrive at an accurate figure representing monthly earnings based on actual earnings over a portion of the year.³⁸ By "substantially the whole

³⁵ *Craig v. Axt*, 1 Cal. I. A. C. Dec. 72; *Frankfort General Ins. Co. v. Pillsbury* (Cal.) 159 Pac. 150.

³⁶ (Wk. Comp. Act, pt. 2, § 11) *Robbins v. Original Gas Engine Co.* (Mich.) 157 N. W. 437.

³⁷ *Rep. Nev. Indus. Com. 1913-14*, p. 21; *Andrewjeski v. Wolverine Coal Co.*, 182 Mich. 298, 148 N. W. 684.

³⁸ Where it appears that employés of a certain class do not, as a rule, put in full time throughout the year, and that it is possible to arrive at an accurate figure representing monthly earnings based upon actual earnings over a portion of the year, average annual earnings may be taken as 12 times such monthly earnings, instead of at 300 times the daily wages. *Coleman v. Guilfoyle Cornice Works*, 1 Cal. I. A. C. Dec. 31. An injured employé was engaged in rafting logs, an employment normally lasting four months in the year, at a daily wage of \$3.60, and it could fairly be presumed that for the remaining eight months he could have secured work in the neighboring mills as a common laborer at \$2.25 per day. The average annual earnings were rated at \$3.60 per day for four months and \$2.25 per day for eight months. *Ruprecht v. Red River Lumber Co.*, 2 Cal. I. A. C. Dec. 864. But because an industry is seasonal it does not necessarily follow that all employments connected with it are also seasonal. Where an employé is following a calling which is used at all seasons, as that of a stationary engineer, then, although he may be

year," within the California Act, is meant that the employé must have worked anywhere from two hundred and seventy-five to three hundred and twelve days. Where such is the case, no attention is paid in calculating the average annual wage to working days in which the employé was not employed, as a sufficient average or deduction is made for them by the statutory requirement fixing the average annual earnings at three hundred times the average daily wage.³⁹ In that state, where the workman is employed for seven days in the week, the average daily wage is multiplied by three hundred and thirty-two, instead of three hundred.⁴⁰ Where he is hired to work continuously, but is to have two holidays off for every holiday which he works, Sundays being counted as holidays, his average annual earnings are to be determined upon the basis of

working at the time of the injury in a seasonal industry, his occupation is not of itself seasonal, and the average annual earnings will be and are here found by multiplying the average monthly earnings by 12. *Reger v. McCloud River Lumber Co.*, 1 Cal. I. A. C. Dec. 567.

³⁹ *Craig v. Axt*, 1 Cal. I. A. C. Dec. 72.

⁴⁰ Where an employé is required by his contract of hire to work seven days per week, subdivisions 1 and 2 of subsection (a) of section 17 of the California Act cannot fairly and reasonably be applied. These subdivisions, which fix the average annual earnings at 300 times the average daily wage, clearly have reference only to employment for six days per week, as the number 300 is a fair average of days actually worked per year only for such men as work approximately six days per week throughout substantially the whole year. Where an employé works seven days per week, his average annual earnings are to be computed by subdivision 3 of subsection (a) of section 17, and are to be found by multiplying the average daily wage by an arbitrary average representative of the number of days per year that one so employed actually works, and fixed by the Commission at 332. *Gallagher v. City of Los Angeles*, 2 Cal. I. A. C. Dec. 26; *Phillips v. Chanslor-Canfield Midway Oil Co.*, 1 Cal. I. A. C. Dec. 580. But the usual method applies where an employé was supposed to be working seven days a week, but actually received two days off each month on an average, and had worked substantially the whole year preceding the injury with the same employer, and to ascertain his average annual earnings there should be multiplied by 300 his average daily earnings, obtained by dividing his actual earnings by the number of days he was actually employed. *Beals v. United Railroads of San Francisco*, 3 Cal. I. A. C. Dec. 30.

employment seven days in the week for one-third of the year and six days in the week for two-thirds of the year.⁴¹ It is immaterial that the earnings of the year were above or below normal, or were more or less than he earned in other years.⁴² Where other methods of computation are not available, the annual earning "capacity" of the employé at the time of the accident will be used to determine the average annual earnings.⁴³

Where the period of employment has been so short as to furnish no basis for determining the average wage, the rate of wages received by the workman at the time of receiving the injury and the wages usually paid in that vicinity for the same class of work may be taken into consideration in determining the average wage.⁴⁴

⁴¹ *Holmquist v. Shipowners' & Merchants' Tugboat Co.*, 1 Cal. I. A. C. Dec. 224.

⁴² Where the injured employé has worked substantially the whole of the year immediately preceding his injury in the same employment, whether for the same employer or not, the earnings for that year alone are to be taken as the basis for computing his average annual earnings. (Wk. Comp., etc., Act, § 17, par. 1.) The fact that the earnings for such year are above or below normal cannot be considered, nor can his earnings for other years be taken into account. *Gordon v. Evans*, 1 Cal. I. A. C. Dec. 94.

⁴³ Where an aviator had been employed for only six weeks, and there was no evidence as to what are the average earnings of aviators where engaged for the whole year, the third method provided in the Act, namely, the annual earning "capacity" of the employé at the time of the accident, will be used to determine the average annual earnings. In this case the maximum allowed by law was determined upon as the average weekly earnings and was in excess of \$70 per week. *Stites v. Universal Film Mfg. Co.*, 2 Cal. I. A. C. Dec. 670.

⁴⁴ *In re Frances Williams*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 31.

Where an instructress employed by the city is drawing a salary of \$60 per month, but has not worked a full year, the presumption is that persons doing the same work, who worked by the year, received the same wages per month that she received. *Shannessy v. City of Chicago*, Bulletin No. 1, Ill., p. 160.

The California Act provides that, where other methods cannot "be fairly and reasonably applied," the "earning capacity" of the employé may be computed with regard to the earnings of other employés in the same class and his previous earnings. (Wk. Comp., etc., Act, § 17 [a] [3].) Where a miner

While it has been the general practice under the various Acts, in determining the issue of average annual earnings, to compute the

works only a few weeks at a time in order to secure a grub stake and spends the rest of his time prospecting, his average annual earnings are based, not upon his actual earnings during the year preceding the injury, but upon the basis of the wages of other employés in the same or a similar employment who have worked substantially the whole year. *Larson v. Holbrook*, McGuire & Cohen, 2 Cal. I. A. C. Dec. 105. Where the injured employé has worked less than one year in the occupation where he is employed at the time of his injury, his average daily earnings are to be fixed at the average daily wage of other employés doing similar work. *Rudder v. Ocean Shore Railroad Co.*, 1 Cal. I. A. C. Dec. 209; *Clark v. Los Angeles County*, 1 Cal. I. A. C. Dec. 623. (Wk. Comp., etc., Act, § 17 [a] [2].) Where an employé has not worked substantially the whole year in the employment wherein he is injured, the law required that his average annual earnings be computed on a basis of the experience of other men of his class who have worked substantially the whole year. Testimony must be taken as to the common experience of men of the grade and class to which the injured workman belongs in the employment in which he is engaged at the time of his injury. In determining average annual or daily wages of an employé, the issue is not as to what the actual earnings of the injured employé may or may not have been. The purpose of the law is to reach the common experience in the same or a neighboring locality of workmen of a class to which the injured workman belongs. *Craig v. Axt*, 1 Cal. I. A. C. Dec. 72. Where an employé received \$2.50 a day and his board, and was engaged in outside work requiring his absence from home, it was proper to fix his daily wages with reference to the wages received by others in the same occupation with reference to work at the place of employment and with reference to allowances for board while away from the place of employment. *Binkley v. Western Pipe & Steel Co.*, 1 Cal. I. A. C. Dec. 33. But in determining the average daily wages of a person employed for only a short time before the accident, regard cannot be had to the employé's earnings in other or more skilled occupations prior to his accident. Where such person is employed at the time of the accident as a common laborer, his average daily wage must be determined upon the basis of that paid common laborers in that community, even though the employé was a fireman and had worked at that occupation within the previous few weeks. *Ginther v. Knickerbocker Co.*, 1 Cal. I. A. C. Dec. 458.

Where a workman belonging to a labor union having a fixed scale of wages per day was employed by the day at the time of his death, but had worked under prior employments by the job, the case was one in which it was impracticable to compute the average wages, and where resort could be had to the average amounts earned by a person in the same grade, employed in the

wages on the basis of what the injured employé was doing and the pay he was receiving at the time of the accident,⁴⁵ where a laborer

same employment in the same vicinity. (Wk. Comp. Act, pt. 5, § 2, cl. 4) *Gove v. Royal Indemnity Co.*, 223 Mass. 187, 111 N. E. 702.

The following definition of "average monthly wages" was adopted by the Nevada Industrial Commission: "Average monthly wages shall mean the earnings of the injured employé during the period of twelve calendar months immediately preceding the date of injury, divided by 12; but if the injured employé lost more than two weeks' time during such period, then the earnings for the remainder of such twelve calendar months shall be divided by the number of months remaining after the time so lost has been deducted. When, by reason of the shortness of the time during which the employé has been in the employment of his employer, or the nature of the terms of the employment, it is impracticable to compute the average monthly wages, as above defined, regard may be had to the average monthly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade, employed at the same work by the same employer; or, if there is no person so employed, by a person in the same grade, employed in the same class or employment and in the same district. Whenever it may be impracticable to compute the average monthly wages, as above defined, the computation shall be made by the Nevada Industrial Commission in such manner as the Commission may, in its judgment, deem just to all concerned. The earnings or wages of the injured employé, in the employment of the said em-

⁴⁵ *Martin v. Mahoney Bros.*, 2 Cal. I. A. C. Dec. 436. Where a workman, by occupation a cement finisher, at which trade he receives \$5 a day, does such other work as the necessities of his employer require, occasionally that of an ordinary cement worker for a wage of \$4 per day, or that of a carpenter's helper for a wage of \$2.50 per day, and is injured while working as a carpenter's helper, the disability compensation must be based on the earnings at the time of the accident as a carpenter's helper. *Id.*

Where a brewery worker was hired as a helper in sinking and digging a well, and paid the regular brewery union rate of \$3 per day, his average weekly wage was \$18, and not what a laborer doing similar work would regularly average in earnings per week. *Coyle v. Mass. Employés' Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 704 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

Where a village marshal called upon decedent to assist in controlling an offender, who fatally wounded deceased, the basis of compensation to be awarded his widow was the earnings of one doing a policeman's services in that or a neighboring locality, and not his average weekly wages in his usual occupation, that of a plumber. *Village of West Salem v. Indus. Com.*, 162 Wis. 57, 155 N. W. 929.

regularly receives twenty cents an hour wages, but on an extraordinary occasion, in which he is injured, is paid one dollar an hour, the extraordinary remuneration should be disregarded in fixing his average earnings.⁴⁶ Where, in a New York case, it appeared that a motorman on a street car had been shifted to a new run a month

ployer in which he was engaged when injured, are the only earnings or wages that shall be considered in computing average monthly wages. No additional source of income or earning power shall be considered. 'Average monthly earnings' shall have the same meaning as 'average monthly wages.' Rep. Nev. Indus. Com., 1913-14, p. 21.

Where the deceased workman had worked for his employer only a short time, his average annual earnings were computed from the amount paid other employés in the same or similar employment who had worked substantially a whole year. *Nycek v. C. Reiss Coal Co.*, Bul. Wis. Indus. Com. 1912-13, p. 23.

Average wages in grade and personal element. "Having found that a man has a particular grade and what are the average wages in that grade, there is no obligation to adopt those average wages as the basis of compensation. The personal element then comes in. It will still be open to consider whether the individual workman is an average man, or below an average man. This must be so where men in a particular grade are employed in piece work. You cannot reject evidence of the skill and efficiency of the individual workman; where payment is at so much an hour for every man in a particular grade, the skill and efficiency of the individual may perhaps be disregarded, though I am not prepared to say that the age and the habits of the individual may not have such an influence upon his chance of employment as to deserve consideration." *Cozens-Hardy, M. R.*, in *Perry v. Wright* (1909) 1 B. W. C. C. 354. Where the wages of a casual dock laborer averaged £2 a week for a year, whereas the average wages of the whole class of dock laborers averaged only 25s. a week, the judge should have considered this element in awarding compensation, instead of merely allowing him half of the class average wage. *Snell v. Bristol Corporation* (1914) 7 B. W. C. C. 236, C. A. Where a casual laborer's compensation was based upon his average weekly earnings under the proviso of the schedule, disregarding the fact that when working for other employers he showed himself able to earn more than the average, such personal qualifications must be taken into consideration. *Cue v. Port of London Authority* (1914) 7 B. W. C. C. 447, C. A. Where a county judge, holding casual and regular shipwrights to be distinct grades, awarded for the death of a casual shipwright the average wages of a good workman of that grade, there being no evidence as to whether the particular workman was above or below the average, his award was without error. *Cain v. Leyland & Co., Ltd.* (1909) 1 B. W. C. C. 351, 368, C. A.

⁴⁶ *Mazzini v. Pacific Coast Ry.*, 2 Cal. I. A. C. Dec. 962.

before the accident, at an increase per hour in wages, and there was evidence that it was customary to pay motormen in the service as long as the claimant had been the rate he was getting in the latter employment, his wages were to be taken as of the date of the injury, and not those earned during the entire preceding year, part of which were earned on the other run.⁴⁷ Under the California Act, the weekly payments of permanent partial disability indemnity in case of a minor are to be assessed at the probable earnings of the minor after reaching the age of twenty-one, in the occupation in which he was employed at the time of his injury, in the usual course of promotion, if he had not been injured.⁴⁸ Where at the time of the death of a minor iron worker he had been promised that, if he showed greater proficiency in operating a riveter, he would in two months receive forty cents an hour, and it is shown that this is five cents an hour greater than the average adult wage for the same kind of work, the average adult wage must be the basis of computation, and not possible earnings for unusual efficiency.⁴⁹ In New Jersey, compensation for the death of an employé should be calculated on the wages being received by him at the time of his death, and not limited to his average wages.⁵⁰

§ 152. — Average weekly earnings

The "average weekly earnings," sometimes the proper basis of the award,⁵¹ signify the average earnings which the workman would

⁴⁷ *Fredenburg v. Empire United Rys., Inc.*, 168 App. Div. 618, 154 N. Y. Supp. 351.

⁴⁸ (Wk. Comp., etc., Act, § 17, [c]) *Collins v. York Bradford Co., Inc.*, 2 Cal. I. A. C. Dec. 220.

⁴⁹ *Mashburn v. California-Portland Cement Co.*, 2 Cal. I. A. C. Dec. 613.

⁵⁰ (P. L. 1911, p. 137, § 2, par. 12) *Davidheiser v. Hay Foundry & Iron Works*, 87 N. J. Law, 688, 94 Atl. 309, following *Huyett v. Pennsylvania R. R. Co.*, 86 N. J. Law, 683, 92 Atl. 58, stating such to be the law, though injustice

⁵¹ (Wk. Comp. Act, pt. 2, § 11) *Linsteadt v. Louis Sands Salt & Lumber Co.* (Mich.) 157 N. W. 64.

make in a normal week if he were employed on the terms prevailing before and up to the time of the accident,⁵² and where he has been regularly employed at the same employment for a longer period than one year, are to be determined by dividing the aggregate amount of his earnings for the year preceding his death by fifty-two.⁵³ Periods of slackness in the trade, which are incidental to the trade, causing a workman's idleness a part of the year, must be taken into account in figuring his average weekly earnings.⁵⁴ In some states, where he has been continuously employed for a considerable period of time, but not for an entire year, his average weekly wage is determined by dividing the aggregate amount of his earnings by the number of weeks he was employed.⁵⁵

result to the employer when the employé is paid by the piece and his earnings are unusually high at the time of injury, and to the employé when his earnings are unusually low; the correcting of the defect being for the Legislature, not for the court.

⁵² *Bailey v. Kenworthy* (1909) 1 B. W. C. C. 351, 371, C. A.

In *Silveria v. Connecticut Quarries Co.*, 1 Conn. Comp. Dec. 509, where, though the deceased workman had earned an average weekly wage of \$12.05 during the 13 weeks preceding the injury, he had been irregularly employed before that, and had not done or tried to obtain work during these periods of idleness, the commissioner held his average weekly earnings should be computed by dividing the total amount earned during the twenty-six weeks preceding the injury by 18, the number of weeks during some part of which he had worked. (Wk. Comp. Act, pt. B, § 13.) In *Cheski v. Connecticut Mills Co.*, 1 Conn. Comp. Dec. 213, where an employé had worked eighteen days out of four weeks, his average weekly wages were computed by dividing the total amount earned by four.

Workmen's Compensation Act of New York, § 15, subd. 3, provides that compensation for loss of an eye shall not be less than \$5 a week, except that "if the employé's wages at the time of the injury is less than \$5 per week he shall receive his full weekly wages." "Weekly wages" in this section does not mean average weekly wages as defined by section 14 to be $\frac{1}{52}$ of his average annual earnings, but means the wages actually received, as defined by section 3, subd. 9. *Morey v. Worden*, 2 N. Y. St. Dep. Rep. 494.

⁵³ *Andrewjeski v. Wolverine Coal Co.*, 182 Mich. 298, 148 N. W. 684; In re *Anna King*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 37. See § 151, ante.

⁵⁴ *White v. Wiseman* (1912) 5 B. W. C. C. 654, C. A.

⁵⁵ In re *Elida Baird*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 28.

The provision of the New Jersey Act with relation to weekly wages being taken to be six times the average daily earnings for a working day of ordinary length, excluding overtime, is confined to cases where the rate of wages is fixed by the output of the employé, and does not apply where he receives a fixed wage per day.⁵⁶ It has been held that a letter written by the authorized agent of the employer, stating that the employé's wages were \$11.94 a week, together with evidence that he worked seven days a week at \$1.75 a day, authorized a finding that his weekly wage was \$11.94.⁵⁷

§ 153. — Daily wages

"Daily earnings," or wages, when made the basis on which to compute the amount of compensation, mean that which would be earned by working for the ordinary number of hours where the employment is by the hour; no deduction being made by reason of enforced idleness during some of these hours, and nothing being added because on some days the employé works overtime.⁵⁸

§ 154. Federal Act

"The same pay as if he continued to be employed," within the provision of the original federal Act authorizing the award of such pay as compensation, and yet in force as to injuries prior to the Act of 1916, means the same rate being paid at the time of the injury.⁵⁹ It includes allowance for subsistence, or in lieu of subsistence, when the same forms a part of the regular remuneration or earnings,⁶⁰ but not otherwise.⁶¹ It includes the right to any in-

⁵⁶ *Conners v. Public Service Electric Co.* (N. J. Sup. 1916) 97 Atl. 792.

⁵⁷ *Id.*

⁵⁸ (P. L. 1913, p. 313) *Smolenski v. Eastern Coal Dock Co.*, 87 N. J. Law, 26, 93 Atl. 85. See, also, § 151, ante.

⁵⁹ *In re Sellos*, Op. Sol. Dept. of L. 387.

⁶⁰ *In re Lanzy*, Op. Sol. Dept. of L. 373.

⁶¹ When lodging and subsistence are not reckoned as a part of the employé's earnings, such employé is not entitled to commutation of subsistence

crease in the pay attached to the injured person's position, made after the injury and during incapacity.⁶² The question of fact as to what is the "same pay" is ordinarily better determined by the administrative and accounting officers of the establishment in which he is employed than by the Secretary of Commerce and Labor.⁶³

in fixing the rate of payment during incapacity. In re Hurtt, Op. Sol. Dept. of L. 384.

⁶² In re Hamilton, Op. Sol. Dept. of L. 379.

⁶³ In re Clark, Op. Sol. Dept. of L. 381.

ARTICLE II

DISABILITY AND INCAPACITY FOR WORK

Section

- 155. "Disability" and "incapacity for work."
- 156. Permanent total disability.
- 157. Permanent partial disability.
- 158. Temporary total disability.
- 159. Temporary partial disability.
- 160. Computation in case of previously impaired physical condition.
- 161. Hernia—California.
- 162. Scheduled injuries.
- 163. Eye.
- 164. Arm.
- 165. Hand, fingers, foot, and ankle.
- 166. Disfigurement.

§ 155. "Disability" and "incapacity for work"

Compensation is awarded for disability and incapacity for work, whether permanent or temporary, total or partial.⁶⁴ Since "disability" usually means more than mere loss of earning power, the fact that an injured workman is employed at the same work and the same wages after the injury as before will not disentitle him to compensation if his physical efficiency has been substantially impaired.⁶⁵ It is essential, however, that there be some impairment of efficiency.⁶⁶ The occupation to be considered in making a dis-

⁶⁴ Compensation should be provided by the employer or his insurer for all injuries involving permanent or temporary disability, whether total or partial. *Wagner v. American Bridge Co.* (Sup.) 158 N. Y. Supp. 1043.

⁶⁵ (P. L. 1911, p. 134, § 2) *Burbage v. Lee*, 87 N. J. Law, 36, 93 Atl. 859; *De Zeng Standard Co. v. Pressey*, 86 N. J. Law, 469, 92 Atl. 278; *Gailey v. Peet Bros. Mfg. Co.*, 98 Kan. 53, 157 Pac. 431.

⁶⁶ This legislation does not cover injuries having no tendency to impair the efficiency of the employé in his occupation, as where an employé's ear was bitten by a horse and its amputation became necessary. *Shinnick v. Clover Farms Co.*, 169 App. Div. 236, 154 N. Y. Supp. 423.

An employé who has suffered no loss other than two teeth, which have been

ability rating is usually that at which the employé was engaged at the time of the injury.⁶⁷ Under some Acts, recovery is allowed for total disability because the employé was unfitted by his injury to follow the occupation in which he was engaged when injured, although it is shown without dispute that he was capable of earning substantial wages in other occupations.⁶⁸

replaced by the employer, is not entitled to any compensation. *Kandalets v. Swift & Co.*, Bulletin No. 1, Ill., p. 24.

Where the employé was incapacitated for work for a time by straining his left shoulder while he was pushing on a piece of joist in order to remove a safe, but there was no restriction in his power to use the injured shoulder or arm, or in its field of motion, at the time of the hearing, the employé was denied compensation. *Robson v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 235 (decision of Com. of Arb.).

"The Compensation Act does not attempt to compensate the applicant for the loss of his fingers, nor for his pain and suffering. It merely considers him as a workman, and provides him with competent medical attention, * * * and compensates him for 65 per cent. of his loss of wage." *Janiec v. Mitchell-Lewis Motor Co.*, Bul. Wis. Indus. Com., 1912-13, p. 30.

⁶⁷ *Felsen v. Atchison, Topeka & S. F. Ry. Co.*, 3 Cal. I. A. C. Dec. 11.

In computing the average annual earnings of a machinist, who, while working as such machinist, has sustained injury to his hand, resulting in the loss of his ability to play and teach the violin, whereby he had earned considerable in addition to his wages as machinist, such earnings must be disregarded; the Act not contemplating compensation except upon the basis of earnings in the industry in which injury occurs. *Id.*

The award of compensation must be based on disability and loss of wages as applied to the employment in which the applicant was performing service at the time of his injury. *Winters v. Mellen Lumber Co.*, Bul. Wis. Indus. Com. vol. 1, p. 89. Disability of a common laborer must be considered in regard to his being able to go back to work as a common laborer in the various kinds of work pertaining to that employment. *Janiec v. Mitchell-Lewis Motor Co.*, Bul. Wis. Indus. Com. 1912-13, p. 30.

The ability of the workman to do the exact work for which he had been employed at the time of the injury is not the sole measure of disability; the nature of the physical injury or disfigurement and the workman's age may also be considered. *Frankfort General Ins. Co. v. Pillsbury* (Cal.) 159 Pac. 150.

⁶⁸ *International Harvester Co. v. Indus. Com.*, 157 Wis. 167, 147 N. W. 53. Ann. Cas. 1916B, 330.

"Incapacity for work" means loss of earning power as a workman in consequence of the injury, whether the loss manifest itself in inability to perform such work as may be obtainable, or inability to secure work to do,⁶⁹ or inability to reach his place of work.⁷⁰

⁶⁹ *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244. What the Legislatures had in mind was compensation for loss of earning capacity as a workman as a result of injury. Whether this loss manifest itself in inability to perform work which is obtainable or inability to secure work to do is not very material. While personal injury must occur, when the word "incapacity" is not expressly qualified by the use of the word "physical" in the statute, deprivation of power to earn wages as a workman as a result of injury is incapacity within the meaning of the law. *Id.* "Incapacity for work" means no more than inability to earn wages, or full wages, as the case may be, at the work in which the injured workman was employed at the time of the accident. *Duprey v. Maryland Casualty Co.*, 219 Mass. 189, 106 N. E. 686; *Ball v. William Hunt & Sons, Ltd.*, 5 B. W. C. C. 459; *McDonald v. Wilsons & Clyde Coal Co., Ltd.*, 5 B. W. C. C. 478; *Gillen's Case*, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A, 371. Inability to obtain work resulting directly from a personal injury is an incapacity for work within the meaning of this act, though a like inability resulting from some other cause, such as an altered condition of the labor market, would not be so. The inability to get work is evidence tending to show an incapacity for work, though it will not always be conclusive. *In re Sullivan*, 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A, 378; *Radcliffe v. Pacific Steam Navigation Co.*, [1910] 1 K. B. 685; *Cardiff v. Hall*, 4 B. W. C. C. 159, [1911] 1 K. B. 1009; *Brown v. J. J. Thornicroft & Co., Ltd.*, 5 B. W. C. C. 386; *Ball v. William Hunt & Sons, Ltd.*, *supra* (overruling 1 K. B. 1048); *McDonald v. Wilsons & Clyde Coal Co.*, *supra*. Where the injury necessitated amputation of the employé's arm, he was entitled to compensation for a total incapacity for work during the entire time that he was out of work, though during a portion of that time he was physically able to work, but on account of being a one-armed man was unable to procure work. (St. 1911, c. 751, pt. 2, § 9) *In re Sullivan*, *supra*. Where an injured employé has been unable after repeated efforts to get an opportunity to earn wages, a finding that his earning capacity is gone, and that therefore he is under an "incapacity for work," is warranted, though he has a physical capacity to work and earn money. *Duprey v. Maryland Casualty Co.*, *supra*. Where the disability of the employé is of such a character as to interfere with his ability to secure employment, as distinguished from his ability to do work, such dis-

⁷⁰ Where a workman fractured his ankle, and although otherwise in good health, could not walk to his work, such inability was held to constitute total incapacity. *Beddard v. Stanton Ironworks Co., Ltd.* (1913) 6 B. W. C. C. 627, C. A.

This expression was taken from the English Workmen's Compensation Act of 1906, in which it was provided that the amount of compensation to be paid "where total or partial incapacity for

ability is compensable, and the Commission has decided on a form of conditional award to include and provide for such disability. *Raily v. Island Transportation Co.*, 2 Cal. I. A. C. Dec. 608.

Where as a result of the injury the employé's opportunity to obtain work had been so narrowed that he found it impossible to get any employment, and his ability to earn had been thereby rendered negligible, the possibility of his obtaining work being so remote, and the market for workmen of his capacity for performing work so inaccessible, that he was to all intents and purposes, at least for some time, totally incapacitated for work, he was awarded total incapacity compensation. *Gillen v. Ocean Accident & Guarantee Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 812 (decision of Indus. Acc. Bd.). The employé lost his arm by accident, and for a period of five months, from May 31 to October 25, did not work. He diligently endeavored to secure employment, but was unable to do so because of the loss of his arm. He obtained a position as watchman on October 26 at an average weekly wage of \$15. The evidence showed that on May 31 he was capable of performing the work which he finally procured, or any work which a one-armed man could ordinarily perform. It was held that the employé was totally incapacitated for work during the period from May 31 to October 25. *Sullivan v. American Mutual Liability Insur. Co.*, 2 Mass. Wk. Comp. Cases, 435 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct., 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A, 378). The employé, a foreman, had his right hand crushed, the first and second fingers severed, and the hand otherwise so mutilated that it would never be useful. Practically the only work which he could do was that of foreman, the position which he held when he was injured, and which he again expected to obtain when contracting business improved. Because of the mutilation of his hand he could not find employment as a blacksmith, his previous occupation; nor was he able, on account of the injury, to obtain any other work. He was entitled to compensation on the basis of total incapacity for work. *Brennan v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 503 (decision of Com. of Arb.). An employé received a personal injury, necessitating the severance of two fingers of the right hand, and was subsequently furnished work which he was unable to perform. He was thereupon discharged, and the insurer declined to pay compensation. The employé searched diligently for work, but was unable to obtain any which he could do because of the incapacity due to the injury. He was held entitled to compensation on the basis of total incapacity. *Krulla v. Casualty Co. of America*, 2 Mass. Wk. Comp. Cases, 409 (decision of Com. of Arb.).

Where a workman who had been partially incapacitated was doing light

work" resulted from the injury should be certain weekly payments. Accordingly decisions of the English courts fixing the meaning there to be given to these words are of great weight.⁷¹ The same words were used in an earlier English statute, and it was held by the Court of Appeals that the object of the Act was to give compensation for an inability to earn wages, and that if an injured employé, after repeated efforts, could not get an opportunity to earn wages, a finding that his earning power was gone, and that therefore he was under an "incapacity for work," was warranted, though he had a physical capacity to work and earn money.⁷² There is incapacity for work when a man has a physical defect which makes his labor unsalable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labor salable for less than it would otherwise bring.⁷³ Incapacity refers to inability to get work in the open market, and not to whether the workman is receiving the same wages as before the accident.⁷⁴ The question is: Was the workman left in such a

work for his employers and receiving part compensation, and, being then dismissed, was unable to find work in the district, the incapacity included the loss due to the inability to obtain work. *McDonald v. Wilsons & Clyde Coal Co., Ltd.* (1912) 5 B. W. C. C. 478, H. L.

⁷¹ *In re Sullivan*, 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A, 378; *In re Hunnewell* (1915) 220 Mass. 351, 107 N. E. 934.

⁷² *Clark v. Gas, Light & Coke Co.*, 21 L. T. R. 184.

⁷³ *Ball v. Hunt & Sons, Ltd.* (1912) 5 B. W. C. C. 462.

Where a county court judge granted full compensation for a period during which a collier who had ruptured himself waited for a vacancy at the hospital and an operation, refusing, on medical advice, to work during that period, the judge saying that he had acted reasonably, it was held to be a misdirection, since the question was not one of reasonableness, but of capacity to work. *Evans v. Cory Bros. & Co., Ltd.* (1912) 5 B. W. C. C. 272, C. A.

⁷⁴ The statutory test is earning capacity, and if it should appear upon the facts that the workman's earning capacity is less after than it was before or at the time of the accident, it seems that he might have a claim even if he was in fact receiving the same wages at the two periods. *Freeland v. Macfarlane, Lang & Co.* (1900) 2 F. 832, Ct. of Sess. (Act of 1897).

A boy workman, who had been injured, was paid more by the same em-

position that in the open market his earning capacity might in the future be less than it was before the accident, as a result of the accident?⁷⁵

Incapacity may be a nervous or mental condition, provided it be such as an average reasonable man would not have overcome.⁷⁶

ployers for doing nondescript work than he had made before the accident happened, but a suspensory award was nevertheless made. *Id.* Where a ship's fireman was unable to use a hammer because of the loss of a finger by accident, and was held to be permanently partially incapacitated, and his employers, seven months after rehiring him as a fireman at full wages, applied to terminate compensation, it was held that his incapacity had not ceased, but was permanent. *Warwick Steamship Co. v. Callaghan* (1912) 5 B. W. C. C. 283, C. A. Where a workman who had been permanently injured was re-employed by his former employers to do some light work, and was paid more than he had received before, but was prevented by heart disease from continuing this work, he was still incapacitated by his injury. *Cory Bros. & Co., Ltd., v. Hughes* (1911) 4 B. W. C. C. 291. In a case where a workman who had been injured was taken back at his old wages by his employers, and they then applied to terminate the weekly compensation, which had been reduced to 1d. a week by registered agreement, it was held that incapacity refers to inability to get work in the open market, and not to whether he is receiving the same wages as before the accident. *Birmingham Cabinet Mfg. Co. v. Dudley* (1910) 3 B. W. C. C. 169, C. A. Cozens-Hardy, M. R., said: "The question which the judge put to himself appears to have been: Was this man able to earn the same wages as he did before the accident? I do not think that was the right question. The question should have been: Is he hampered in the labor market by reason of the accident? Is he not less likely to secure employment? If he is, it would not be right to disentitle him from ever saying that his capacity was diminished by reason of the accident." *Id.*

Where an injured employé has recovered, so that he is only partially disabled physically from doing work, but the remaining disability substantially prevents him from competing in the open labor market, his disability is to be considered as total. *Lindh v. Toyland Co., Inc.*, 2 Cal. I. A. C. Dec. 646. Where an employé is partially able physically to perform remunerative tasks, but because of deformity and inability to satisfy prospective employers, due to his injury, is totally disabled from earning a livelihood, he should be awarded total disability indemnity. *Cohnhoff v. Thomas & Schneider Art Glass Co.*, 2 Cal. I. A. C. Dec. 564.

⁷⁵ *Birmingham Cabinet Mfg. Co. v. Dudley* (1910) 3 B. W. C. C. 169, C. A.

⁷⁶ Cozens-Hardy, M. R., has said: "The effects of an accident are at least two fold: They may be merely muscular effects—they almost always must

That the employé, but for want of sufficient will power, could have thrown off the nervous condition which followed the injury, will not deprive him of the right to compensation for such condition.⁷⁷

include muscular effects—and there may also be, and very frequently are, effects which you may call mental, or nervous, or hysterical. I cannot, for the moment, think which is the proper word to use in respect to them. The effects of this second class, as a rule, arise as directly from the accident which the workman suffered as the muscular effects do; and it seems to me entirely a fallacy to say that a man's right to compensation ceases when the muscular mischief is ended, but the nervous or hysterical effects still remain." *Eaves v. Blaenclydach Colliery Co., Ltd.* (1910) 2 B. W. C. C. 329, C. A.

An injured workman recovered as far as his muscular condition was concerned, but still honestly believed he was unable to work; it was held that he was still incapacitated. *Id.* A workman who sustained a nervous shock while assisting an injured fellow workman, and was unable to work, was held to be incapacitated. *Yates v. South Kirby, Featherstone and Hemsworth Collieries, Ltd.* (1910) 3 B. W. C. C. 418, C. A. Where, in a case based on an injury to a ship painter's eye, the medical testimony was conflicting, and the medical referee said that if the man was telling the truth it was a case of hysterical blindness, it was held there was evidence to support a finding of total incapacity. *James v. Morley, Carver & Co., Ltd.* (1913) 6 B. W. C. C. 680, C. A. Where a workman was in a hospital for a week as a result of a fall, and on being discharged did light work for five weeks, and then had to go to an infirmary for three months, being discharged from there in a nervous, hysterical condition, which rendered him incapable of working, it was held there was evidence to support a finding of neurasthenia caused by the accident. *Morris v. Turford & Southward* (1913) 6 B. W. C. C. 606, C. A. Where a workman suffering from neurasthenia gave up as soon as his heart failed him, whereas he would probably have recovered if he had kept on working, the incapacity did not result from the accident. *Price v. Brunyeat, Brown & Co.* (1910) 2 B. W. C. C. 337, C. A. Where an injured workman returned to his work, and eighteen months later quit work because of nervousness caused by the accident, but which an average reasonable man could have overcome, it was held that he was not incapacitated. *Turner v. Brooks & Doxey, Ltd.* (1910) 3 B. W. C. C. 22, C. A. Where an injured man had recovered his physical condition, and was quite fit for his work, but from brooding over the accident had lost the courage to persevere at his work, and applied for an increase of a nominal award, it was held that his incapacity had ceased. *Holt v. Yates & Thorn* (1910) 3 B. W. C. C. 75, C. A.

⁷⁷ In re Hunnewell, 220 Mass. 351, 107 N. E. 934.

A hod carrier was carrying a hod of bricks on his shoulder when the elevator upon which he was standing suddenly fell a distance of five stories;

Mere inability to obtain work does not conclusively show incapacity.⁷⁸ The applicant must establish the fact of disability, and show that his inability to earn as much as he was earning at the time of the injury was the result of the injury, and not because work is scarce and hard to find. Compensation is payable for inability to do work, not for inability to find work to do.⁷⁹

Discharge for lack of work does not constitute disability.⁸⁰ Whether the discharge of an injured workman, who has been re-employed, has any bearing on the right to compensation, depends on whether the discharge was due to a condition resulting from the

he being very much bruised on his chest, back, and side, and suffering from a nervous shock and disturbance in consequence. The question of malingering was raised by the insurer, and an impartial physician was called upon to examine the employé and report. He reported: "That he took, and until to-day, has taken, his pains too seriously, is beyond question; but such a misinterpretation is a very natural consequence of his unpleasant experience, and so, I think, he is not malingering." The employé was held entitled to compensation. *Diaz v. Contractors' Mut. Liab. Insur. Co.*, 2 Mass. Wk. Comp. Cases, 150 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct., 217 Mass. 36, 104 N. E. 384).

See § 95, ante.

⁷⁸ An employé fell on the stairs of the factory in which he was employed, striking on his back and being incapacitated for twenty-one days. About four months after the injury the factory shut down and the employé was unable to obtain any employment from the date of the shut-down, April 8, to June 18, when he secured a position at which he earned a higher wage than at the time of the injury. He claimed compensation for the period during which he was unable to find employment. He had suffered prior to the injury from the after effects of a disease of childhood, and an impartial physician reported that he had wholly recovered from the effects of the injury. Not having any physical incapacity due to the injury, he was not entitled to compensation because of inability to obtain work. *Tremblay v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 156 (decision of Com. of Arb.).

Where an injured workman, who had been receiving part wages and part compensation, was discharged, the mere fact that he could not obtain employment elsewhere did not show incapacity which entitled him to more compensation. *Dobby v. Wilson, Pease & Co.* (1910) 2 B. W. C. C. 370, C. A.

⁷⁹ *Winn v. Small*, 1 Cal. I. A. C. Dec. 5.

⁸⁰ *Lough v. Standard Oil Co.*, 1 Cal. I. A. C. Dec. 41.

injury, or to some other cause, such as misconduct of the workman.⁸¹ While no burden rests on the employer, such as relieves the employé from seeking suitable employment, to obtain employment for him,⁸² yet where the injury is of a nature tending to affect the ability to obtain work, an employer seeking to reduce compensation, or be relieved therefrom, must prove that suitable employment can be obtained.⁸³ On this subject Commissioner

⁸¹ A carpenter had the thumb, forefinger, and little finger of his left hand cut off by a circular saw which he was operating. He obtained work at different times after the injury, but was discharged as soon as his employers noticed his hand and found that he was unable to perform the work given him. He was entitled to compensation on account of total incapacity for work. *McDonald v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 224 (decision of Com. of Arb.).

Where a waitress suffered an injury to the index finger of her right hand, which left it stiff, and on returning to her employment was grumbled at because the stiff finger made her clumsy, and left, there was compensable incapacity resulting from the injury. *Ward v. Miles* (1911) 4 B. W. C. C. 182, C. A. But where a workman, after a permanent injury, was taken back by his employers at higher wages than before, and then later dismissed for misconduct, there was no incapacity resulting from the injury. *Hill v. Ocean Coal Co., Ltd.* (1910) 3 B. W. C. C. 29, C. A. Where a workman, after the loss of one eye, was re-employed at his former wages, and was later discharged for alleged misconduct, but there was really incapacity resulting from the accident, compensation must be awarded. *White & Sons v. Harris* (1911) 4 B. W. C. C. 39, C. A.

⁸² Where a trial judge found that a workman who had lost his right arm was physically able to do light work, and from his own knowledge of labor conditions in the district knew that the workman could get such work if he tried, the amount of compensation was rightly reduced. *Silcock & Sons v. Golightly* (1915) 8 B. W. C. C. 48, C. A. Where a miner so far recovered from nystagmus that he was able to do light work, but would make no effort to get it, his compensation was reduced. *Williams v. Ruabon Coal & Coke Co., Ltd.* (1914) 7 B. W. C. C. 202, C. A. *Cozens-Hardy, M. R.*, said: "The man says, in effect, 'It is for you, the employers, to find me light work.' I repudiate that way of putting it entirely; there is no principle of law to support it." *Id.*

⁸³ The court refused to terminate compensation, because the employer's burden in this respect was not discharged, where a boy working as a cabinet maker's apprentice, after having his hand mutilated, found work as an er-

Chandler, of Connecticut, said: "Employers generally recognize the moral obligation to find employment for employ  s more or less debilitated from injury, at the earliest possible moment, usually permitting them to resume work for the first few days under favorable conditions. This practice should be encouraged, and failure to observe it without good cause should be given such adverse consideration as the other evidence and the circumstances of the case justify."⁸⁴ Where pending litigation a workman's employers offer him work, which, however, is not for any certain period and not permanent, such an offer has little significance in determining

rand boy at higher wages than he had received before, but was soon discharged for misconduct, and his former employer did not show that work was procurable (*Wilson v. Jackson's Stores, Ltd.* [1905] 7 W. C. C. 122, C. A.); where, although a mason's laborer, who had one eye injured, could do work which did not require two eyes for safety, but was nevertheless unfitted for his former occupation, and there was no evidence that such work could be obtained (*Bryce & Co. v. Connor* [1905] 7 F. 193, Ct. of Sess. [Act of 1897]); where the employers showed that the workman was physically able to do light work, but not that he could obtain any (*Proctor & Sons v. Robinson* [1910] 3 B. W. C. C. 41, C. A.); where a coal porter in a gasworks was permanently incapacitated by an accident which took off four fingers, and failed in his efforts to get other work (*Clark v. Gaslight & Coke Co.* [1905] 7 W. C. C. 119, C. A.); and where a ship painter's eye, which had been injured, retained only 15 per cent. of normal vision, and his other eye was poor, so that he was incapacitated for scaffold work, and his employers did not prove that he was able to obtain work (*James v. Mordey, Carner & Co., Ltd.* [1913] 6 B. W. C. C. 680, C. A.).

But it has been held that where a workman's employers, on application for review, showed that the man was fit to do any kind of light work, their burden was discharged, although there was evidence that he had failed in several efforts to obtain employment. *Cardiff Corporation v. Hall* (1911) 4 B. W. C. C. 159, C. A. And where an injured workman was re-employed by his former employers, but was idle for four days during a labor strike, which made it impossible for his employers to find work for all their regular staff, and claimed compensation for the four days on the ground that his injury prevented him from getting work elsewhere, but the trial judge found no such incapacity, his claim was refused. *Woodhouse v. Midland Ry. Co.* (1914) 7 B. W. C. C. 690, C. A.

⁸⁴ *Naruk v. Main*, 1 Conn. Comp. Dec. 48.

his probable future earnings.⁸⁵ Where it appears that the employé was totally incapacitated, the award cannot be reduced because he has not attempted to obtain employment.⁸⁶ But he cannot, by acting on unwise advice and refusing work suitable to his condition, improve his right to compensation.⁸⁷ Inability resulting from idleness is not compensable incapacity, though the idleness originated in an injury,⁸⁸ unless the continued idleness is due to inability, as a consequence of the injury, to obtain work.⁸⁹ The fact that an

⁸⁵ *Giachas v. Cable Co.*, 190 Ill. App. 285.

⁸⁶ (Laws 1911, c. 751) *In re Septimo*, 219 Mass. 430, 107 N. E. 63.

⁸⁷ Where a workman unreasonably refused light work on account of unwise medical advice and the domination of his wife, there was no incapacity resulting from the injury, and the judge on review terminated the payments. *Higgs & Hill, Ltd., v. Unicum* (1903) 6 B. W. C. C. 265, C. A. Where a ship's fireman refused a light job offered him a year after an injury to his hand, without even going to see what it was, and where he would have recovered by the date of the arbitration if he had accepted, it was held there was no incapacity resulting from the injury. *Furness, Withy & Co. v. Bennett* (1910) 3 B. W. C. C. 195, C. A.

But where an employé with a slight injury to one hand was offered light work, which he refused to do, but it did not clearly appear that it had been determined by his physician that he was able to do light work yet, or that he understood he was to go to work until his physician had so advised, the offer of work was indefinite and misunderstood by the employé and did not deprive him of compensation for the disability. *McKnight v. American Can Co.*, 2 Cal. I. A. C. Dec. 427.

⁸⁸ Where, upon the stopping in 1910 of the payments to a workman injured in 1907, he took proceedings, and it was found that long idleness was the cause of his inability, it was held the incapacity did not result from the injury. *David v. Windsor Steam Coal Co.* (1911) 4 B. W. C. C. 177, C. A. Where it was found, on an application to review compensation, that the workman's inability was due to lack of condition, caused by a long period of idleness, it was held that incapacity was not resulting from the injury, and compensation was reduced to 1d. a week. *Upper Forest & Worcester Steel & Tinplate Co., Ltd., v. Grey* (1910) 3 B. W. C. C. 424, C. A.

⁸⁹ Where an injured collier would probably have recovered if he could have done light work, but his efforts to obtain it met with no success, there was incapacity resulting from accident. *Bonsall v. Midland Colliery Owners' Mut. Indemnity Co., Ltd.* (1914) 7 B. W. C. C. 613, C. A.

employé was placed in jail after the injury does not bar recovery of compensation, if he was incapacitated from performing his regular duties by reason of the accident during that time.⁹⁰

That the employé is a man of failing physical powers, and probably will be incapacitated for work in a few years, as a result of such physical weakness, independently of his injury, does not bar him from compensation for total disability if his incapacity to work is the result of his injuries.⁹¹ But the California Commission has held that where an aged employé is injured by a fall, sustaining the fracture of several ribs, as well as bruises and contusions, and after the physical injuries caused by the fall have healed it is found that he is unable to recover the strength to resume work because of his advanced age, compensation should be paid only for the period for which he was disabled by the fractures and bruises. The industry is not responsible for the breakdown of his physical condition, caused by increasing age, though such disability is brought on at this time by the accident, instead of later.⁹² The question of incapacity⁹³ and duration thereof are questions of fact to be deter-

⁹⁰ *Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 11, p. 40; McNally v. Furness, Withy & Co., Ltd. (1913) 6 B. W. C. C. 664, C. A.*

An employé who received a serious injury to his foot was afterward sent to the State Farm because of intoxication. The evidence showing that he was totally incapacitated by reason of the injury during the time of his sentence at the State Farm, he was allowed compensation. *Hanlon v. Employers' Liab. Assur. Corp., Ltd., 2 Mass. Wk. Comp. Cases, 716 (decision of Com. of Arb.).*

⁹¹ *Duprey v. Maryland Casualty Co., 219 Mass. 189, 106 N. E. 686; Lee v. William Baird & Co., Ltd., 1 B. W. C. C. 34.*

⁹² *Udell v. Wagner, Peterson & Wilson, 2 Cal. I. A. C. Dec. 113.*

⁹³ Where a workman suffered the loss of an eye, and received compensation for some time from his employers, and then, believing that he could do certain work they offered, accepted a nominal award, and on finding that he could not do the work was restored by a finding of the county court judge to full compensation, the question of incapacity was one of fact for the judge to decide. *Thayne v. Gray & Co., Ltd. (1915) 8 B. W. C. C. 17, C. A.* Where a workman who had lost the top joint of his thumb worked at light work for six months, and on being asked to resume his old job refused, on the ground that he was unable to grip ropes such as would be necessary, and was award-

mined as are other questions of fact.⁹⁴ Compensation will seldom be awarded on the unsupported testimony of the workman as to the time when the disability terminates. The duration of the disability will instead be determined in California by reference to the testimony of the applicant, the information given by the attending physician as to the probable course of the injury after the injured man left his care, and by the advice of the medical director of the Industrial Accident Commission.⁹⁵ Where it appears that the disability is proximately caused by accident, that it exists at the time of the hearing, and that the only issue is as to the cause of the continued disability, conflicting or undecisive medical evidence will be resolved in favor of the injured employé.⁹⁶

The Washington Commission has held that, where a claimant is unable to furnish proof of the magnitude of the injury sustained by the detailed report of a competent attending physician, who made examination of the resulting physical condition within a reasonable time after the accident, it will not open the door to fraud by making an award, unless the injury is of such continuing and serious character that a state surgical examiner has been able to make a full and satisfactory special report thereon,⁹⁷ and that the duration of disability, if temporary, or the character, if permanent, except in rare cases, must be proven by report of a licensed physician or surgeon.⁹⁸ To establish a valid claim under the Washing-

ed compensation for partial incapacity by the county court judge, the question of incapacity was one of fact for him to decide. *Curry v. Dosford & Sons, Ltd.* (1915) 8 B. W. C. C. 19, C. A. Where, on an application for review by the employers, the judge said he could not decide the question of incapacity because the medical evidence was conflicting, the case was returned with instructions that he must decide. *Cowan v. Simpson* (1910) 3 B. W. C. C. 4, C. A.

⁹⁴ *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244.

⁹⁵ *Gregory v. Merrill Metallurgical Co.*, 1 Cal. I. A. C. Dec. 408.

⁹⁶ *Spencer v. Gibson*, 1 Cal. I. A. C. Dec. 565.

⁹⁷ (Wk. Comp. Act Wash. § 12) *Rulings Wash. Indus. Ins. Com.* 1915, p. 21.

⁹⁸ *Id.* p. 20.

ton Act, the injured workman need not be so helpless as to require the assistance of a nurse, but there must be professional certification of his being entirely incapable of doing any gainful work for a period of time resulting in a loss of not less than 5 per cent. of his monthly wage.⁹⁹

The existence and continuation of incapacity on the one hand, and of malingering or termination of incapacity on the other, are questions of fact to be determined from the evidence; compensation being awarded, denied or limited in accordance with such determination.¹ The signing of a final release while evidence of the

⁹⁹ (Wk. Comp. Act Wash. § 5) Id. p. 16.

¹ In *Intorigne v. Smith & Cooley*, 1 Conn. Comp. Dec. 228, where it appeared that the disability was due largely to imagination and slight neurotic condition, which would be best cured by the claimant's early return to work, he having already received compensation for twenty-six weeks, an award of six weeks additional was made to allow the claimant sufficient time to resume his normal mental condition and end the disability. In *Dominick v. Brainerd, Shaler & Hall Quarry Co.*, 1 Conn. Comp. Dec. 655, wherein the evidence tended strongly to show malingering, the commissioner, in consideration of all the facts shown, awarded compensation of \$5 a week for four weeks, and incidental expenses of \$3, "in order to administer a soothing balm to the injured's mental condition, and to allow a sufficient lapse of time to effect a recovery by proper muscular activity of the injured arm." In *Hurlowski v. American Brass Co.*, 1 Conn. Comp. Dec. 6, where the claimant's vision was still impaired as a result of the injury, and was apt to be made worse by fatigue, and he also suffered headache and dizziness when he tried to work, it was held that he was still incapacitated. In *Wallace v. Tracy Bros. Co.*, 1 Conn. Comp. Dec. 156, where a workman was taken back by his employers and given light work, but was later discharged because they had no more of that kind of work, while another man was kept on at his old work and he was given no chance to try it, and was unable to find other work that he could do, he was entitled to compensation for incapacity due to the injury. In *Giovanellie v. C. W. Blakeslee & Sons*, 1 Conn. Comp. Dec. 164, where it appeared that the claimant had been discharged from the hospital and his card marked "cured," and was seen walking a half mile to the doctor's office and at play throwing balls weighing about two pounds, and had ceased to receive medical attention, while the evidence he produced of incapacity was of doubtful character, it was held his incapacity had ended. In *Fasulo (alias Fise) v. Andrew B. Hendryx Co.*, 1 Conn. Comp. Dec. 29 (affirmed by superior court), where it was shown on medical examination that the claimant's injured finger had healed sufficiently to enable him to

employé's opinion that he was able to work is not necessarily conclusive that he is in fact able to do so, since his opinion may be erroneous. Self-diagnosis is not of itself evidence of ability to work.² That a workman thought his disability had ceased and set out on his vacation, does not affect compensation, so long as his disability actually continues.³

§ 156. Permanent total disability

There are four classes of disability: Permanent total, temporary total, permanent partial, and temporary partial. Permanent total disability usually entitles the employé to periodical payments, based upon his wages, to last a maximum number of periods, and a pension after that for the rest of his life.⁴ Whether a disability constitutes a permanent total disability is a question of fact, to be determined from the facts of each particular case,⁵ but is not neces-

work without harm other than inconvenience, it was held that incapacity had ceased. In *Killooy v. Evans*, 1 Conn. Comp. Dec. 277, where it appeared that, though plaintiff slipped and fell on the ice while discharging her duties and sustained an abrasion of her face and head, she was at no time incapacitated from work and had received full wages during the entire time since the accident, her claim was dismissed. In *Puridzy v. Winchester Repeating Arms Co.*, 1 Conn. Comp. Dec. 420, where owing to the fact that claimant's left eye was never as good as his right, that he was unused to using it solely, and to a slight sympathetic irritation, due to the injury to the right eye, causing total loss of sight, he suffered considerable in his left eye, but there was no injury to the left eye, and no incapacity in that eye connected with the injury, compensation was allowed only for the total loss of sight of the right eye.

² *Naruk v. Main*, 1 Conn. Comp. Dec. 48.

³ Compensation will be awarded for the full term of disability caused by a compensable injury, although during such period of disability the injured employé, mistakenly deeming his wound had practically healed, left on his vacation without pay. *Bickelnitzky v. Acme Brewing Co.*, 3 Cal. I. A. C. Dec. 5.

⁴ Wk. Comp. Act Cal. § 15 (2) (5).

⁵ *State ex rel. Casualty Co. of America v. District Court (Minn.)* 158 N. W. 700.

Paralysis of the body, from the waist down, and of both legs, which is permanent, constitutes a total disability of 100 per cent. *Phillips v. Chanslor-*

sarily a jury question.⁶ The loss of sight of both eyes constitutes permanent total disability.⁷ The determination of the extent of

Canfield Midway Oil Co., 1 Cal. I. A. C. Dec. 580. Where a workman, as a result of coming in contact with a high-power electric current, sustained a permanent complete disablement of the right arm, shoulder, and hand, spinal deformity, and complete loss of motion of spine, shoulders, and neck, limited motion of the right leg, and distortion and lameness in both feet, he has suffered a 100 per cent. permanent disability, which entitles him to an award of 65 per cent. of his average earnings for 240 weeks, and a pension of 40 per cent. of his average earnings thereafter for life. *Gibney v. Caspar Lumber Co.*, 2 Cal. I. A. C. Dec. 825.

In *Haughland v. Howe*, 1 Conn. Comp. Dec. 401, where the claimant, though having no useful vision, as far as ability to earn was concerned, in the injured eye, was able to count figures at a distance of two feet, it was held he could not recover specific indemnity under the schedule for "complete and permanent loss of sight," though he was awarded for partial incapacity, and provision made for reopening the finding in case of further diminution of sight.

Where the weight of the evidence, medical and otherwise, showed that the employé was totally incapacitated for work by the results of the injury, due to the amputation of his arm, and that another surgical operation was needed to relieve a condition of sensitiveness following the operation, it was held that he was totally incapacitated for work. *Clementi v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 330 (decision of Com. of Arb.).

Where claimant lost by the accident the entire sight of his right eye and 95 per cent. of his left, and sustained injuries to his head which made it impossible for him to stoop or bend over without pain, and there was testimony that he was unable to engage in any occupation, the evidence of injury was sufficient to support a finding of permanent total disability. *State ex rel. Casualty Co. of America v. District Court*, supra.

Where the arm of a domestic servant was stiffened by the injury, so that it would not flex more than 20 per cent., was also atrophied and stiffened at the shoulder so that she could not raise her arm above her head, and the nerves to the extensor muscles of her wrist were severed, so that though able to do some work as a domestic, she required assistance in nearly every line of the work, and could not have secured employment as a regular domestic because of her condition, she was totally incapacitated. *McGill v. Dunn County*, Bul. Wis. Indus. Com., 1912-13, p. 33.

⁶ *Sinnes v. Daggett*, 80 Wash. 673, 142 Pac. 5.

⁷ *Kraljivich v. Yellow Aster Mining & Milling Co.*, 1 Cal. I. A. C. Dec. 554.

The employé having suffered loss of both eyes, a permanent total disability is conclusively presumed, and he is entitled to a 100 per cent. rating, or

the compensable disability in case of a previously impaired physical condition is reserved for consideration in another section.⁸

§ 157. Permanent partial disability

A workman is partially disabled where he is rendered less able to perform work.⁹ The per cent. of total disability that the injury in each case constitutes depends on the particular facts.¹⁰ The combined result of two accidents in the same employment may entitle the workman to compensation for a permanent partial disability, though, if each accident were considered separately, such compensation would not be due.¹¹ Whether there is a permanent par-

indemnity of 65 per cent. of his average weekly earnings for 240 weeks, and thereafter 40 per cent. thereof for the remainder of life. *Sampo v. Yellow Aster Mining & Milling Co.*, 2 Cal. I. A. C. Dec. 539; *Galante v. Mammoth Copper Mining Co. of Maine*, 2 Cal. I. A. C. Dec. 732.

⁸ See § 160, post.

⁹ Where an employé, in consequence of an injury to his fingers, could not tightly close them in his hand, and was thereby rendered less able to perform his work, he was partially incapacitated from performing labor. *Gailey v. Peet Bros. Mfg. Co.*, 98 Kan. 53, 157 Pac. 431.

¹⁰ *Sinnes v. Daggett*, 80 Wash. 673, 142 Pac. 5.

Where an electric power station operator, by accidental contact with two blades of a switch he was polishing, had his arm burned off four inches below the elbow, and his right hand so badly burned that it was impossible for him to pick up articles, and his mouth and jaw so burned as to prevent distinct speech, the Commission found his disability sufficient to entitle him to an award of a life pension of 34¼ per cent. of his average weekly earnings, following the usual indemnity of 65 per cent. of his weekly wages for 240 weeks. *Brooks v. Central California Traction Co.*, 2 Cal. I. A. C. Dec. 420.

That an injury causing the amputation of the index finger of a carpenter and cabinet maker between the knuckle and proximal joint occasioned a permanent partial disability of 20¼ per cent., although he was able to do the same work as before the injury, was a finding of fact supported by the evidence. *Frankfort General Ins. Co. v. Pillsbury (Cal.)* 159 Pac. 150.

¹¹ Where an employé lost the first joint of one finger of his left hand by accident, and two months later lost the joint of another finger of the same hand by another accident in the same employment, and no permanent par-

tial disability, where the disability would ordinarily be only partial, but is made total by a previously existing impairment, is considered in another section.¹²

Permanent disability ratings are made under the California Act with reference to the nature and extent of the injury, the age of the injured person, and his occupation. Thus the fact that the loss of a part of a finger on the left hand is more disabling to a carpenter than to a common laborer will be considered.¹³ After a permanent disability rating has been properly arrived at, it is not a defense that the employé returned to work before the termination of the period covered by the payments, or that the disability did not disqualify him for the kind of work which he was doing at the time of his injury.¹⁴ Inability of an injured employé, who is only

tial disability compensation would be due if each accident were treated separately, but the combined result of the two accidents entitled the applicant to permanent partial disability indemnity of 5¼ per cent., it was awarded. Where both accidents occur in the same employment within a short space of time, and no compensation has been paid for the first, the percentage of permanent disability should be based upon the combined results of the two, as accords nearest to the actual injury or deprivation of earning power sustained. *Berry v. Pacific Coast Steel Co.*, 2 Cal. I. A. C. Dec. 178.

¹² See § 160, post.

¹³ *Johnson v. Hammond Lumber Co.*, 1 Cal. I. A. C. Dec. 574. The rating schedule for permanent partial disability is made, not solely with regard to the direct loss of earning power by reason of the injury, but with regard also to the impairment of physical efficiency for the remainder of the life of the injured employé. *Immel v. American Beet Sugar Co.*, 2 Cal. I. A. C. Dec. 385.

But where the circumstances of a special case indicate that the rating appearing in the schedule published by the Commission, as to a certain kind of permanent disability, is too low, or where the testimony shows that the framers of such schedule made an underestimate as regards a certain class of permanent disability, the Commission will not be bound by the schedule, but will rate such disability upon the basis indicated by the evidence to be proper. *Lee v. Pacific Coast Steel Co.*, 3 Cal. I. A. C. Dec. 28.

¹⁴ *Gabriel v. Northwestern Pacific R. R. Co.*, 2 Cal. I. A. C. Dec. 129. Where a carpenter accidentally has the index finger of his left hand severed, but within twenty days returns to his work at the same wage, and the par-

partially disabled, to find employment by reason of hard times or of the scarcity of employment, cannot be taken into consideration in determining the extent of a disability indemnity to be awarded him. The California Commission is authorized to take into consideration, in determining the extent of temporary partial disability only: (1) The work which such employé with reasonable diligence is capable of doing in view of the nature of his physical injuries; and (2) the handicap of an injured or sick employé over able-bodied persons seeking employment.¹⁵ This Commission has power to award compensation for a permanent partial disability amounting to less than 10 per cent. of total disability.¹⁶ No permanent partial disability award is given for an injury resulting in the loss of the little finger at the distal joint and the tip of the third finger between the end and the distal joint, both on the right hand, for the reason that the disability caused thereby is of too slight a nature to be compensated in this manner. Full temporary total and partial disability award will be made for such injury, however.¹⁷ Where an applicant sustains a fractured leg, thereby entitling him to a temporary total disability until his recovery, and also sustains a permanent disability to his toes, but the amount to which he is entitled because of his permanent disability is less than the amount paid him as a temporary disability indemnity, he is not entitled to any compensation for his permanent injury.¹⁸

ties stipulate that he is able to do as good work and as much of it as he had done previously, his permanent disability will nevertheless be rated with reference to the nature of his physical injury or disfigurement, the occupation of the injured employé, and his age, especially where the stipulation is shown to have been entered into by inadvertence and to be untrue in fact. *Immel v. American Beet Sugar Co.*, 2 Cal. I. A. C. Dec. 385.

¹⁵ *Johnson v. Cluett Peabody Co.*, 2 Cal. I. A. C. Dec. 7.

¹⁶ *Solloway v. Kopperud*, 2 Cal. I. A. C. Dec. 187. The Commission has power to award compensation for a less per cent. of total disability than 10 per cent., here 2¾. *Mass. Bonding & Ins. Co. v. Pillsbury*, 2 Cal. I. A. C. Dec. 480, 170 Cal. 767, 151 Pac. 419.

¹⁷ *Shushke v. Vail & Vickers*, 2 Cal. I. A. C. Dec. 182.

¹⁸ *Mason v. Knight*, 1 Cal. I. A. C. Dec. 493.

The provision of the New York Act that, in case of partial disability not otherwise specifically provided for in section 15, the compensation shall be $66\frac{2}{3}$ per cent. of the difference between the average weekly wages of the injured employé and his wage-earning capacity after the accident, this compensation to continue during the disability, subject to certain conditions and limitations, applies to a case of the loss of the tip of the first phalange of a finger, where the wages received after the accident are less than those received prior thereto.¹⁹ The amount to be awarded for permanent partial disability under the Washington Act is in the discretion of the Industrial Insurance Department.²⁰

§ 158. Temporary total disability

The facts of each case of temporary disability must determine whether or not it is total.²¹ Total temporary disability no longer

¹⁹ (Wk. Comp. Act, § 15, subds. 3, 4) *Mockler v. Hawkes* (Sup.) 158 N. Y. Supp. 759.

²⁰ *Sinnes v. Daggett*, 80 Wash. 673, 142 Pac. 5.

²¹ As to relation between total disability and inability, because of the injury, to obtain work, see § 155, ante.

Where the evidence shows that an injured employé is able to work a few days at a time, but that whenever he does attempt to work a relapse is inevitable after a few days, such employé is still under a total temporary disability. *Colot v. Union Lumber Co.*, 1 Cal. I. A. C. Dec. 512.

In *Verderame v. Blenner*, 1 Conn. Comp. Dec. 325, where claimant sustained an injury consisting of the severance of the artery, nerves, and tendons upon the anterior surface of her left wrist, she was awarded compensation for total temporary incapacity. Where on supplemental hearing it was shown that she had little use of her left hand, the fingers contracting upon the palm, and she being unable to dress herself or do any amount of work, it was held there was still total incapacity resulting from the injury.

The employé was totally incapacitated for work where a girl, 15 years of age, suffered an injury as a result of which the ring finger was wholly amputated and the index fingers were rendered permanently incapable of use below the middle joint, and the little finger also injured (*Cunka v. American Mut. Liab. Insur. Co.*, 2 Mass. Wk. Comp. Cases, 491 [decision of Com. of Arb.]); where an employé received a blow in the right eye from a belt which carried power to a boring machine on which he was employed, and a trau-

exists when by reasonable diligence an employé can earn. When this ability has returned to him to a definite extent, he is then only entitled to compensation for temporary partial disability.²² Evidence that the injured employé was employed by his former em-

matic cataract developed, which sympathetically affected the left eye and caused incapacity for work (*Stachuse v. Fidelity & Casualty Co. of N. Y.*, 2 Mass. Wk. Comp. Cases, 324 [decision of Indus. Acc. Bd.]); where a carpenter, blind in one eye and partially deaf at the time of the injury, was incapacitated for work except "bench work," though he claimed later to be totally incapacitated from performing any work, and was shown upon examination by an impartial examiner to be unable to perform any work except that which could be done while seated (*Duprey v. Md. Casualty Co.*, 2 Mass. Wk. Comp. Cases, 132 [affirmed by Sup. Jud. Ct., 219 Mass. 189, 106 N. E. 686]); where the employé suffered a fracture of the bones in his left hand and of his right arm, above the elbow, the latter so serious that the broken bone never united, leaving the left hand considerably stiff and cramped, and the right arm incapable of use, and endeavored to obtain work at various places of employment without success, being in fact unable to earn any wages (*Jamieson v. Fidelity & Deposit Co. of Md.*, 2 Mass. Wk. Comp. Cases, 772 [decision of Com. of Arb.]); where an impartial physician reported that the employé was still unable to do the work of a grocery clerk, his regular occupation, and recommended that the treatment suggested by the employé's physician be afforded him (*Portnoy v. Fidelity & Casualty Co. of N. Y.*, 2 Mass. Wk. Comp. Cases, 823 [decision of Indus. Acc. Bd.]); and where a carpenter had the tip of the thumb of his right hand taken off by a planer knife, and later obtained employment wheeling coal, but, finding he was unable to continue at this work because of further trouble with the injured thumb, asked for lighter work, was discharged, and was unable to obtain other work (*Noval v. American Mut. Liab. Insur. Co.*, 2 Mass. Wk. Comp. Cases, 586 [decision of Com. of Arb., affirmed by Indus. Acc. Bd.]). Where the evidence showed that the employé received a peculiar and serious injury, which in fact incapacitated him wholly for work, and there was need of further expert medical treatment in order to more promptly restore the employé to normal working efficiency, the employé was totally incapacitated for work. *Dibilio v. American Mut. Liab. Insur. Co.*, 2 Mass. Wk. Comp. Cases, 485 (decision of Com. of Arb.).

²² *Larnhart v. Rice-Landswick Co.*, 1 Cal. I. A. C. Dec. 557.

Where a concrete worker, who sustained an injury while working for the same employer as a common laborer digging trenches, recovered sufficiently to assume the duties of a common laborer, but was not strong enough to perform the more arduous duties of a concrete worker, the compensable temporary disability had terminated. *Utieres v. Otto*, 2 Cal. I. A. C. Dec. 652.

ployer and paid wages, after the accident, though some evidence that he was not wholly incapacitated, is not conclusive.²³

Under the California Act, where the permanent disability rating was for a period of sixteen weeks for the crippling of the employé's left hand, but the actual total incapacity resulting from the injury lasted for five months longer, compensation is payable for the actual total disability; the permanent partial rating being included therein.²⁴ Where the employer paid full wages during the disability, and there is no evidence showing an agreement of the parties as to what portions were respectively for services and compensation, it will be conclusively presumed that the disability was total.²⁵

§ 159. Temporary partial disability

Like other phases of disability, the existence of temporary partial disability is to be determined from the facts of each particular case.²⁶ Under the Massachusetts Act, an award of compensation

²³ *In re Septimo*, 219 Mass. 430, 107 N. E. 63.

²⁴ *Maher v. Sunset Lumber Co.*, 2 Cal. I. A. C. Dec. 602.

²⁵ *Turner v. City of Santa Cruz*, 2 Cal. I. A. C. Dec. 991.

²⁶ Where a carpenter's foreman is still able to supervise the work he is employed upon, but is unable as the result of the accident to use tools and work with those under him, he is under a partial disability. It is not generally or customarily true that a carpenter's foreman is not expected to use tools and only to superintend the work of carpenters under him. While this would be true of a superintendent of construction on a large building, it is not generally true of the foreman of a gang of carpenters. *Gordon v. Evans*, 1 Cal. I. A. C. Dec. 94. A fracture of the main bone of the forearm, because of the pain, if for no other reason, constitutes disability for a reasonable period, whatever the occupation of the injured person, and therefore entitles him to disability compensation. *Shouler v. Greenberg*, 1 Cal. I. A. C. Dec. 146. The statement of the doctor that applicant cannot do ordinary labor, together with his own testimony to the same effect, practically uncontroverted, is sufficient to warrant a conclusion that the applicant was at least partially incapacitated from earning a living. *Acrey v. City of Holtville*, 2 Cal. I. A. C. Dec. 587.

In *Peters v. Indianapolis Abattoir Co.*, 1 Conn. Comp. Dec. 263, where the

for total disability to terminate at a certain date did not preclude the employé from securing payment for partial disability, where it appeared that it was intended that the question of payment for partial disability should be left open for future determination.²⁷

§ 160. Computation in case of previously impaired physical condition

In some states, where an injury to an employé results in total disability because his physical condition was previously impaired,

claimant had recovered from his injuries, all but a tenderness on the left side and atrophy of the muscles, but suffered from backache resulting from over-use and strain upon the muscles of the back, consequent upon his injury, he was awarded compensation for partial incapacity. In *Jacobs v. American Steel & Wire Co.*, 1 Conn. Comp. Dec. 100, where the claimant, after several weeks of total incapacity from being struck in the eye with a wire, returned to work, but was unable to work full time because he was still undergoing medical treatment, which caused continual pain and annoyance, he was awarded one-half the difference between his wages before and after the injury, on the basis of partial incapacity. In *Cottun v. I. Newman & Sons*, 1 Conn. Comp. Dec. 289, the commissioner found, on medical evidence conflicting as to whether there was mere flabbiness of the injured muscle at the time of hearing, or an injury to the structure, that there was partial disability, but refused to find that condition permanent, and recommended that the employer offer work under favorable conditions, so as to ascertain definitely the extent and probable duration of such incapacity, the award for five weeks additional to be modified if it later appeared necessary.

The employé, who had previously been awarded indemnity for total incapacity, had obtained a position at which he was able to earn an average weekly wage of \$1.50. He had made several efforts to obtain other employment, but without success. The medical testimony showed that his partial incapacity for work was due to a condition of hysterical blindness and neurosis, having a casual relation with the personal injury received. His average weekly wages at the time of the injury were \$30. It was held that the employé is entitled to compensation on account of partial incapacity. *Hunnewell v. Casualty Co. of America*, 2 Mass. Wk. Comp. Cases, 827 (decision of Indus. Acc. Bd., affirmed by Sup. Jud. Ct., 220 Mass. 351, 107 N. E. 934).

It was error to classify the "consolidation" of two inches of the workman's lung as temporary, after it had healed as much as it would ever heal, and thereby extend the allowance for temporary disability. (P. L. 1913, p. 302,

²⁷ In re Hunnewell, 220 Mass. 351, 107 N. E. 934.

as where a one-eyed man is made totally blind by the loss of the other eye, or a man having only one hand loses it, the award is made for total disability.²⁸ In other states, a different rule prevails,²⁹ and, in case of loss of sight, compensation is allowed only

amending Wk. Comp. Act of 1911) *Birmingham v. Lehigh & Wilkesbarre Coal Co.* (N. J. Sup.) 95 Atl. 242, distinguishing *Nitram Co. v. Creagh*, 84 N. J. Law, 243, 86 Atl. 435, in which the temporary award ran while the hand was in process of healing.

²⁸ "The employé, when he entered the service of the subscriber, had that degree of capacity which enabled him to do the work for which he was hired. That was his capacity. It was an impaired capacity as compared with the normal capacity of a healthy man in the possession of all his faculties. But nevertheless it was the employé's capacity. It enabled him to earn the wages which he received. He became an 'employé' under the Act, and thereby entitled to all the benefits conferred upon those coming within that description. The Act affords a fixed compensation for a limited time while the incapacity for work resulting from the injury is total. It establishes no other standard. It fixes no method for dividing the effect of the injury, and attributing a part of it to the employment and another part to some pre-existing condition, and it gives no indication that the Legislature intended any such division. The total capacity of this employé was not so great as it would have been if he had had two sound eyes. His total capacity was thus only a part of that of a normal man. But that capacity, which was all he had, has been transformed into a total incapacity by reason of the injury. That result has come to him entirely through the injury." *In re Brannconner*, *In re Travelers' Insur. Co.*, 223 Mass. 273, 111 N. E. 792.

Where a workman, having only one hand, lost it as the result of an accident in his employment, he was entitled to compensation for total disability. (Wk. Comp. Law, § 15, subd. 1) *Schwab v. Emporium Forestry Co.*, 167 App. Div. 614, 153 N. Y. Supp. 234.

A pile driver lost the vision of his left eye by accident. The vision in the right eye had been destroyed previously by a cataract, and he was totally incapacitated for work because of the injury. The Committee of Arbitration awarded compensation on account of total disability. *Morrison v. Fidelity & Casualty Co.*, 2 Mass. Wk. Comp. Cases, 594 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

²⁹ The liability of the employer is ordinarily limited to compensation commensurate with the injury suffered by the employé while in his service, and he is relieved from the consequences of an injury previously sustained, even though both resulted in permanent total disability. The employer accepts in his service a disabled employé, knowing of the disability and with knowledge

for the loss or disability which resulted from the injury suffered in the employment.³⁰

that under the Compensation Act he is liable for accidental injuries to such employé while engaged in his service; but to couple the prior disability with one suffered while in his service, and make the employer liable for both, would seem a hardship the Legislature intended to avoid. *State ex rel. Garwin v. District Court*, 129 Minn. 156, 151 N. W. 910.

³⁰ Where a workman, who had previously lost one eye, lost the other in an accident arising out of and in the course of his employment, the injury could not be considered a total disability. *Weaver v. Maxwell Motor Co.*, 186 Mich. 588, 152 N. W. 993, L. R. A. 1916B, 1276.

Prior to the time relator entered respondent's service he had lost the sight of one eye by accidental means. After entering respondent's service he lost, by accident happening during the course of his employment, the sight of his other eye, thus rendering him totally blind. It was held, under section 15 of the Compensation Act, that the last employer was liable for a permanent partial disability only, for that was the extent of the injury which the employé suffered while in his service. *State v. District Court*, *supra*. Section 15, Wk. Comp. Act, limits the liability of an employer for accidental injury to an employé, where such employé had before entering the service suffered an injury which resulted in permanent partial disability, to the compensation provided for by section 13 for a permanent partial disability, though both injuries together result in permanent total disability. (Gen. St. 1913, c. 84a, §§ 8195-8230). *Id.*

Where an employé sustained a serious injury to one eye in 1911, which would eventually result in total blindness of that eye, and in 1914 sustained the immediate destruction of the sight of the other eye by accident occurring in the course of his employment with the defendant, the percentage of permanent disability for which the employer is liable in compensation is to be determined solely with reference to the physical injuries caused by the second accident, and not with reference to the condition of the applicant ensuing after the second accident, as influenced by the first. The employer is therefore liable to pay compensation for the loss of one eye, and not for total blindness. *Rouner v. Columbia Steel Co.*, 2 Cal. I. A. C. Dec. 207. Where disability is prolonged by reason of the injured workingman's having suffered, prior to the happening of the accident in question, from varicose ulcers, so as to have practically no skin left, but only scar tissue upon the exposed parts, and this feature greatly prolongs disability from a new ulcer caused by an accidental bruise, the disability payments will be limited to such time as, in the judgment of the competent medical advisers, the disability would have terminated in any ordinary case of varicose ulcer. *Fischer v. Union Ice Co.*, 2 Cal. I. A. C. Dec. 72. Where the applicant

Under the Connecticut Act, where one eye is destroyed and the other injured, and total incapacity for work results from the injured eye because of the blindness of the other, though it would not have caused incapacity had that eye been normal, compensation is payable for loss of the eye under the schedule, and for total incapacity during its existence.³¹ Where the claimant had no useful vision in her eye because of a prior injury, though she was able to distinguish light from dark, she could not recover for loss of sight on account of an accident which necessitated the removal of the eye; but where the removal of such eye was made desirable by pain and soreness consequent upon sticking a spindle into it while stooping to pick up a bobbin which had fallen on the floor, compensation was allowed for disability due to its removal.³²

§ 161. Hernia—California

A hernia, though usually remediable by operation, and therefore a temporary disability, constitutes a permanent disability where it is not operated upon and no operation is tendered by the employer. An employé receiving a hernia is under no obligation to sustain an operation at his own expense, as his earnings should be devoted primarily to the support of his family, and he cannot reasonably be required to deprive them of such support to undergo

was injured by a fall, causing a severe sprain of the left ankle, and recovery therefrom was prolonged by reason of a condition of general arterial disease, and at the date of the hearing the applicant's disability was about equally divided between his general condition and the result of the accident, he was held entitled to compensation during the entire continuance of disability resulting from the accident. *Dabila v. Brandon & Lawson*, 1 Cal. I. A. C. Dec. 239. But where an employé bruises his leg, this bruise subsequently breaking down into an ulcer, and the duration of this ulcer is greatly prolonged by a condition of varicose veins, but it is shown that the varicose condition did not in any way contribute to the formation of the ulcer, compensation will be allowed for the full period of disability. *Hoffman v. Korn*, 2 Cal. I. A. C. Dec. 166.

³¹ *Swanson v. Sargent & Co.*, 1 Conn. Comp. Dec. 433.

³² In *Nichols v. Max Pollock Co.*, 1 Conn. Comp. Dec. 74.

an operation.³³ Unless an employer has knowledge prior to the accident of a hernia then existing, disability awards for hernia, claimed to result from the accident, will be made only when the traumatic origin of the hernia is clearly established, and any award will be limited to cover the cost of operation to cure the hernia and for disability consequent upon such operation, except for such disability as may have existed prior to the offer on the part of the employer or insurance carrier to provide for such operation.³⁴ Where an employé is operated upon for hernia, and within a few days after leaving the hospital returns, suffering from typhoid fever, such typhoid fever will not be presumed to have been caused by the hernia or operation, and compensation will be allowed only for the normal period of disability which would result from the operation if no disease had intervened.³⁵

§ 162. Scheduled injuries

Where compensation under the schedule is in addition to other compensation, it is often called "additional compensation."³⁶ The

³³ *Taylor v. Spreckels*, 2 Cal. I. A. C. Dec. 62. A hernia may be treated as a permanent disability unless operated upon, and compensation may be awarded upon the basis of such permanent disability, unless an operation be tendered for its cure at the expense of the employer, even though 90 days may have elapsed from the date of the accident. *Id.*

Hernia cannot usually be regarded as a permanent disability, as it is remediable by operation. *Brandt v. Globe Indemnity Co.*, 1 Cal. I. A. C. Dec. 309. Hernia is a temporary disability, because it is remediable, and the risk of the operation is inconsiderable, in view of the seriousness of the injury if not remedied, under section 16, subd. (e), of the California Act. An employé suffering from hernia must therefore submit to an operation, if offered, or forfeit part or all of the compensation due him. *McNamara v. United States Fidelity & Guaranty Co.*, 1 Cal. I. A. C. Dec. 138.

³⁴ *Mifsud v. Palace Hotel Co.*, 1 Cal. I. A. C. Dec. 37.

³⁵ *Viglione v. Montgomery Garage Co.*, 2 Cal. I. A. C. Dec. 87.

³⁶ The injured employé, who had suffered the loss of any member, was entitled to specific award, as stated in section 25 of the Nevada Industrial Insurance Act, and in addition to said award was also entitled to an award

particular injuries set out are merely examples to aid in administering the Act. The enumeration does not profess to be exclusive.³⁷ The usual theory of the Compensation Acts is to make provision in the schedule for certain specific injuries, and to leave all other injuries to be compensated for under general provisions.³⁸ An award within the statutory limit cannot be held arbitrary.³⁹ Under a provision that the schedule shall also apply "in case the injury is such that" the member "is permanently incapable of use," the words "incapable of use" should receive a construction which, while fairly within their interpretation, is not narrow and technical, nor, on the

of 50 per cent. of the average monthly wage for such time as he was totally disabled. Rep. Nev. Indus. Com. 1913-14, p. 24.

The fact that a workman, after suffering the loss of one or more fingers, is able to earn the same wage as before, does not affect his right to the specific indemnity provided in section 10, part II, of the Law; such indemnity being given because the workman must go through the remainder of his life without the use of the members so lost. *Lardie v. Grand Rapids Showcase Co.*, Mich. Wk. Comp. Cases (1916) 17.

³⁷ *Wagner v. American Bridge Co.* (Sup.) 158 N. Y. Supp. 1043.

³⁸ "The whole schedule is so specific that it is difficult to see how the Legislature could have intended that an injury to an arm impairing its usefulness 50 per cent. or any degree, would come within the schedule. It seems from the whole Act that the purpose of the Legislature was to confine the fixed compensation named in the schedule in subdivision 5 to the specific injuries named therein." *Northwestern Fuel Co. v. Leipus*, 161 Wis. 450, 152 N. W. 856.

It was held in *Wallace v. Tracy Bros. Co.*, 1 Conn. Comp. Dec. 155, that the Connecticut Act provides compensation under the schedule in lieu of all other compensation for the injuries included therein, and that compensation may be awarded in addition to compensation under the schedule, for injuries to other fingers which do not come under the schedule. In *Batch v. Borough of Groton*, 1 Conn. Comp. Dec. 177, where claimant's finger was crushed in a pump, and infection set in and spread, causing the total loss of the use of the hand and septic phlebitis in the right leg, compensation was awarded under the schedule for loss of the use of the hand, and separate disability indemnity for incapacity due to the condition of the leg.

³⁹ An award of \$1,200 to a servant for loss of several fingers could not be set aside as arbitrary, where this was less than the maximum amount authorized by statute. *Sinnes v. Daggett*, 80 Wash. 673, 142 Pac. 5.

other hand, so free and liberal as to give a right which the words themselves do not fairly import.⁴⁰ The complete loss of the functions of a thumb, finger, toe, hand, arm, foot, leg, or eye should be considered as the total loss of such member;⁴¹ but the loss of the merest shaving of bone from the tip of the first phalange is not equivalent to the loss of the phalange.⁴² When the accident sets in motion agencies which ultimately destroy the sight of the eye, no right to compensation accrues, and no compensable injury exists, until the point of time is reached where the eye is a total loss.⁴³ "All other cases in this class," in the provision of the Wisconsin Act that in such cases "the compensation shall bear such relation to the amount stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule," obviously has reference to the injuries mentioned specifically in the schedule, and was not intended to include impairment occasioned by a different injury than that named in the schedule.⁴⁴ Where the injury consisted of a fracture of the skull, paralysis of the right side of the mouth, and injuries to the nostril, eye, and ear, together with impairment of the use of the right arm, an award of 340 weeks' pay was unauthorized under the New Jersey Act, when there was no evidence that the injuries stood to the disability in the proportion of 340 to 400, but, on the contrary, the evidence showed that

⁴⁰ (St. 1911, c. 751, pt. 2, § 11, amended by St. 1914, c. 708) *Floccher v. Fidelity & Deposit Co. of Md.*, 221 Mass. 54, 108 N. E. 1032.

⁴¹ Rep. Nev. Indus. Com., 1913-14, p. 21.

The loss of the use of a member is sufficient to entitle the injured party to compensation as provided in the schedule, whether the member is completely severed or not; the action of the surgeon in amputating the finger, or failing to amputate it, not being controlling (section 10, part II, Workmen's Compensation Act). *Lardie v. Grand Rapids Showcase Co.*, Mich. Wk. Comp. Cases (1916) 17.

⁴² (Wk. Comp. Act, § 15, subd. 3) *Mockler v. Hawkes*, 158 N. Y. Supp. 759.

⁴³ *Kalucki v. American Car & Foundry Co.*, Mich. Wk. Comp. Cases (1916) 390.

⁴⁴ *Northwestern Fuel Co. v. Lelpus*, 161 Wis. 450, 152 N. W. 856.

the proportion of the extent of the disability was much less. None of these injuries are specially provided for, and allowance therefor must be under the provision that the compensation shall bear such relation to the amounts stated in the schedule as the disabilities bear to those produced by the injuries named in the schedule.⁴⁵ Awards under the schedule of the Washington Act are dependent upon surgical discharge and proofs when the extent of the injury is to be determined.⁴⁶

There is nothing in the New York Act to justify concurrent compensation for temporary total disability and under the schedule for total disability, and such a construction is contrary to the intention of the Legislature.⁴⁷

§ 163. — Eye

An award for permanent impairment of vision is unauthorized, where the injury does not destroy the workman's eye or vision, or prevent him from returning to work and earning the same wages as before the injury, though his eye be permanently injured.⁴⁸ The loss being only partial, he is entitled to compensation measured only by his lessened wages.⁴⁹ Where a workman, after injury to

⁴⁵ *O'Connell v. Simms Magneto Co.*, 85 N. J. Law, 64, 89 Atl. 922. An award made under section 2 of the New Jersey Act must be according to paragraph 11, containing the schedule of amounts, and is limited by that paragraph. (*P. L.* 1911, p. 136, § 2, par. 11) *Bateman Mfg. Co. v. Smith*, 85 N. J. Law, 409, 89 Atl. 979.

⁴⁶ (*Wk. Comp. Act Wash.* § 5) *Rulings Wash. Indus. Ins. Com.* 1915, p. 17.

⁴⁷ *Fredenburg v. Empire United Rys., Inc.*, 168 App. Div. 618, 154 N. Y. Supp. 351.

⁴⁸ *Hirschkorn v. Fiege Desk Co.*, 184 Mich. 239, 150 N. W. 851.

⁴⁹ *Cline v. Studebaker Corporation (Mich.)* 155 N. W. 519, L. R. A. 1916C, 1139.

Where, as a result of an injury, an employé lost 50 per cent. of the vision in one eye, and his earning capacity was thereby impaired, he was entitled to one-fourth of his average weekly wages, the same being based upon one-fourth loss of vision, and the injury as a matter of law having affected his

his eye, has 10 per cent. of the normal vision without glasses and 50 per cent. with glasses, he is not entitled to compensation for total loss of the eye, on the ground that his eyesight has been diminished 90 per cent., since it is his duty to minimize the injury by using glasses.⁵⁰ But where the injury will permanently destroy the sight of an eye unless the workman submits to an operation, full compensation should be awarded for loss of an eye, not merely for temporary disability; the proper course being to deal with the case as it stands at the time—that is, as a case of permanent disability—and allow compensation for 100 weeks. If the workman chooses later to submit to an operation and is cured, the extent of the intervening temporary disability will be known, and the weekly compensation can be terminated on application to the court for a modification of the order, as the statute authorizes. If the operation proves a failure, the award for permanent disability will stand.⁵¹ Loss of the sight of an eye is considered total where the sight remaining in the eye is of no practical value,⁵² and an operation would not only be very dangerous, but could result in a benefit of no value, unless there be a total loss of the sight of the other eye.⁵³ Where the evidence showed that it was probable that there

earning capacity to that extent. *Csuprinski v. Mechanical Mfg. Co.*, Bulletin No. 1, Ill., p. 105.

⁵⁰ *Id.*

⁵¹ *Fryer v. Mt. Holly Water Co.*, 87 N. J. Law, 57, 93 Atl. 679.

⁵² In *Cowles v. Wilkenda Land Co.*, 1 Conn. Comp. Dec. 361, where it appeared that the claimant had sustained an injury to his eye which made it impossible for him to distinguish even the largest objects until they were too close to avoid them, in case of an automobile or car, and that the eye was of no practical use and a detriment to the vision in the other eye, it was held he had suffered a complete and permanent loss of the sight of the eye within section 12 of the Act.

⁵³ In *Lewis v. Goodyear India Rubber Glove Mfg. Co.*, 1 Conn. Comp. Dec. 238, where the claimant had no present sight in his right eye, and an operation to restore the sight would be inadvisable, very dangerous, and probably fatal, and the benefit accomplished only of value in case of total loss of sight of the other eye, it was held the employé had suffered a "complete and

was potential, or possible, vision in the right eye prior to the occurrence of the injury, that the restoration of vision following an operation would be useful only in the event of a great or total loss of vision in the uninjured left eye, that the injury destroyed any possibility of ever restoring sight to the right eye, and that, prior to the injury, the employé had less than one-tenth vision in the right eye, he was not entitled to a specific "additional" compensation provided for in case of reduction of vision to one-tenth of normal with glasses.⁵⁴ A schedule giving compensation for total blindness of one eye authorizes compensation under a relative injury provision for partial blindness of one eye, the physical organ being retained.⁵⁵

§ 164. — Arm

The provision of an Act that paralysis of a member shall be equivalent to a "loss" of the member does not authorize classifying

permanent loss of the sight of the eye," compensable under the schedule (Wk. Comp. Act, pt. B, § 12, subd. [g]).

⁵⁴ *Eldredge v. Employers' Liab. Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 639 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

⁵⁵ (St. 1913, § 2394—9, subd. 5; Laws 1915, c. 378) *Stoughton Wagon Co. v. Myre* (Wis.) 157 N. W. 522.

"It was held in *Northwestern Fuel Co. v. Leips*, supra, that a partial and permanent impairment of the strength and usefulness of an arm was not within the class of injuries scheduled in subdivision 5 of section 2394—9, St. 1913, because that schedule referred to the physical loss of an arm, and mere impairment without loss of the member could not be held to be in that class. The case before us, however, is plainly not within that reasoning. The schedule gives a certain compensation for total blindness of one eye, the physical organ itself being retained, and in the present case there is partial blindness of the eye, the physical organ being retained. The court is of opinion that this injury is logically within the statutory class, and hence that compensation under the relative injury provision of the statute was properly awarded. The relative injury clause in question has been amended by chapter 378, Laws of 1915, so that there is now no doubt of the legislative purpose to make it applicable to all cases of permanent disability resulting from injuries to those members of the body or its faculties named in the schedule, although the member be not severed or the faculty totally lost." *Id.*

a mere impairment of an arm as a loss thereof.⁵⁶ An award, for a partial injury to the motion of the arm, of the same compensation as the statute fixes for the loss of the arm, is not in compliance with a statutory mandate that the compensation shall bear such relation to the amounts stated in the schedule as the disabilities bear to those produced by the injuries named in the schedule.⁵⁷

§ 165. — Hand, fingers, foot, and ankle

No award can be made for partial loss of a hand under a schedule providing compensation only for a total loss.⁵⁸ A hand is incapable of use when its normal use has been entirely taken away; it not being essential that the incapacity of use be tantamount to an actual severance of the hand.⁵⁹ For example, where the workman's middle, ring, and little fingers are paralyzed, and there is such an interference with the circulation that the hand goes to sleep, the hand is "incapable of use," though there is a small amount of mo-

⁵⁶ *Northwestern Fuel Co. v. Leipus*, 161 Wis. 450, 152 N. W. 856. Obviously the "loss" of a member designated in the schedule has reference, not to the impairment of the member by injury, but to the physical loss of it. All through the schedule there is nothing to indicate that impairment of a member was intended to be loss of a member, or that reduction of the efficiency of the member one-half would be one-half loss of the member. "The loss of an arm at the elbow," or "the loss of a forearm at the lower half thereof," does not mean the impairment of the arm, but the actual physical severance of it. The fact that the schedule so specifically fixes the precise injury for which compensation is allowed excludes the idea that the schedule covers any other or different injury. In every instance the loss is specifically defined. *Id.*

⁵⁷ (P. L. 1913, pp. 302, 304) *Barbour Flax Spinning Co. v. Hagarty*, 85 N. J. Law, 407, 89 Atl. 919, distinguishing *Banister Co. v. Kriger*, 84 N. J. Law, 30, 85 Atl. 1027, which arose under the earlier statute, wherein the period of time during which compensation should be paid was fixed, whereas, under the amendment of 1913, which now controls, the period is not fixed.

⁵⁸ (Wk. Comp. Act pt. 2, § 10) *Carpenter v. Detroit Forging Co.* (Mich.) 157 N. W. 374.

⁵⁹ (St. 1911, c. 751) *In re Meley*, 219 Mass. 136, 106 N. E. 559.

tion in the thumb and first finger.⁶⁰ Injuries between the elbow and the wrist should be considered injuries to the hand.⁶¹ Where the injury results in complete loss of the index, second, and third fingers, and makes the fourth finger stiff and practically useless, the workman is usually entitled to compensation as for a hand rendered permanently useless, rather than for loss of the particular fingers;⁶² but it has been held that where a workman lost the use of four fingers, apparently retaining the use of the rest of his hand, it was not clear that the claimant should be allowed for the loss of the use of the entire hand, the court saying: "It is now claimed that claimant did not lose the use of the hand, but only of the four fingers, and that the usefulness of the remainder of the hand, including the thumb, was practically unimpaired. These seem to be the conceded facts. I am not clear that upon these conceded facts the claimant should have been allowed for the loss of the use of the entire hand. While the four fingers were stiffened, the thumb was uninjured, and the claimant is unquestionably better off than

⁶⁰ *Floccher v. Fidelity & Deposit Co. of Md.*, 221 Mass. 54, 108 N. E. 1032.

⁶¹ *Rockwell v. Lewis*, 168 App. Div. 674, 154 N. Y. Supp. 893; *State ex rel. Kennedy v. District Court*, 129 Minn. 91, 151 N. W. 530, which cites (*N. J. Sup.*) 88 Atl. 953.

In a hearing under the Wk. Comp. Act to ascertain the compensation to be awarded an injured employé, where there are permanent injuries to the hand and arm below the elbow, the court should determine the percentage of total disability of the hand and fix the compensation accordingly. Where the same accident results also in permanent partial disability to the arm above the elbow, the court should determine the total disability of the arm as a whole, including the forearm and hand, and fix the compensation accordingly. It is improper in such a case to divide the injuries into two units, those to the hand and those to the arm. (*Laws 1913, c. 467; Gen. St. 1913, c. 84a*) *State ex rel. Kennedy v. District Court*, *supra*.

A workman's forearm and hand were impaired by an accident to the extent of 75 per cent., and his upper arm to the extent of 8 per cent. The amount awarded was 75 per cent. of what the statute fixes for an arm. It was held that this award was not necessarily incongruous with the statutory provision making amputation between the elbow and the wrist equivalent to the loss of a hand only. *Blackford v. Green*, 87 N. J. Law, 359, 94 Atl. 401.

⁶² *Rockwell v. Lewis*, 168 App. Div. 674, 154 N. Y. Supp. 893.

if the hand had been taken off or rendered entirely useless. In my judgment, it is unnecessary to determine this, because the award was made by consent of the attorney representing the appellants, and, while the appellants afterward claimed that he exceeded his authority, we are unwilling to interfere with the determination of the Commission that the award should stand.”⁶³ Similar holdings have been made in other cases,⁶⁴ but the rule is to the contrary in Illinois.⁶⁵ Where the accident necessitating amputation of the first phalange of the third finger is followed by cellulitis of the joints, which makes the remainder of the finger practically useless, the injury is equivalent to the loss of the finger, and claimant cannot recover more than the specific amount provided for such loss by contending that he has not lost the finger, and so bringing the injury under the relative injury clause.⁶⁶ In awarding compensation the hands may be considered separately, and, after compensation has

⁶³ *Cunningham v. Buffalo C. & B. Rolling Mills* (Sup.) 155 N. Y. Supp. 797.

⁶⁴ In *De Vito v. Atlantic Insulated Wire & Cable Co.*, 1 Conn. Comp. Dec. 407, where the claimant's injury necessitated the amputation of the four fingers of the right hand, but left the functions of the thumb unimpaired, it was held he had not suffered “a complete and permanent loss of the use of the hand,” entitling him to an award under the schedule, though he was awarded for the loss of four fingers. And in *Kilbride v. Pratt & Whitney Co.*, 1 Conn. Comp. Dec. 688, where the evidence showed that there was a large scar and deformity on the back of the workman's hand, and that he could not hold things with the hand, and the medical evidence estimated a 45 per cent. impairment of the hand, it was held the total and permanent loss of the use of the hand had not been shown.

Under a schedule allowing 60 weeks' compensation for the loss of all the fingers of one hand, where there was, according to medical evidence, apt to be a little use of the first finger and slight movement of the proximal joints, after a careful operation, compensation was awarded for 50 weeks. *Higgins v. Hanover & Butler*, Rep. Wis. Indus. Com. 1914-15, p. 37.

⁶⁵ The loss of the first, second, third, and fourth fingers of a right hand, with palm and thumb remaining intact, constitutes a permanent and complete loss of the hand, under paragraph (e), section 8. *Swickard v. Arrow Motor Cartage Co.*, Bulletin No. 1, Ill., p. 172.

⁶⁶ (Consol. Laws, c. 67, § 15, subd. 3) *Feinman v. Albert Mfg. Co.*, 170 App. Div. 147, 155 N. Y. Supp. 909.

been allowed for injuries rendering one hand incapable of use, additional compensation can be given for incapacity to use a finger of the other hand.⁶⁷

Where an employé suffers the loss of two joints of his index finger and an injury to his thumb, in an accident in his employment, he is entitled to compensation under the Illinois Act, both for the 15 weeks of incapacity due to the accident and also compensation for the permanent disfigurement of his hand.⁶⁸

Where a thumb is so injured that a piece of tendon and flesh are destroyed, compensation is properly awarded for loss by severance of one phalange of the thumb, rather than for loss of the thumb.⁶⁹ Where an arm is broken and an abscess develops, resulting in ankylosis of the thumb, making it permanently useless, compensation is recoverable for partial injury to the thumb.⁷⁰ Under the Nevada Act, the loss of the distal or second phalange of the thumb, or the distal or third phalange of the first, second, third, or fourth finger, is considered a permanent partial disability and equal to the loss of one-half of such thumb or finger; and compensation is one-half of the amount specified for the loss of the entire thumb, or first, second, third, or fourth finger.⁷¹

Where a portion of the second phalange of the workman's index finger is amputated, compensation should be awarded on the basis of total loss of the finger.⁷² An award of one-half the amount specified for loss of a finger is also proper, where the injury necessitates

⁶⁷ *In re Meley*, 219 Mass. 136, 106 N. E. 559.

⁶⁸ (Act of 1912, Jones & A. Ann. St. 1913, par. 5453, § 5, subds. "a," "b," and "c") *Watters v. Kroehler Mfg. Co.*, 187 Ill. App. 548.

⁶⁹ *Weber v. American Silk Spinning Co. (R. I.)* 95 Atl. 603.

⁷⁰ *Newcomb v. Albertson*, 85 N. J. Law, 435, 89 Atl. 928.

⁷¹ *Rep. Nev. Indus. Com.* 1913-14, p. 24.

⁷² *Fortino v. Merchants' Dispatch Transportation Co. (Sup.)* 156 N. Y. Supp. 262.

In Illinois, the loss of more than one phalange of a finger or toe is equivalent to the loss of the entire member. *McClennan v. Allith Prouty Co.*, Bulletin No. 1, Ill., p. 116.

amputation of the third finger of the right hand, so that substantially all the outer phalange is cut off.⁷³ But the mere pinching of a finger, which does not result in permanent injury, is not to be considered as loss of one-half of a finger.⁷⁴ Distinct allowances may be made for injury to different fingers,⁷⁵ and compensation may be allowed for temporary injury to one finger and permanent injury to another.⁷⁶ Separate awards under the schedule for the loss of a thumb and a finger run consecutively, and not concurrently.⁷⁷ And where there is incapacity due to the laceration of a finger, as well as the loss of one phalange of the third finger and the entire fourth finger, compensation will be awarded separately for each injury, the payments to run consecutively.⁷⁸

⁷³ *In re Petrie*, 215 N. Y. 335, 109 N. E. 549.

Amputation of about one-third of the bone of the distal phalange, materially interfering with the use of the finger, authorizes an award of one-half the amount allowable for loss of a finger. (Laws 1914, c. 41, § 15, subd. 3) *In re Petrie*, 165 App. Div. 561, 151 N. Y. Supp. 307.

⁷⁴ (Laws 1914, c. 41, § 15, subd. 3) *In re Petrie*, *supra*.

⁷⁵ *Maziarski v. Ohl & Co.*, 86 N. J. Law, 692, 93 Atl. 111. That distinct damage may be allowed for injury to each finger is sufficiently indicated by the provision of the statute that the amount received for more than one finger shall not exceed the amount provided in the schedule for the loss of a hand. *Id.* Where several fingers are partly injured by the same accident, the total award is properly composed of separate awards for the injury to each finger, as fixed by the statute, not to exceed, however, the amount provided for loss of a hand. The weekly payments in such case do not run concurrently. *George W. Helme Co. v. Middlesex Common Pleas*, 84 N. J. Law, 531, 87 Atl. 72.

⁷⁶ *Maziarski v. Ohl & Co.*, 86 N. J. Law, 692, 93 Atl. 111.

Where a workman got his fingers smashed, and some of them amputated, and a temporary disability resulted, partly due to an infection preventing his going to work, damages were properly allowed both under clause "a" and clause "c," even though the damages would exceed the maximum recoverable under clause "b." (P. L. 1911, p. 137, § 2, par. 11) *Nitram Co. v. Creagh*, 84 N. J. Law, 243, 86 Atl. 435.

⁷⁷ *Fredenburg v. Empire United Rys., Inc.*, 168 App. Div. 618, 154 N. Y. Supp. 351.

⁷⁸ *Drapeau v. Stoddard*, 1 Conn. Comp. Dec. 590.

In Pascale v. S. L. & G. H. Rogers Co., 1 Conn. Comp. Dec. 33, compensation

The clause of the New Jersey Act providing for a minimum compensation of \$5 applies where the injury is to the index finger and the middle finger of the left hand; that to the index finger being temporary and that to the other finger being equal to the loss of one-half the phalange of that finger.⁷⁹ Where an employé earning \$8.50 per week loses the first phalange of the index finger, he is entitled to \$5 per week for thirty-five weeks, besides the cost of reasonable medical and hospital services and medicines for two weeks.⁸⁰

Compensation for permanency of the injury cannot be allowed under the Massachusetts Act, in addition to an allowance for incapacity for work, where one-half inch of the first phalange of the left index finger was severed, rendering the phalange permanently incapable of use, but not resulting in permanent incapacity for use of the entire finger.⁸¹ But where the employé received a personal injury causing the right hand and the little finger of the left hand to be permanently incapacitated for use, he is entitled to "additional" compensation for fifty weeks for the permanent incapacity of the hand, and twelve weeks for the permanent incapacity of the finger.⁸²

The loss of a part of the bone of any phalange constitutes the loss of that phalange for the purpose of the Illinois Act.⁸³

was awarded separately for injuries causing the amputation of parts of two different fingers, 35 weeks for one and 7 for the other.

⁷⁹ *Maziarski v. Ohl & Co.*, 86 N. J. Law, 692, 93 Atl. 110; *Banister Co. v. Kriger*, 84 N. J. Law, 30, 85 Atl. 1027. In *Nitram Co. v. Court of Common Pleas*, 84 N. J. Law, 243, 86 Atl. 435, an allowance for both temporary injury and permanent injury was sustained.

⁸⁰ (P. L. 1911, p. 134, § 2, par. 14) *James A. Banister Co. v. Kriger*, 84 N. J. Law, 30, 85 Atl. 1027 (rehearing denied 89 Atl. 923).

⁸¹ (St. 1911, c. 751, pt. 2, § 11, amended by St. 1913, c. 696) *In re Contractors' Mut. Liab. Insur. Co.*, 217 Mass. 511, 105 N. E. 376.

⁸² *Meley v. Mass. Employés' Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 404 (decision of Com. of Arb., affirmed by Indus. Acc. Bd., also by Sup. Jud. Ct., 219 Mass. 136, 106 N. E. 559).

⁸³ *Palmer v. Scheidenhelm*, Bulletin No. 1, Ill., p. 135.

The fact that the workman is totally disabled by reason of injuries to two fingers for 2½ months, and that the injury resulted in a partial loss of the use of his fingers, which condition is permanent, is such as to make a compensation award of 50 per cent. of his average weekly wage, for a period of 43 weeks, a reasonable award under the Michigan Act.⁸⁴

An allowance of more for an injury to an ankle than the stipulated compensation for the loss of a foot is authorized. Whether the allowance should equal such stipulated compensation is a question to be determined at the trial.⁸⁵ Where it appears that, though the claimant's foot was not actually cut off, it is wholly useless and gives no better results than an artificial foot, besides being painful to use, compensation will be awarded for the complete and permanent loss of the use of the foot.⁸⁶

§ 166. Disfigurement

In order to entitle one to compensation for disfigurement, the disfigurement must usually be of such a serious and permanent character as to either directly or indirectly impair his earning capacity or ability to secure work in the labor markets of the world.⁸⁷

The highest court of England has decided that an injury or dis-

⁸⁴ *Ridler v. Little Co.*, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 27.

⁸⁵ (P. L. 1911, p. 134, § 2, par. 11) *Rakiec v. Delaware, L. & W. R. Co.* (N. J. Sup.) 88 Atl. 953.

⁸⁶ *Mahoney v. Seymour Mfg. Co.*, 1 Conn. Comp. Dec. 292.

⁸⁷ *Billman v. Two Rivers Coal Co.*, Bulletin No. 1, Ill., p. 69. Disfigurement, to entitle applicant to compensation, must in reality disfigure to the extent that it will interfere with his obtaining employment. *Harpestad v. Alexander*, Bulletin No. 1, Ill., p. 14.

A scar on side of head about three-quarters of an inch wide is such disfigurement as to affect the workman's earning capacity, as it makes him less aggressive and more timid. *Id.* But the loss of a tooth that has been replaced by a gold crown does not constitute a disfigurement of the face, under paragraph (c), § 8, of the Workmen's Compensation Act. *Niemark v. West Coast Roofing Co.*, Bulletin No. 1, Ill., p. 56.

figurement which destroys or impairs the injured workman's capacity to get work is an element to be taken into consideration in the assessment of compensation.⁸⁸ Under the Illinois Act, where a workman loses the tips of two fingers of his right hand, impairing the sense of feeling in these fingers, and incapacitating him permanently from doing the kind of work in which he was engaged at the time of the accident, he is entitled to compensation for disfigurement of his hand.⁸⁹ And where an employé suffers the loss of two joints of his index finger and an injury to his thumb, in an accident in his employment, he is entitled to compensation for the permanent disfigurement of his hand.⁹⁰ Under the New York Act, where an employé's ear is bitten by a horse and amputation necessitated, leaving a disfigurement, but not impairing the employé's efficiency, the injury does not come in the class of scheduled disabilities.⁹¹ It is otherwise, however, where total deafness results and impairs the employé's industrial efficiency.⁹²

⁸⁸ *Ball v. Hunt*, 81 L. J. K. B. 782, 787.

⁸⁹ (Wk. Comp. Act 1911, Jones & A. Ann. St. 1913, par. 5453, § 5) *Stevenson v. Illinois Watch Case Co.*, 186 Ill. App. 418.

⁹⁰ (Act of 1912, Jones & A. Ann. St. 1913, par. 5453, § 5, subsecs. a, b, and c) *Watters v. Kroehler Mfg. Co.*, 187 Ill. App. 548.

⁹¹ *Shinnick v. Clover Farms Co.*, 169 App. Div. 236, 154 N. Y. Supp. 423.

⁹² *Wagner v. American Bridge Co. (Sup.)* 158 N. Y. Supp. 1043.

ARTICLE III

DEATH BENEFITS

Section

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|------|------------------------------------|
| 167. | Computation and amount of benefit. |
| 168. | California. |
| 169. | Minnesota. |
| 170. | New Jersey. |
| 171. | New York. |
| 172. | Washington. |
| 173. | Wisconsin. |
| 174. | Federal Act. |

§ 167. Computation and amount of benefit

Under the English Act, and state Acts similar to it in this respect, the compensation payable to dependents is an amount reasonable and proportionate to their injury.⁹³ The English Workmen's Compensation Act provides that in cases of partial dependency the amount recoverable shall be reasonable "and proportionate to the injury to the said dependents." This language required that the English courts in cases of partial dependency inquire whether deceased was a financial asset and whether his death was a financial injury to the dependent. On the other hand, the Connecticut Act makes the sole test one of dependency upon the earnings of the deceased at the time of the injury and fixes the minimum award in cases where the injury results in death. It follows, therefore, that in determining under the latter Act the extent of dependency upon a minor, it is immaterial whether the cost of the minor's support used up all his wages, where the dependent was legally entitled

⁹³ In England the amount payable to dependents is to be reasonable and proportionate to their injury, and the exact amount is determined for each case. "The sum is to be proportioned to the injury. It is for the Committee to say what is reasonable and proportionate to the injury." *Hodgson v. Owners of West Stanley Colliery* (1910) 3 B. W. C. C. 267.

The purpose of the Compensation Act was to provide a percentage income to the widow, or dependent next of kin, based upon their pecuniary loss. *State ex rel. Gaylord Farmer's Co-op. Creamery Ass'n v. District Court*, 128 Minn. 486, 151 N. W. 182.

to receive the wages of the minor and to use them for the support of the family.⁹⁴

Under the Massachusetts Act, the sum to be paid is measured by the wages of the deceased workman, not by the injury done to the dependent. Where the dependents were only partly dependent upon the earnings of the deceased, the amount to be paid is "a weekly compensation equal to the same proportion of the weekly payments made for the benefits of persons wholly dependent as the amount contributed by the employé bears to the annual earnings of the deceased at the time of his injury." The amount to be paid in case the dependent was partly dependent is to be measured by that proportion of the average weekly wages of the deceased which the amount of his wages contributed by him to the dependent's support bore to the amount of his annual earnings, without regard to the benefits, if any, received by the deceased from the dependents.⁹⁵ Where an employé receives board from a dependent to whose support he contributed, the value of such board is not to be deducted from his contributions in determining percentage of dependency.⁹⁶

⁹⁴ *Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, 96 Atl. 1025.

In *Koether v. Union Hardware Co.*, 1 Conn. Comp. Dec., 38, it was held that, where a son contributed practically all of his earnings to a family fund, all of which was required for the support of the family, the board, room, clothing, washing, etc., which he received were not to be deducted in computing the amount of compensation.

⁹⁵ (Wk. Comp. Act, § 6) *Gove v. Royal Indemnity Co.*, 223 Mass. 187, 111 N. E. 702.

Where all of a minor's weekly earnings, amounting to \$5.67, were given by him to his father to support his father's family, consisting of a wife and several minor children, including decedent, the father was entitled to \$4 per week for 300 weeks from the date of the fatal injury, though he paid the expense of the deceased son's maintenance to the extent of at least \$2.50 per week. (St. 1911, c. 751, pt. 2, § 6) In *re Murphy*, 218 Mass. 278, 105 N. E. 635.

⁹⁶ *Gove v. Royal Indemnity Co.*, 223 Mass. 187, 111 N. E. 702.

The employé contributed the sum of \$12.50 weekly to the dependents, \$10 in cash to his mother, and \$2.50 in groceries, and the sole question at issue was whether the dependents were entitled to the payment of a weekly com-

No deduction will be made from death benefits for the time during which the employé worked after the injury,⁹⁷ or for payments made to him by way of compensation.⁹⁸

pensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employé to the partial dependents bears to the average annual earnings of the deceased, or whether from the amount so contributed the value of his board should be deducted. The Committee held that the value of board should not be deducted in computing the compensation. *Hayden v. Mass. Employés' Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 198 (decision of Com. of Arb.). The employé, a minor, contributed all of his wages, amounting to \$5.67 a week, to his father. The father was not wholly, but only partially dependent upon the wages of the son for support, and the question is: Is the father entitled to the minimum of \$4 a week, or should there be a deduction from the minimum amount, on account of the fact that the employé, while contributing all his wages to his father, was supported by the father, and his maintenance was at least \$2.50 a week? The Board decided and held that the employé contributed his entire earnings to the dependent, a proportion of 100 per cent., and that there is due the dependent 100 per cent. of the minimum compensation provided by the statute; that is, the payment of \$4 a week for 300 weeks from the date of the injury. *Murphy v. American Mut. Liab. Insur. Co.*, 2 Mass. Wk. Comp. Cases, 817 (decision of Indus. Acc. Bd., affirmed by Sup. Jud. Ct., 218 Mass. 278, 105 N. E. 635).

⁹⁷ (St. 1911, c. 751, part 2, § 6) In *re Cripp*, 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828.

⁹⁸ The widow, as sole dependent of a deceased employé, was entitled to compensation from the date of the last payment to the deceased employé for a period not to exceed 300 weeks from the date of the accident, without any deduction being made for payments made to the employé for loss of a finger. (St. 1911, c. 751, pt. 2, § 11 [d], as amended by St. 1912, c. 571, § 2, and St. 1913, c. 696, § 1) In *re Nichols*, 217 Mass. 3, 104 N. E. 566, Ann. Cas. 1915A, 862. The employé received an injury which necessitated the amputation of the third finger of the right hand. Later blood poisoning set in and death ensued. Under section 11 (d), part II, the employé was entitled to the payment of half his weekly wages for a period of 12 weeks, in addition to the payments due on account of incapacity for work; the amputation of the finger being one of the "specified injuries" for which the specified compensation named should be paid "in addition to all other compensation." Subsequent to the payment of the "additional compensation" the employé died, and the insurer requested the Board to rule as to whether the amount paid as "additional compensation" should not be properly deducted from the compensation due the widow. The Industrial Accident Board ruled that the statute makes

§ 168. — California

The California Act does not require that all payments made by an employé to the support of his dependents shall be paid from his earnings for the period during which such contributions were made. It requires merely that the extent of partial dependency be fixed at such proportion of three times the average annual earnings "as the annual amount devoted by the deceased to the support of the person or persons so partially dependent bears to such average earnings."⁹⁹ Where a partial dependency is clearly established, but there is no direct evidence to show the amount of contributions made, such partial dependency may be computed by reference to the earnings of the deceased employé during the year preceding his death and deducting therefrom his known expenditures, making a reasonable allowance for the cost of room and board, clothing, and incidental spending money,¹ or by estimating

it obligatory upon the insurer to pay the additional compensation, and that no provision is made for its deduction if death results from the injury. *Nichols v. London Guarantee & Accident Co., Ltd.*, 2 Mass. Wk. Comp. Cases, 814 (decision of Indus. Acc. Bd., affirmed by Sup. Jud. Ct., 217 Mass. 3, 104 N. E. 566, Ann. Cas. 1915A, 862).

⁹⁹ *Mahoney v. Yosemite Valley R. R. Co.*, 2 Cal. I. A. C. Dec. 150.

Where an employé was shown to have contributed various sums to a sister for her support until his death, and one of such contributions was the sum of \$230 received from the proceeds of a life insurance policy canceled by him, this amount may be included in the annual contribution for support used as a basis for determining the extent of dependency. *Id.*

¹ *Parsley v. O'Brien Bros.*, 1 Cal. I. A. C. Dec. 494.

Where partial dependency is well established, but by reason of the failure of the dependents to keep records of the contributions made by the deceased employé it is impossible to determine directly the amount of his contributions, it may be determined by subtracting from the total earnings of the deceased during the preceding year his estimated expenditures, including the estimated value of board and room received at home; it being shown that he turned in for the support of his family all of his wages, except certain amounts retained for personal purposes. *Donovan v. Holy Cross Cemetery*, 1 Cal. I. A. C. Dec. 510. Where, the fact of partial dependency being established, the applicant claimed to have received \$30 per month from him, but the known wages and expenditures of the deceased indicated that he

the income of the dependent relatives from all other sources and finding the difference between this amount and the cost of maintenance of the whole family for the same period.² Where contributions made by a deceased employé are shown to have been in irregular amounts, covering a period of fifteen months, the annual contribution will be computed by reducing the total amount given for support during this time to a proportionate amount for a period of twelve months. The Act provides as a basis for determining a death benefit based upon partial dependency the annual contribution devoted by the deceased employé to the support of the dependent.³ In fixing the extent of dependency in cases where no particular sum is regularly paid over by a son who lives with his aged parents and is their principal support, and the parents do not look to any one else for support, it is proper to consider all the circumstances in the conduct of the household, and to have regard to any other source of income the family may have.⁴ Where a son contributes one-half his earnings to his family, consisting of a sister, mother, and father, one-sixth of his average annual income is estimated as having been devoted to the sister's support.⁵

Proof of partial dependency need not be made by direct and irrefragable evidence. A technical and rigid requirement to establish the degree of dependency by this sort of evidence would in many cases result in failure to establish any degree of dependency

could not well have contributed more than \$27.50 a month, the extent of the partial dependency was determined upon the basis of contributions at the monthly rate of \$27.50. *Dennehy v. Flinn & Tracy*, 1 Cal. I. A. C. Dec. 302.

² *Matthiesen v. Pacific Gas & Electric Co.*, 1 Cal. I. A. C. Dec. 398. When the fact of dependency is established, but the evidence on the extent thereof is not exact, the amount contributed may be estimated from the alleged contributions to the dependent, his average earnings, the living expenses of the dependent, and her other sources of income, if any. *Bristol v. Gartland*, 1 Cal. I. A. C. Dec. 632.

³ *Mahoney v. Yosemite Valley R. R. Co.*, 2 Cal. I. A. C. Dec. 150.

⁴ *Binkley v. Western Pipe & Steel Co.*, 1 Cal. I. A. C. Dec. 33.

⁵ *Irwin v. Globe Indemnity Co. of N. Y.*, 1 Cal. I. A. C. Dec. 547.

whatever, when, as a matter of fact, a substantial contribution to the support of the family was made by the deceased.⁶

§ 169. — Minnesota

The purpose of the compensatory provision of the Minnesota Act is to secure the widow, or dependent next of kin, of an employé who should meet an accidental death while engaged in the line of his employment, a percentage income based upon their pecuniary loss, and the salary or compensation actually received by the employé at the time of his death represents such loss.⁷ Under the provision that partial dependents are entitled to "that proportion of the benefits provided for actual dependents which the average amount of the wages regularly contributed by the deceased * * * bore to the total income of the dependent" the monthly contributions of a workman to his mother should be considered as a part of her "total income," in determining the amount she is entitled to recover as a partial dependent.⁸ A partially dependent sister of a deceased workman is entitled to the minimum⁹ weekly payment of \$6 for 300 weeks,¹⁰ regardless of whether she inherited anything from the estate of the employé.¹¹

§ 170. — New Jersey

Where the decedent leaves no widow, but leaves a mother or father actually dependent upon him, compensation should be com-

⁶ *Matthiesen v. Pacific Gas & Electric Co.*, 1 Cal. I. A. C. Dec. 398.

⁷ (Laws 1913, c. 467, §§ 8-34; Gen. St. 1913, §§ 8202-8230) *State ex rel. Gaylord Farmers' Co-op. Creamery Ass'n v. District Court*, 128 Minn. 486, 151 N. W. 182.

⁸ (Gen. St. 1913, § 8211, as amended by Laws 1915, c. 209) *State ex rel. Hayden v. District Court (Minn.)* 158 N. W. 792.

⁹ (Laws 1913, c. 467, § 14, subds. 13, 15, 17; Gen. St. 1913, § 8208). *State ex rel. Globe Indemnity Co. v. District Court (Minn.)* 156 N. W. 120.

¹⁰ (Gen. St. 1913, § 8208) *State ex rel. Crookston Lumber Co. v. District Court*, 131 Minn. 27, 154 N. W. 509.

¹¹ *Id.* See § 78, ante.

puted on the basis of 25 per cent. of his wages for the number of weeks fixed by statute, with due regard to the maximum and minimum amounts also fixed by the statute.¹²

§ 171. — New York

Under an express provision of the New York Act, the probable increase in a minor employé's wages may be considered, notwithstanding a provision that "all questions of dependency shall be determined as of the time of the accident."¹³ This Act places no limit on the number of payments that may be awarded to the dependents.¹⁴ A provision "for the support of grandchildren or brothers and sisters under the age of 18 if dependent upon the deceased at the time of the accident, 15 per cent. of such wages for the support of each person until the age of 18 years; and for the support of each parent or grandparent of the deceased if dependent upon him at the time of the accident, 15 per cent. of such wages during such dependency," contemplates a separate award for each dependent, and hence the award of one dependent is not merged in the award of another legally chargeable with her support.¹⁵

¹² (P. L. 1911, p. 139, § 2, par. 12) *Reardon v. Phila. & R. Ry. Co.*, 85 N. J. Law, 90, 88 Atl. 970; *Quinlan v. Barber Asphalt Paving Co.*, 84 N. J. Law, 510, 87 Atl. 127; *McFarland v. Central R. Co. of N. J.*, 84 N. J. Law, 435, 87 Atl. 144, 47 L. R. A. (N. S.) 279, Ann. Cas. 1915A, 1; *Tischman v. Central R. Co. of N. J.*, 84 N. J. Law, 527, 87 Atl. 144.

Compensation at the rate of 25 per cent. of the average weekly wages may be awarded to a father, who is an actual dependent upon a deceased son; the son, a minor, leaving a father and mother, five minor brothers, and four sisters surviving. *Havey v. Erie R. Co.*, 88 N. J. Law, 684, 96 Atl. 995.

¹³ (Wk. Comp. Act, §§ 14, 16) *Kilberg v. Vitch*, 171 App. Div. 89, 156 N. Y. Supp. 971.

In awarding compensation to a dependent mother and sister of a deceased employé 16 years old, the Commission properly considered the probable increase of the employé's wages. (Wk. Comp. Act, Consol. Laws, c. 67, § 14). *Id.*

¹⁴ (Wk. Comp. Act, § 16, subd. 4) *Walz v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6, 155 N. Y. Supp. 702.

¹⁵ *Id.*

§ 172. — Washington

The rule existing at the time of the passage of the Washington Act was that parents of a minor workman were not entitled to damages for his death, even though actually dependent, their recovery being limited to the loss of his services during minority. The compensation provided for by subdivision 3 of section 5 of the Act is therefore the exclusive compensation to be allowed for the death of an unmarried minor workman.¹⁶ A widow is not entitled to additional compensation on account of the adoption of a child subsequent to the death of her husband.¹⁷ A 19 year old employé's dependent mother is entitled to compensation while her dependent condition continues, not merely until decedent would have been 21 years old.¹⁸

§ 173. — Wisconsin

The Wisconsin Act provides that, in case of permanent disability of an employé who is over 55 years of age, the specified compensation shall be reduced by 5 per cent.; in case he is over 60 years of age, by 10 per cent.; and in case he is over 65 years of age, by 15 per cent. In preceding subdivisions it is provided that in case of death of the employé a sum equal to the compensation specified for a permanent injury or disability shall be paid as a penalty to the surviving dependents. The term "permanent injury," as thus used, has its ordinary meaning, and cannot be extended to include injuries resulting in death, and hence in case of death there can be no reduction for the advanced age of the employé.¹⁹

¹⁶ (Wk. Comp. Act Wash. § 5, subd. 3) Opinion Atty. Gen., Jan. 9, 1912.

¹⁷ (Wk. Comp. Act Wash. § 5) Rulings Wash. Indus. Ins. Com. 1915, p. 16.

¹⁸ (Sess. Laws 1911, c. 74, § 5, subd. 3) *Boyd v. Pratt*, 72 Wash. 306, 130 Pac. 371.

¹⁹ (St. 1913, § 2394—9, subd. 5) *City of Milwaukee v. Ritzow*, 158 Wis. 376, 149 N. W. 480. While the point raised is not entirely free from difficulty, it is considered that the terms "injury," "permanent injury," "disability," "permanent disability," and "permanently totally disabled" are descriptive of

Under this Act, where the deceased employé leaves no one wholly dependent upon him for support, but one or more persons partially dependent, the death benefit should be such percentage of four times the average annual earnings of the deceased employé as the average amount devoted by him to the support of the person so partially dependent bears to such average annual earnings.²⁰ "The amount devoted by the deceased * * * to the support of partial dependents" means, in the case of dependent parents, the amount received for themselves and for the support of minor children, including the deceased. In short, it is the amount contributed to the support of the family.²¹ The "support" of a dependent means the shelter, food, clothes, etc., required to meet his daily necessities, and compensation is to be determined by the amount devoted by the employé to those purposes during the year preceding his death.²²

§ 174. — Federal Act

The amount of compensation payable to a dependent parent under the original federal Act is equivalent to the full pay of the deceased for the balance of the year following the latter's death, though the parent had not been wholly dependent upon him, or had received, before the injury, only a share of his wages.²³

a class of events creating a right to compensation to the injured one, and that the injury resulting proximately or otherwise, or followed by death, covered by subdivisions 3 and 4, constitute a separate and distinct class of events, where the compensation goes to the dependents, and that it is to the former only that the words "the compensation herein shall be reduced," etc., applies. *Id.*

²⁰ *Dougherty v. State of Wisconsin*, Bul. Wis. Indus. Com. vol. 1, p. 99.

²¹ *Damrau v. Kuetemeyer*, Rep. Wis. Indus. Com. 1914-15, p. 19.

²² *Dougherty v. State of Wisconsin*, Bul. Wis. Indus. Com. vol. 1, p. 99.

²³ *In re Noriega*, Op. Sol. Dept. of L. 378.

ARTICLE IV

PAYMENT, RELEASE, AND RELATED MATTERS

Section

- 175. Time, commencement, and continuation of payments.
- 176. Original federal Act.
- 177. Waiting period.
- 178. Original federal Act.
- 179. Lump sum payments.
- 180. Amount.
- 181. Deductions from award or settlement.
- 182. Deduction of payments made.
- 183. Deduction for interest.
- 184. Increased and reduced compensation.
- 185. Restriction of employé's rights in insurance contract.
- 186. Pensions.
- 187. Change, suspension, and termination of compensation.
- 188. California.
- 189. Release.
- 190. Contracting out.
- 191. Assignment of compensation rights.
- 192. Apportionment.

§ 175. Time, commencement, and continuation of payments

Where disabilities are temporary, or where they are total and permanent, the New Jersey Act directs that compensation be paid for the period of disability. Where the disability is partial, but permanent, the statute omits that direction, because in many cases the amount cannot be ascertained, except by judgment of the court, and there is no statutory authority for giving that judgment a retroactive effect.²⁴ Where an award of compensation for 200 weeks is made, and later it is determined that the disability is total and permanent, and an additional award of compensation for 200 weeks is made, to make the 400 weeks authorized by this Act, the

²⁴ (P. L. 1911, p. 137, § 2, par. 11, subds. a, b, c) *Banister Co. v. Kriger* (N. J. Sup.) 89 Atl. 923, denying rehearing in the case reported in 84 N. J. Law, 30, 85 Atl. 1027.

second 200 payments should not begin until the expiration of the first 200 payments.²⁵ Two awards, one under the schedule and one not, ordinarily run consecutively and not concurrently.²⁶

There is no provision in the Iowa Act which permits employers to make payments otherwise than weekly, unless an arrangement is made for the payment in a lump sum.²⁷

§ 176. — Original federal Act

The year for which compensation is payable begins to run on the day following the date of the injury and terminates with the anniversary of the day of injury.²⁸ The date of the injury is the date on which the injury results in incapacity for work.²⁹ So long as the injury continues the employé is entitled to his status at the time of the injury, and must be paid compensation as if he continued to be employed,³⁰ even though the work on which he was employed has been stopped or suspended before he is able to resume work;³¹ but he is entitled to compensation no longer than his incapacity is due

²⁵ *Diskon v. Bu'bb*, 88 N. J. Law, 513, 96 Atl. 660.

²⁶ In *Swanson v. Sargent & Co.*, 1 Conn. Comp. Dec. 433, it was held that compensation for the loss of an eye under the schedule and compensation for incapacity due to injury to the other does not run concurrently, but consecutively. In *Kaiser v. Pinney*, 1 Conn. Comp. Dec. 562, where the claimant was found entitled to compensation under the schedule for loss of hearing, and also for total incapacity, as a result of being struck on the head by a piece of timber, causing Meniere's disease, it was held that the double compensation should run consecutively, and not concurrently.

As to separate awards under the schedule, see § 165, ante.

²⁷ (Code Supp. 1913, § 2477m14) Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 34.

²⁸ In *re Kelly*, Op. Sol. Dept. of L. 337. The compensation year begins to run from the exact time when the wage earnings cease. In *re Robinson*, Op. Sol. Dept. of L. 386.

²⁹ In *re Bowen*, Op. Sol. Dept. of L. 340.

³⁰ In *re Huff* (Dec. Comp. of Treas.) Op. Sol. Dept. of L. 568; (Dec. Comp. of Treas.) Op. Sol. Dept. of L. 786.

³¹ In *re McCrae*, Op. Sol. Dept. of L. 375.

to his original injury, and may not be paid because, on account of old age or other bodily infirmity, he is unable to resume work within the year.³² The payment of compensation provided for contemplates a continuing liability, and even in case of death that the payments will be made as they would have accrued.³³ Where the period of incapacity covers more than one fiscal year, payment should only be made for the time of incapacity during each fiscal year from the appropriation for that year. A temporary employé, who is injured and whose incapacity continues beyond his term of appointment, is entitled to pay during incapacity, regardless of the termination of the employment.³⁴ Ability to resume the regular work of the injured person's employment appearing, compensation ceases under the Act, though the employé remains seriously and permanently injured.³⁵ Ability to resume work means inability to resume the regular work of the injured person's employment in the

³² *In re Blackhurst*, Op. Sol. Dept. of L. 690. To entitle an employé to continued compensation, the disability must be due in an appreciable measure to the original injury. *In re McAllister*, Op. Sol. Dept. of L. 680.

A workman was struck in the eye by a piece of steel, causing the loss of the eye. The injury, while permanent, was stated by the United States hospital service physician to have no bearing on the physical condition. He was held entitled to compensation only for the time he was physically incapacitated by the injury. *In re Holden*, Op. Sol. Dept. of L. 268. In this case the superior officer of the claimant recommended that he be paid only for a certain number of days, but gave no satisfactory reason for his recommendation. As the medical evidence appeared to substantiate the contention of the claimant, it was decided that a claim was established. *In re Smith*, Op. Sol. Dept. of L. 745. The hospital surgeon reported that the injury should not have caused incapacity for more than 15 days, while the attending physician certified to incapacity for a longer period. In view of all the circumstances, the claim was allowed. *In re Williamson*, Op. Sol. Dept. of L. 750.

³³ *In re Huff* (Dec. Comp. of Treas.) Op. Sol. Dept. of L. 568.

³⁴ (Dec. Comp. of Treas.) Op. Sol. Dept. of L. 794. Where the period of incapacity covers more than one fiscal year payment should only be made for the time of incapacity, regardless of the termination of the employment. (Dec. Comp. of Treas.) Op. Sol. Dept. of L. 795.

³⁵ *In re Carroll*, Op. Sol. Dept. of L. 367.

course of which the injury was sustained, not any work he may be able to do notwithstanding the injury.³⁶ Hence, inability to resume regular work of the employment appearing, compensation is payable, though the claimant is discharged and obtains other employment of a different character.³⁷ However, where an injured employé, though unable to return to his regular work, returns to work of a different character, and receives the same pay as if his duties remained unchanged, compensation under the Act ceases; his right to compensation is merged in his right to receive pay for his services.³⁸ Ability to resume work at a given date cannot be predicated on the fact that an injured person refused to submit to an operation, and therefore, according to medical opinion, delayed recovery.³⁹ When delay in returning to work is not chargeable to the claimant, but to some rule or regulation of the establishment where he is employed, loss of time occasioned thereby is an incident of the injury, and the claimant is entitled to pay therefor.⁴⁰ The time consumed by an injured workman in returning from the place where he was treated for the injury may be considered a part of the incapacity period, where it was necessary to go to such place for treatment because of the lack of facilities at a nearer point.⁴¹ The compensation period includes all regular working days, exclusive of Sundays and legal holidays.⁴²

³⁶ *In re Query of Naval Constructor of Boston Navy Yard*, Op. Sol. Dept. of L. 345.

Claimant was advised by the government physician who treated the injury to perform light work in the way of exercise, but this did not disentitle him to compensation, which was payable until he was able to resume his regular duties. *In re Richerson*, Op. Sol. Dept. of L. 775.

³⁷ *In re Hill*, Op. Sol. Dept. of L. 369.

³⁸ *In re Manaloc*, Op. Sol. Dept. of L. 383.

³⁹ *In re Passus*, Op. Sol. Dept. of L. 371.

⁴⁰ *In re Winn*, Op. Sol. Dept. of L. 389.

⁴¹ *In re Cernich*, Op. Sol. Dept. of L. 539; *In re Bailey*, Op. Sol. Dept. of L. 297.

⁴² *In re Weissenborn*, Op. Sol. Dept. of L. 388.

§ 177. **Waiting period**

As a rule, compensation is not payable unless the resulting disability lasts longer than two weeks,⁴³ or ten days.⁴⁴ The provision of the New Jersey Act that "no compensation shall be allowed for the first two weeks after injury received, except as provided by paragraph 14, nor in any case unless the employer has actual knowledge of the injury or is notified thereof within the period specified in paragraph 15," does not reduce the compensation for loss of a phalange from an allowance for 35 weeks to an allowance for 33 weeks. It is probable that the intent of this section was to exclude allowance of compensation in the case of a temporary disability lasting less than two weeks, except for medical and hospital services and medicines.⁴⁵ This section must be read in connection with the section relating to the furnishing of medical attention and medicine, and be confined to cases where death does not occur. Where the workman is killed instantly, the provision for holding up the compensation for two weeks does not apply.⁴⁶ Under the California Act, where an injured employé returns to work within two weeks after an accident at the same wages that he was receiving before his injury, no temporary total or partial disability compensation can be awarded, even though he has not entirely recovered. Compensation is awarded only for loss of earnings due to accidental injury, and not for pain and suffering unaccompanied

⁴³ *Armiger v. Townsend-Davis Baking Co.*, 1 Cal. I. A. C. Dec. 55; *Turgeon v. Fox Co.*, 1 Cal. I. A. C. Dec. 68; *Lough v. Standard Oil Co.*, 1 Cal. I. A. C. Dec. 41; *Kagaroff v. Southern California Gas Co.*, 1 Cal. I. A. C. Dec. 43.

⁴⁴ In *Swanson v. Sargent & Co.*, 1 Conn. Comp. Dec. 433, it was held that the loss of a member compensable under the schedule is a presumed incapacity, and that the waiting period applies to such injuries, under a provision that, if incapacity extends beyond a period of ten days, compensation shall begin on the eleventh day. (Wk. Comp. Act, pt. B, § 8, as amended by Laws 1915, c. 288, § 4.)

⁴⁵ *James A. Banister Co. v. Kriger*, 84 N. J. Law, 30, 85 Atl. 1027.

⁴⁶ *Connors v. Public Service Electric Co.* (N. J. Sup. 1916) 97 Atl. 792.

by loss of earnings beyond the two weeks' waiting period.⁴⁷ But where an employer elects to pay compensation for any portion of the period of disability, without deducting for the waiting period of the first fifteen days, the injured employé will not be forced to refund the indemnity paid for such waiting period, nor will the employer be credited therewith on the award.⁴⁸

178. — Original federal Act

Although the nature of the injury and the physician's certificate indicate clearly that the incapacity will continue more than fifteen days, the Secretary is not justified in approving a claim which fails to show affirmatively that incapacity continued for more than that period.⁴⁹ When the days of incapacity, whether consecutive or in broken periods, amount to more than fifteen, counting intervening Sundays and holidays, the law entitles the employé to compensation.⁵⁰ The day on which the injury occurred should be included in determining whether duration of incapacity existed for more than fifteen days.⁵¹ An employé who is so injured that he can never resume the work on which he was engaged at the time of the injury, but who, after fourteen days of incapacity, is able to resume work by accepting an assignment to a character of work with which his injury does not materially interfere, and who does so resume work, may receive compensation for the time lost, even though it may not amount to more than fifteen days.⁵² Where there is a conflict of opinion between the

⁴⁷ *Ely v. Maryland Casualty Co.*, 1 Cal. I. A. C. Dec. 335.

⁴⁸ *Turner v. City of Santa Cruz*, 2 Cal. I. A. C. Dec. 991.

⁴⁹ *In re Dray*, Op. Sol. Dept. of L. 540.

⁵⁰ *In re Wells*, Op. Sol. Dept. of L. 515.

⁵¹ *In re Taylor*, Op. Sol. Dept. of L. 542. An injury continues for "more than" fifteen days if the period of disability lasts for fifteen full days in addition to the day of injury; the day of injury cannot be disregarded without extending the period limited to sixteen days. *In re Fogg*, Op. Sol. Dept. of L. 509.

⁵² *In re Davis*, Op. Sol. Dept. of L. 516.

government surgeon and the attending physician as to the ability of the claimant to return to work, and the record sustains the views of the attending physician, the claimant cannot be forced to lose his right to compensation by being compelled by decision of the government surgeon to resume his work before the fifteen-day period expires.⁵³ An employé who is physically able to resume work within fifteen days after the injury, but who is prevented from actually resuming work until eighteen days thereafter because of holidays or lack of work, is not entitled to compensation.⁵⁴ Any doubt as to whether the injury continued more than fifteen days should be resolved in the claimant's favor.⁵⁵

§ 179. Lump sum payments

From an investigation of the Workmen's Compensation Acts in the various countries and states, it appears that almost without exception provision is made for commutation of payments to a lump sum. In some jurisdictions the lump sum payment may be made by agreement, but in the majority the question whether it shall be permitted is left to the determination of an administrative board or to the judgment of a court. In some states it can be made by the tribunal on the application of either party; in some the matter is

⁵³ *In re Tyrrell*, Op. Sol. Dept. of L. 546.

⁵⁴ *In re Avery*, Op. Sol. Dept. of L. 517.

⁵⁵ The government physician certified that he had treated an injury daily for a period of more than fifteen days, but that the injury received did not show sufficient external evidence of violence to lead to the belief that it would cause incapacity for more than fifteen days. As claimant made affidavit that he was unable to resume work for the same period that the government physician treated the injury, it was held that the preponderance of the evidence established a claim for compensation. *In re Smith*, Op. Sol. Dept. of L. 541. When claimant's actual incapacity, due to the injury from shock received at the time of the accident and developing later, continued beyond the period of disability (less than fifteen days) covered by a report of the yard surgeon, and about which condition there was a difference of opinion between the yard surgeon and the attending physician, the doubt should be determined in the claimant's favor. *In re Coleman*, Op. Sol. Dept. of L. 544.

within the discretion of the court or Commission, with or without the consent of either party; in some states six months must expire before the agreement or the application to the court may be made. The manner in which the lump sum is to be arrived at or must be computed is also fixed in some states, while in others it is left to agreement, subject to approval by the court. The theory of legislation authorizing commutation of payments to a lump sum is that cases will arise in which the employé's condition will be so marked that there will be little reason to anticipate improvement in earning capacity, and that the circumstances will warrant allowing a lump sum available at once, rather than periodical payments.⁵⁶

A discretion vested in the court relative to the method of payment must be exercised in conformity with the spirit of the law and so as to best promote the ends of justice. One method must not be chosen in preference to another arbitrarily, or merely to suit the convenience or lessen the labors of the judge, but he should consider the circumstances, and apply that method which will most effectually promote the welfare of the parties.⁵⁷ When he exercises his judgment and discretion as to the best method of making compensation in the light of all the facts, the result will not be disturbed on appeal, except for an abuse of the discretion.⁵⁸

⁵⁶ *Roberts v. Packing Co.*, 95 Kan. 723, 149 Pac. 413; *McCracken v. Missouri Valley Bridge & Iron Co.*, 96 Kan. 353, 150 Pac. 832; *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244.

⁵⁷ *Ackerson v. National Zinc Co.*, 96 Kan. 781, 153 Pac. 530.

⁵⁸ *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244; *Ackerson v. National Zinc Co.*, *supra*.

An award of compensation in a lump sum will not be disturbed, in the absence of abuse of discretion. *Halverhout v. S. W. Milling Co.*, 97 Kan. 484, 155 Pac. 916; *Gorrell v. Battelle*, *supra*; *Cain v. Zinc Co.*, 94 Kan. 679, 146 Pac. 1165, 148 Pac. 251; *Roberts v. Packing Co.*, 95 Kan. 728, 149 Pac. 413; *McCracken v. Bridge Co.*, 96 Kan. 353, 150 Pac. 832.

An award of compensation in a lump sum for partial disability for a maximum period allowed by the statute will not be disturbed, where it appears authorized by the facts. *Gorrell v. Battelle*, *supra*.

A statement by the court in a Kansas case, in response to a suggestion that as long as the employer was not in default no action to recover could be brought, that "that theory would shut a man out from his right to recover a lump sum and would not give him any discretion," did not show that the court failed to exercise its discretion in the matter of periodical payment or lump sum judgment.⁵⁹

Commutation, being a departure from the normal method of payment, is to be allowed only when it clearly appears that the condition of the beneficiaries warrants such departure,⁶⁰ but there

⁵⁹ *Girten v. National Zinc Co.* (Kan.) 158 Pac. 33.

⁶⁰ *Bailey v. U. S. Fidelity & Guaranty Co.*, 99 Neb. 109, 155 N. W. 237. The law should be administered with due regard to the preservation of the means of support, and in ordinary cases the normal method should not be departed from. *Id.* The power of the insurance department to commute payments to a lump sum will, as a matter of policy, be seldom exercised, as in practically all cases it is obviously better for the beneficiaries to receive the sum to which they are entitled in installments at stated intervals, rather than in a lump sum. (Wk. Comp. Act Wash. § 7) *Rulings Wash. Indus. Ins. Com.* 1915, p. 18. The Commission will not require a defendant against its objections to pay compensation in a lump sum, except in cases of exceptional urgency. *Wilson v. Gallegher*, 1 Cal. I. A. C. Dec. 306. Lump sum settlements are not favored by the Commission, and will not be granted, except where necessary for the protection of the rights of the applicant, or unless extreme need be shown by him. One of the principal purposes of the Act is to prevent injured persons from becoming public charges, and it is for this reason that the Commission permits lump sum settlements only in relatively rare instances, and never if such lump sum settlement seems likely to be followed by an individual becoming a charge upon the state or any political subdivision of it. *Bedini v. Northwestern Pacific R. R. Co.*, 1 Cal. I. A. C. Dec. 312.

Commutation denied. In *Morgillo (alias Morgean) v. Westinghouse, Church, Kerr & Co.*, 1 Conn. Comp. Dec. 311, where claimant applied for a commutation to a lump sum in order to allow him to return to his home in Italy, but it appeared that his thigh, which was broken by the accident, had formed a vicious union, causing pain and awkwardness, amounting to a deformity, which would be greatly decreased by an operation, and the employer was willing to provide such an operation free of charge, by a competent surgeon, it was held to be for the best interest of the parties that commutation be denied; and on rehearing in this case, where the operation was considered advisable on account of the vicious union, because under any stress it would be liable to

should be no hesitancy in permitting such departure where the best interests of the parties demand it.⁶¹ Where the employer is will-

break again, after which the proposed operation would be no longer possible, and it being improbable that if claimant returned to Italy (for which purpose he desired the commutation) he would be able to secure expert surgical treatment on account of the extraordinary demands made upon surgeons of that country by the war, commutation was again denied. In *Fabbian v. C. W. Blakeslee & Sons*, 1 Conn. Comp. Dec. 305, where it was shown that only part of the compensation being paid periodically was needed for the support of the dependent minor son, but that if commutation were allowed a certain profit would be made on the rate of exchange in transmitting the money to Italy, where the dependent lived, the commissioner held such was not sufficient reason to justify commutation. In *Cushner v. H. C. Rowe & Co.*, 1 Conn. Comp. Dec. 574, it was held commutation into a lump sum was neither just nor necessary, the only reason to justify a commutation being the necessity for an expensive operation, and it appearing that the claimant had sufficient funds in the bank to meet the expense of such operation.

⁶¹ Because the court exercises discretionary power in a matter peculiarly for its consideration, its action is practically final. Consequently it is to be expected that district courts will act cautiously and candidly, and not render lump sum judgments for any other reason than that the welfare of the parties requires it. Whenever such a judgment appears to be best under all the circumstances, there should be no hesitation in pronouncing it. *McCracken v. Missouri Valley Bridge & Iron Co.*, 96 Kan. 353, 150 Pac. 832.

Commutation granted. In *Clarke v. Bigelow-Hartford Carpet Co.*, 1 Conn. Comp. Dec. 166, where the decedent left a widow and several dependent children, the death benefit was commuted to a lump sum in order that it might be applied on a mortgage on the home where the family lived. In Connecticut commutation is wholly in the discretion of the commissioner, regardless of the consent of the parties. In *Catto v. G. Cudemo & Co.*, 1 Conn. Comp. Dec. 374, where it appeared that claimant had a brother and brother-in-law residing in Italy, that if he could purchase a small place near, his wife and children, with such help as they might receive from said relatives, would be able to support the family, and that in these surroundings they would be much better situated, an agreement for commutation of the total disability payments into a lump sum was approved by the commissioner. In *Riley v. Walsh*, 1 Conn. Comp. Dec. 505, where commutation to a lump sum was desired in order that the widow might lease and stock a small farm, she expecting to derive her support therefrom, and both parties requested the commutation, it was allowed. In *Bucherri v. Hartford Rubber Works Co.*, 1 Conn. Comp. Dec. 622, it was held that in view of the claimant's natural desire to return to his home in Italy, of the decreased cost of living there, and the advantage

ing to make the commutation, it will be authorized where convenient to the applicant and he is shown to be competent to safely invest the proceeds without squandering them.⁶² Commutations to lump sums have been made in order to enable the employé to invest his compensation in a business of his own,⁶³ to return to his

of exchange rates, a commutation to a lump sum was just and reasonable, and an amount necessary to discharge claimant's indebtedness in this country and provide his transportation was advanced, and the remainder deposited in a bank agreed upon near his home, to his account. In *Pumpanelli v. Aberthaw Construction Co.*, 1 Conn. Comp. Dec. 620, where the improvement of claimant's injured eye by operation was possible, but uncertain, and not one which he could be required to accept, and he desired a commutation to a lump sum for the purpose of returning to his wife and children in Italy, and the employer joined in the request for commutation, it was granted. Where it appeared that the dependent father, residing in Italy, was in extremely straitened circumstances, the compensation payments were commuted to a lump sum, under section 17 of the Act. *Brio v. Carpenter, Boxley & Herrick*, *The Bulletin*, N. Y., vol. 1, No. 5, p. 11.

⁶² *Green v. County of Alameda*, 2 Cal. I. A. C. Dec. 636; *Wilson v. Gallegher*, 1 Cal. I. A. C. Dec. 306.

Where the widow, found entitled to a death benefit, asks for a lump sum settlement, and the evidence shows her to be possessed of business experience, economical, and thrifty, the owner of her own home, and thoroughly capable of handling money, and the defendant employer advises such commutation, such facts are sufficient to warrant an award of a lump sum settlement. *Green v. County of Alameda*, *supra*. Commutation of the weekly death benefit payments to a lump sum discounted at the statutory rate will be allowed, where the defendant is willing to pay a lump sum and the applicant desires the money to take her to her family in Texas and to purchase a house and small tract of land there to aid in her support. *Owen v. Mahoney Bros.*, 1 Cal. I. A. C. Dec. 308.

⁶³ The commutation of the weekly payments of the award to a lump sum was here allowed, where the employé was a man thirty-four years of age and desired the money in a lump sum to start a small grocery store in a community where the chances of success were found by the Commission after investigation to be good. *Kelly v. Snare & Triest Construction Co.*, 1 Cal. I. A. C. Dec. 471. But where an applicant who had sustained an injury entitling him to \$2,557.44 requested, against the opposition of his employer, a commutation to enable him to purchase a dairy herd for his milk business, such facts were an insufficient basis for commutation. *Casson v. Northwestern Pacific Ry. Co.*, 2 Cal. I. A. C. Dec. 729.

native land,⁶⁴ to discharge a mortgage on the dependent's home,⁶⁵ and also where the employer was about to wind up its business

⁶⁴ Where a stevedore, who had accidentally lost one of his eyes and was unable to follow his trade, requested commutation of his disability indemnity to enable him to return to Norway, where his parents resided in a home belonging to him, there to take up the business of a fisherman, and it appeared that he was an industrious, temperate, and thrifty man, a commutation of the whole sum was made. *Olsen v. Western Fuel Co.*, 2 Cal. I. A. C. Dec. 643. An employer will be allowed to settle his liability for compensation by the payment of a lump sum, instead of in weekly payments, where the possibility of the workman's future improvement is uncertain, and the employé wishes to return to his native country, provided that the sum be paid by the purchase of a ticket for transportation for him, and the balance upon his departure. *Bedini v. Northwestern Pacific R. R. Co.*, 1 Cal. I. A. C. Dec. 312. But where the only reason assigned by the applicant for the commutation of a permanent disability award is his desire to return to his native country to invest the balance there, such reason is insufficient to justify the Commission in ordering that the amount of benefit made payable be discounted to a lump sum. *Galante v. Mammoth Copper Mining Co. of Maine*, 2 Cal. I. A. C. Dec. 732.

⁶⁵ Except in cases of exceptional urgency, as to enable a widow of the deceased employé to discharge a mortgage upon the family home, the Commission will not require a defendant against its objections to pay compensation in a lump sum. *Wilson v. Gallegher*, 1 Cal. I. A. C. Dec. 306. A commutation to a lump sum of a portion of the death benefit awarded to the mother of an employé will be allowed where it is to be used to discharge a mortgage upon her home. *State Comp. Insur. Fund of the State of Cal. v. Jacobsen*, 1 Cal. I. A. C. Dec. 311. The commutation of a portion of the award to a lump sum, with proper allowance for interest deductions in finding the present worth of future payments so commuted, will be allowed, where the amount is sought to enable the dependent to remove incumbrances on the family home, defray funeral expenses, and meet an unsecured note given by the deceased. *Kennedy v. Guardian Casualty & Guaranty Co.*, 1 Cal. I. A. C. Dec. 152. But where an injured employé asks that the indemnity awarded be commuted to a lump sum to enable him to purchase furniture for a rooming house and pay off a mortgage on property of his mother in Wisconsin, and there is no showing that it is necessary for the protection of the applicant, or for his best interests, the request will be refused. *Kruger v. Strehlow, Freese & Peterson*, 2 Cal. I. A. C. Dec. 334.

Where the widow inherited from her husband a house heavily mortgaged, and also some insurance, and it appeared that if her compensation were commuted to a lump sum she could pay off the mortgage and so escape paying interest, and a competent business man volunteered to attend to the

and leave the state.⁶⁶ Requests for commutation have been refused where the applicant was shown to be intemperate,⁶⁷ and where he was suffering mental disability.⁶⁸

The Nebraska Act leaves the question of how much shall be paid in a lump sum in ordinary cases to the agreement of interested parties, but in such serious matters as death and permanent disability, where the interests of those dependent upon the workman may be involved, the question of whether it is for the best interests of the dependents to have the payments made periodically or to be made in a lump sum must be submitted to the district court, acting in a capacity somewhat analogous to that of a guardian or next friend of the dependents, for its approval or rejection. The object of this provision is to preserve the rights of persons often inexperienced in business matters and unable to protect themselves, and to determine whether it is to their best interests to substitute a lump sum, which might easily be dissipated, for payments made in lieu of

payment of the mortgage and assist her in safely investing the balance, without pay therefor, commutation was allowed. *Zarling v. North Side Coal Co.*, Bul. Wis. Indus. Com. 1912-13, p. 29.

⁶⁶ Where a death benefit had been rendered against an employer who was not insured, and it was later shown that the employer was about to wind up its business and to leave the state, and the widow of the deceased employé was shown to be competent to handle the balance of the award due her, the balance was commuted in accordance with the provisions of the Act and made payable at once. *Decounter v. United Greenwater Copper Co.*, 2 Cal. I. A. C. Dec. 700.

⁶⁷ Where an injured employé asks that the indemnity awarded be commuted to a lump sum to establish him in business, and it appears that he is intemperate and had been arrested for drunkenness even since his injury, and there are no unusual circumstances to justify commutation, his request will be refused. *Olson v. Tice*, 2 Cal. I. A. C. Dec. 333.

⁶⁸ Where an employé was in a bad mental condition, suffering from some brain trouble which made him very dull and stupid, but the exact character of the disability was very uncertain, and the claimant was unable to show any advantage in a lump sum settlement, or that he was able to conserve a large sum of money, the awarding of a lump sum was inadvisable, and was denied. *Catterson v. County of Los Angeles*, 2 Cal. I. A. C. Dec. 981.

wages.⁶⁹ There is no provision in this Act allowing either party to compel the employer to pay, or the workman or dependent to receive, a lump sum satisfaction.⁷⁰ An agreement made by the parties subject to "consent" of the court is prerequisite.⁷¹ Such agreement, if reasonable and made in good faith, is binding on the insurer.⁷²

⁶⁹ *Bailey v. U. S. Fidelity & Guaranty Co.*, 99 Neb. 109, 155 N. W. 237.

⁷⁰ (Rev. St. 1913, § 3681) *Bailey v. U. S. Fidelity & Guaranty Co.*, supra; *Johansen v. Union Stockyards Co.*, 99 Neb. 328, 156 N. W. 511.

The Employers' Liability Act allows the parties interested to "settle all matters of compensation between themselves" (Rev. St. 1913, § 3677). The amount of compensation, when not agreed upon by the parties, is to be determined by the district court (section 3680), and except as expressly provided in the Act must be payable periodically (section 3686). *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N. W. 509. When the amount of compensation in periodical payments has been determined, either by agreement of the parties or by decision of the court, it "may be commuted to one or more lump sum payments, except compensation due for death and permanent disability." (Rev. St. 1913, § 3681) *Id.* There is no requirement in the section of the statute which applies to residents of this country that six months must elapse before an agreement for a lump sum payment may be made, or the consent of the district court be procured to such an agreement. *Bailey v. U. S. Fidelity & Guaranty Co.*, 99 Neb. 109, 155 N. W. 237. In such case no other or different authority for making such commutation is provided by that section. It still depends upon the agreement of the parties, except that their right to so agree in the specified cases depends upon "the consent of the district court." *Id.*

⁷¹ Although in general the agreement of the parties will authorize such commutation, in case of death or permanent disability, the consent of the court is also necessary. If the district court, upon careful investigation, finds that special circumstances exist, making it necessary to commute to a lump sum for the protection of the workman or his dependents, the court may "consent" to such agreement by the parties. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N. W. 509.

⁷² If an employer and the party to whom payment is to be made make a reasonable agreement in good faith for the payment of a lump sum, not inconsistent with the amount of the periodical payments previously determined, the agreement will bind an insurance company, which has assumed a risk under section 3688, Rev. St. 1913, equally with the employer. It has no greater rights than he has, and cannot block a settlement by objecting to payment in a lump sum merely because it was not consulted. *Bailey v. U.*

The Nevada Industrial Commission, believing that the indiscriminate exercise of the authority conferred by section 31 of the Nevada Industrial Insurance Act, which provides that the Commission may, in its discretion, allow the conversion of compensation provided for in this Act into a lump sum payment, under such rules, regulations, and system of computation as may be devised for obtaining the present value of such compensation, would nullify the spirit and intent of the Act, announced by resolution that such authority, as a matter of policy, would be exercised only in extraordinary cases, as in practically all cases it is better for the beneficiaries to receive the award to which they are entitled in installments at stated intervals, rather than in a lump sum.⁷³

The New Jersey Act, as amended in 1913, not only fixes the rate and manner of computation, but indicates principles for the court's guidance in passing on an application for commutation. It provides that: "In determining whether the commutation asked for will be for the best interest of the employé or the dependents of the deceased employé, or that it will avoid undue expense or undue hardship to either party, the judge of the court of common pleas will constantly bear in mind that it is the intention of this Act that the compensation payments are in lieu of wages, and are to be received by the injured employé or his dependents in the same manner in which wages are ordinarily paid. Therefore commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure. Commutation shall not be allowed for the purpose of enabling the injured employé, or the de-

S. Fidelity & Guaranty Co., 99 Neb. 109, 155 N. W. 237. "We find nothing in the statute to justify the claim that if the employer and the workman, or the dependent person to whom payment is due, agree upon a lump sum in lieu of the periodical payments, an insurance company has any right to object to the manner of payment agreed upon by the parties by the consent of the court." *Id.*; *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N. W. 509.

⁷³ Rep. Nev. Indus. Com. 1913-14, p. 24.

pendents of a deceased employé, to satisfy a debt, or to make payment to physicians, lawyers, or any other persons.”⁷⁴ Before awarding a lump sum, the judge must determine what sum should be paid periodically, and should state the method by which he reached his result and the reasons which induced him to commute the periodical payments into a lump sum.⁷⁵ His decision should be based on specific findings of fact supported by legal evidence.⁷⁶

In Minnesota the matter of settlement is governed by sections 13 and 14 of the Act, but the question how and in what manner such settlement shall be paid is left with the parties to agree upon. When a lump sum is agreed upon, it is final, and not subject to readjustment. Settlement means one thing, and payment of the amount settled upon another, and when the parties agree that the sum fixed shall be paid in lump, and that sum is in fact paid, the matter is concluded.⁷⁷ The parties in controversy must agree to a lump sum award before the court has any right to commute the payments to a lump sum. The court cannot commute the payments against the will of either party.⁷⁸

§ 180. — Amount

“Commute” indicates a lessening of the amount of payment.⁷⁹ The amount to be awarded in a lump sum is ordinarily the pres-

⁷⁴ P. L. N. J. 1913, p. 309, § 2, par. 21.

⁷⁵ (P. L. 1911, p. 134) *Mockett v. Ashton*, 84 N. J. Law, 452, 90 Atl. 127. The determination of the trial judge should set forth, in cases where weekly payments are to be commuted in a lump sum, the basis of award in amount per week and number of weeks; the commuted amount under paragraph 21 being expressly predicated on such finding. (Laws 1911, p. 142, § 2, par. 20) *Long v. Bergen County Court of Common Pleas*, 84 N. J. Law, 117, 86 Atl. 529.

⁷⁶ (St. 1911, p. 143, § 2, par. 21) *New York Shipbuilding Co. v. Buchanan*, 84 N. J. Law, 543, 87 Atl. 86.

⁷⁷ (Gen. Laws 1913, c. 467, § 22, subd. 1; Gen. St. 1913, § 8216) *Op. Atty. Gen. on Minn. Wk. Comp. Act*, Bul. 9, p. 8.

⁷⁸ *State ex rel. Anseth v. District Court* (Minn.) 158 N. W. 713.

⁷⁹ As used in a provision of the Ohio Act that a Board may commute periodical benefits to one or more lump sum payments, the word “commute”

ent worth of that sum which would otherwise be payable.⁸⁰ However, in the absence of a statute authorizing deductions for interest, payment on a lump sum settlement must be for the full amount.⁸¹

§ 181. Deductions from award or settlement

In computing the sum payable, the rule is that regard must be had to any payment, allowance, or benefit received from the employer, but not payment of debts or anything received otherwise than from the employer.⁸² Deductions for previous overpayments

means that the Board may authorize the payment to the dependent of something less than he would otherwise receive. (Wk. Comp. Act, § 40) State v. Indus. Com., 92 Ohio St. 434, 111 N. E. 299.

⁸⁰ Where, on petition for payment of compensation in a lump sum, it appears that it would be for the best interests of both parties that the payment be thus made, the amount awarded in a lump sum should be the present worth of that sum to which the petitioner would be entitled under the Act. (Wk. Comp. Act 1912, Jones & A. Ann. St. 1913, par. 5449 et seq.) *Staley v. Illinois Central R. R. Co.*, 186 Ill. App. 593. In commuting the periodical payments to a lump sum, it is error to multiply the weekly minimum by the prescribed number of weeks. Award must be made sufficient to reduce the lump sum to the present value of the periodical payments. (P. L. 1911, p. 137, § 2, par. 11c) *James A. Banister Co. v. Kriger*, 84 N. J. Law, 30, 85 Atl. 1027 (rehearing denied 89 Atl. 923). A lump sum settlement, made by taking the present value of the periodical payments computed at 5 per cent. simple interest, is not error. *Bailey v. U. S. Fidelity & Guaranty Co.*, 99 Neb. 109, 155 N. W. 237.

⁸¹ (Gen. Laws Minn. 1913, c. 467, § 25; Gen. St. 1913, § 8220). *Op. Atty. Gen. on Minn. Wk. Comp. Act*, Bul. 9, p. 9.

⁸² On application for compensation the judge must consider a lump sum of £10 paid under an agreement which he had refused to register. *Horsman v. Glasgow Navigation Co., Ltd.* (1910) 3 B. W. C. C. 27, C. A. The cost of maintaining an injured seaman in a hospital in port for fifteen weeks after his accident, which the employers were not required to do under the Merchant Shipping Act, must be regarded in fixing the amount of compensation. *Kempson v. Owners of Moss Rose* (1911) 4 B. W. C. C. 101, C. A. Payment by the employers of a bill for a workman's hospital maintenance and medical treatment is a factor to be considered in assessing compensation. *Sorensen v. Gaff & Co.* (1913) 6 B. W. C. C. 279, Ct. of Sess. Where employers paid an injured workman considerably more than the amount of full

have been held improper.⁸³ But where a workman agrees to have his rent deducted from his weekly compensation, such deductions are proper.⁸⁴

Awards for temporary disability or under a schedule for specific injuries cannot be deducted from awards for permanent disability

compensation during nine months, and then in paying half wages failed to consider certain extras, and refused to correct their error, which they admitted, unless the amounts overpaid in the first nine months should be deducted, they were entitled to such reduction. *Porter v. Whitbread & Co.* (1914) 7 B. W. C. C. 205, C. A. The fact that a workman who was injured in the employ of a distress committee received poor relief of 10s. a week during his inability is not to be considered in assessing the compensation. *Gilroy v. Mackie et al. (Leith Distress Committee)*, (1910) 2 B. W. C. C. 269, Ct. of Sess. Where under the Merchant Shipping Act a seaman who is injured while the ship is at sea must be paid his wages until he can be discharged at a port, the eight days' wages paid the workman in this instance for the time between the accident and his discharge at port are not to be considered in assessing compensation. *McDermott v. Owners of S. S. "Tintoretto"* (1911) 4 B. W. C. C. 123, H. L., and 2 B. W. C. C. 208, C. A.

That the deceased workman was a member of the Duluth Firemen's Relief Association and that his dependents draw benefits therefrom does not bar recovery of compensation nor reduce the amount thereof. The firemen who join this association are held to have purchased its protection for the benefit of themselves and their families, and not for the benefit of their employers. *State ex rel. City of Duluth v. District Court (Minn.)* 158 N. W. 791.

⁸³ It was improper for a county court judge in assessing compensation to deduct overpayments previously received by the workman before arbitration. *Flynn v. Burgess* (1914) W. C. & Ins. Rep. 238, C. A. Where an employer paid compensation of 14s. 7d. per week under an agreement up until June, and then on review secured their reduction to 10s. beginning in February, he could not withhold present payments because of the previous overpayments. *Hosegood & Sons v. Wilson* (1911) 4 B. W. C. C. 30, C. A. Where a judge, on review of compensation, found that in consequence of receiving full amount of compensation from August to October, whereas he should only have had part compensation from August to December, a workman had already received more than he was legally entitled to, and therefore awarded no compensation for the remaining two months, he was in error in regarding the previous overpayments. *Doyle v. Cork Steam Packet Co.* (1912) 5 B. W. C. C. 350, C. A.

⁸⁴ *Brown v. South Eastern & Chatham Ry. Co.'s Managing Committee* (1910) 3 B. W. C. C. 428, C. A.

ity.⁸⁵ In view of the provision of the California Act that "liability for compensation shall not be reduced or affected by any insurance contribution or other benefit whatsoever due to or received by the person entitled to such compensation," a contribution received by an injured employé from his labor union during a strike, which occurs during his period of disability, cannot be deducted from the compensation due him.⁸⁶ The California Commission has no authority to allow deductions to be made from the amount of an award for debts owed by the injured employé to the employer, where such debts do not arise out of the payment in advance or on account of compensation due for his injury.⁸⁷

In California an employer is allowed to deduct from the temporary total disability indemnity due an injured employé the amounts earned by him while working elsewhere during the period for which such disability indemnity was payable,⁸⁸ but such deduction will

⁸⁵ Awards under Wk. Comp. Act Wash. § 5, subd. (3) (d) for a temporary period, paid monthly or otherwise, are not to be deducted from awards for dismemberment or "permanent partial disability" provided in subdivision (f). (Wk. Comp. Act Wash. § 16) Opinion Atty. Gen. Wash. Dec. 12, 1911.

⁸⁶ (Wk. Comp., etc., Act, § 34 [b]) *Schebrosky v. Morrison & O'Neil*, 1 Cal. I. A. C. Dec. 401. See § 78, ante.

⁸⁷ *Cason v. Star Laundry*, 1 Cal. I. A. C. Dec. 485. The Industrial Accident Commission is without jurisdiction or authority to allow a deduction to be made from compensation awarded an injured employé for debts claimed to be owed by him to his employer. The power of the Commission to make deductions from compensation due is expressly limited by section 29 (a) of the Act, and the cases enumerated therein do not include set-offs arising out of other transactions. Furthermore, to allow such set-off would require the Commissioner to sit as a court and determine liabilities arising from contract or perhaps tort, while its jurisdiction is expressly limited to cases arising under the Compensation Act. *Stormont v. Bakersfield Laundry Co.*, 1 Cal. I. A. C. Dec. 533. The amount of the award for compensation must be paid, without set-off of money owed by the employé to the employer, under section 29 (a) of the Act. *Manford v. Carstenbrook*, 3 Cal. I. A. C. Dec. 21.

⁸⁸ *Harbart v. Bryson Estate Co.*, 1 Cal. I. A. C. Dec. 515. While the fact that an employé earning wages for a few days at a time, but suffering a relapse each time, is not inconsistent with the condition of temporary total disability, the employer or insurance carrier is entitled to have such earnings

not be allowed from an award for permanent disability.⁸⁹ Under the New Jersey Act, that the workman worked for the employer for several years after the accident for the same wages as before does not entitle the employer, in the absence of an agreement that the wages shall be considered as compensation, to a deduction therefor from the award.⁹⁰ In Wisconsin, compensation may be allowed to a workman totally incapacitated from again following his occupation, but able to engage in other employments, without any deduction for such amounts as he may be able to earn in the other employments.⁹¹ In a recent case the court seemed to favor the opposite holding, but considered itself bound by the terms of the Act. It said (opinion by Judge Barnes): "This is a new statute containing a large number of provisions which deal with a new and complex subject. It may well be that, if the Legislature had in mind the concrete case with which we are dealing, it would have provided for such a contingency. It is not very probable that it was intended to give an employé who lost a thumb and finger of the left hand the same compensation that he would be entitled to

deducted from the temporary total disability benefits payable by them. *Colot v. Union Lumber Co.*, 1 Cal. I. A. C. Dec. 512.

⁸⁹ Where an employé is awarded a permanent partial disability indemnity, and within three months after his injury returns to work at full wages, this fact does not entitle the employer to a deduction from the payments of compensation, since the benefits for permanent disability are not based upon immediate loss of earnings, but upon a sum necessary to recompense the injured employé for the physical loss for the rest of his life. *Peterson v. Pelasco*, 2 Cal. I. A. C. Dec. 199. Where an injured employé, awarded compensation for a permanent partial disability, before the period of weekly payments therefor has expired, returns to work with the same employer under full pay and performs full service, the employer is not entitled to have credited on the award of disability indemnity any part of the full pay given the employé for such service. *Wray v. Panama-Pacific International Exposition*, 3 Cal. I. A. C. Dec. 6.

⁹⁰ *De Zeng Standard Co. v. Pressey*, 86 N. J. Law, 469, 92 Atl. 278.

⁹¹ *Mellen Lumber Co. v. Indus. Com.*, 154 Wis. 114, 142 N. W. 187, L. R. A. 1916A, 374, Ann. Cas. 1915B, 997.

receive had he been so maimed that he was totally incapacitated from doing any kind of work. If this is so, then it is apparent that the Legislature overlooked the contingency with which we are dealing, or it in fact has provided that the future earning capacity of the employé must be taken into account. The plain and obvious meaning of the language used in the statute is generally the safest guide to follow in construing it. Seeking hidden meaning in variance with the language used is a perilous undertaking, which is quite as apt to lead to an amendment of a law by judicial construction as it is to arrive at the actual thought in the legislative mind. Where a statute plainly says, as this one does, that the loss in case of partial disability shall consist of such percentage of the weekly earnings of the employé as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, we fail to see how the court would be justified in adding thereto the following limitation: 'Less such sums as the employé might be able to earn in some other calling.' " ⁹²

§ 182. — Deduction of payments made

Payments on account of compensation, made by the employer before the hearing, may be deducted from the amount of the award made against him at the hearing.⁹³ Where compensation under the

⁹² *Id.*

⁹³ After an injury, which entitled a workman to an award of \$5 a week, he went back to work and was paid \$10 a week, although he did not earn that amount. Upon proceedings under the Workmen's Compensation Act the judge credited the employer with \$5 a week for 39 out of 41 weeks for which they had paid. It was held that there was no error, as it was a fair presumption that the payments were made in discharge of the legal liability, so far as there was such liability, and that payments in excess of that liability were either compensation for labor or were a benevolence. (P. L. 1913, p. 312) *Blackford v. Green*, 87 N. J. Law, 359, 94 Atl. 401.

Where irregular or advance payments are made by an employer to an injured employé on compensation which may later be awarded, the employer is allowed to have such payments credited upon an award against him, pro-

schedule is in lieu of all other compensation, and a claimant has already received compensation allowed for temporary total disability before it becomes known that the sight of his eye is completely destroyed, this amount is to be deducted from compensation provided by the schedule.⁹⁴ Money advanced to the decedent as unearned wages may be deducted from compensation due him, but not from benefits due to the widow on account of her dependency, or for burial expense; the rights of the widow being separate and distinct from those of the workman.⁹⁵ No deduction can be made for medical services furnished by the employer beyond the period required by statute.⁹⁶ In death cases, where employers make advances that are absolutely needed and necessary to the injured employés, and no serious question is raised concerning the correctness of same, the Illinois Board will allow credit for them.⁹⁷ Under the Califor-

vided that no serious harm has been done the employé because of the irregularity of the payments. Unless money be paid as part payment on account of compensation, it cannot be credited to the employer, as the Act contains no provisions authorizing the Commission to adjust a set-off or counterclaim. *Johnson v. Cluett Peabody Co.*, 2 Cal. I. A. C. Dec. 7. Where an employer by mistake secures a simple accident insurance policy upon an employé, instead of an employer's compensation liability policy, and the employé is injured, and payments are made to him by the insurance company in accordance with the policy, the employer is entitled to have credited to himself the amount paid, upon the theory that the payments made by the insurance company were in reality payments procured to be made by him upon account of liability for compensation. *Mecartea v. Marsh*, 2 Cal. I. A. C. Dec. 128. Where during the first five weeks of total disability following the injury the applicant received full wages from his employer, and during the next six weeks of total disability received more than 65 per cent. of his earnings, the full sum paid should not be treated as 100 per cent. compensation during the five weeks, but the whole sum paid should be credited in full on whatever sum was awarded to the applicant. *Ramirez v. Binkley & Wayne*, 3 Cal. I. A. C. Dec. 33.

⁹⁴ *Kreppel v. Boyland*, 2 N. Y. St. Dep. Rep. 489.

⁹⁵ *Hackney v. City of New Britain School Board*, 1 Conn. Comp. Dec. 160.

⁹⁶ *Mahoney v. Seymour Mfg. Co.*, 1 Conn. Comp. Dec. 292.

⁹⁷ *Rediger v. Pekin Wagon Co.*, Bulletin No. 1, Ill., p. 146.

nia Act, where an employé, so disabled that his service is of little value, is kept at work on full pay, instead of being paid indemnity, the Commission will hold such pay to be compensation, and no part of it to be wages, since the law does not contemplate satisfying its compensation provisions by payment of wages, instead of compensation.⁹⁸ But where he permits the injured employé to remain in living quarters formerly furnished her, but later furnished to her sister, also an employé, and as a part of the sister's contract of employment, the value of such quarters cannot be deducted as a part payment of the compensation due the injured employé.⁹⁹ Nor where money is paid by an employer to his employé, after an injury sustained by the latter, as a pure gift, and not as a part payment on liability to be later determined, can the employer subsequently change his mind and claim a pecuniary benefit for what was at the time intended as an act of generosity or charity. Such payments cannot be credited upon compensation later awarded.¹

§ 183. — Deduction for interest

The Minnesota Act provides that an employer may deposit with "any savings bank or trust company of the state to be approved and designated by the court," "a sum equal to the present value of all future installments of compensation calculated on a 6 per cent. basis," and that "such sum, together with all interest thereon," shall thereafter be held in trust for the employé or his dependents, and "payments from said fund shall be made by the trustee in the same amounts and at the same time as are herein required of the

⁹⁸ *Turner v. City of Santa Cruz*, 2 Cal. I. A. C. Dec. 991. Where an employer elects to pay 100 per cent. compensation, instead of 65 per cent. provided by the Act, the employé will not be required to refund any portion of indemnity so paid, and the employer will be credited only for the number of payments he has made, and not with the amount thereof in money. *Id.*

⁹⁹ *Fowler v. Zellerbach-Levison Co.*, 1 Cal. I. A. C. Dec. 609.

¹ *Johnson v. Cluett Peabody Co.*, 2 Cal. I. A. C. Dec. 7.

employer until such fund and interest shall be exhausted.”² Under this provision, where employer and employé agree upon the amount of compensation to be paid, and the court grants permission to the employer to pay the amount to the trustee, the employer may deduct 6 per cent. on all deferred payments.³

§ 184. Increased and reduced compensation

The Massachusetts Act provides that, “if the employé is injured by reason of the serious and willful misconduct of a subscriber or of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation * * * shall be doubled.”⁴ Under this provision it has been held that serious and willful misconduct on the part of the employer is not established by failure to provide safety devices,⁵ by poor working conditions permitted by him,⁶ by failure to supply a foreman,⁷ or prop-

² Minn. Wk. Comp. Act, Gen. Laws 1913, c. 467, § 28 (Gen. St. 1913, § 8223).

³ Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 11, p. 15.

⁴ Mass. Wk. Comp. Act, § 3, pt. II.

⁵ An employer neglected to provide a “skid” on the right-hand side of the staging, and by reason of this neglect the employé was fatally injured. This was not serious and willful misconduct on the part of the employer. *Kerrigan v. Employers’ Liab. Assur. Corp., Ltd.*, 2 Mass. Wk. Comp. Cases, 360 (decision of Com. of Arb.).

⁶ The employé claimed double compensation because of the failure of an inexperienced workman to properly repair an elevator which he was required to operate. Because of the poor manner in which the elevator was repaired, it broke loose from the wire cable which supported it, falling with

⁷ The employé, with other men, had been ordered to take down a staging section by section, and had been instructed by the employer to be very careful about the manner in which it was taken down. The staging was removed by the workmen, under general orders from the employer, but without proper supervision by him or any other person vested with authority to supervise, and after the work had proceeded for about an hour and a half the structure fell. The employé was not entitled to double compensation. *Holland v. Fidelity & Deposit Co. of Md.*, 2 Mass. Wk. Comp. Cases, 308 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

er tools,⁸ or sufficient workmen, where their presence would not have prevented the accident;⁹ nor is such misconduct shown by the exercise of poor judgment on the part of a foreman.¹⁰ The

him in it from the second to the first floor of the building. It was held that the employé was not entitled to double compensation. *Jacques v. Travelers' Insur. Co.*, 2 Mass. Wk. Comp. Cases, 478 (decision of Com. of Arb.). The employé claimed that his personal injury was due to the condition of the saw which he was using. Two fellow employés testified, however, that the injury happened because the claimant reached over the saw to remove a stick which had become wedged, and cut his thumb thereby. He could have shut off the power and removed the obstruction without danger of injury. It was held that the injury was not caused by the serious and willful misconduct of the employer. *Mikonis v. Royal Indemnity Co.*, 2 Mass. Wk. Comp. Cases, 384 (decision of Com. of Arb.).

⁸ The employé received a fatal injury while working in the pole yard of the subscriber, his head being crushed. It was claimed that the pole which caused his death would not have rolled over, but for the inability of the employé's fellow workmen to hold it, because of the inefficient cant hooks supplied and their inexperience. The evidence showed that all of the men on the job had been employed for a period adequate to become familiar with the work which they were required to do, and had been instructed by the superintendent and foreman the proper manner in which to perform this work. The cant hooks were not in good repair, and a new supply of hooks had been ordered by the subscriber. The Committee held that the widow was not entitled to double compensation. *Tobin v. Aetna Life Insur. Co.*, 2 Mass. Wk. Comp. Cases, 612 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

⁹ The employé claimed that the failure of the subscriber to provide a "tag man," whose sole duty should be to signal the engineer when to start and stop the engine, was serious and willful misconduct. The foreman acted as "tag man" when the necessity arose, and the engine was not in operation at the time of the accident. Therefore the presence of an employé, whose sole duty was to act as "tag man," would not have prevented the injury, and the employé was not entitled to double compensation. *Marshall v. U. S. Fidelity & Guaranty Co.*, 2 Mass. Wk. Comp. Cases, 119 (decision of Com. of Arb.).

¹⁰ The employé claimed serious and willful misconduct of the subscriber through a person exercising superintendence—a foreman. The evidence showed that the injury was not due to the serious and willful misconduct of the foreman, the latter's act in ordering the employé to resume the work of digging out a blast hole being neither willful nor deliberate. It could not be said that the foreman had any idea serious consequences would result

breaking of a wire rope, allowing a heavy heater coil to fall upon the workman, has been held not to show serious and willful misconduct of the employer.¹¹

Under a provision of the Wisconsin Act that, in case the injury is caused by the failure of the employer to comply with any lawful order of the Commission, the compensation awarded shall be increased 15 per cent., where the injury to the muscles and ligaments of the workman's arm was sustained by coming in contact with set screws on a line shaft, which were there contrary to an order of the Commission, the compensation award was so increased;¹² likewise where the injury was due to a violation of an order requiring guards in front of the feed rolls on an ironer, to prevent the workman's hands being drawn into the rolls.¹³ Where

from the carrying out of his instructions. The blast had been carefully inspected immediately after the explosion by a party of five, including the foreman, one of the employers, and the employé, and as a result of this inspection the two former were satisfied that there had been a perfect explosion in each of the blast holes. The employé was not entitled to double compensation. *Revita v. Royal Indemnity Co.*, 2 Mass. Wk. Comp. Cases, 352 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.). The employé claimed that his injury was due to the serious and willful misconduct of a person exercising superintendence. The evidence showed, however, that the belt had not broken frequently, as claimed by him, and that it was not defective, but was made of good material. The employé was held not entitled to double compensation. *Oliveira v. Aetna Life Insur. Co.*, 2 Mass. Wk. Comp. Cases, 517 (decision of Com. of Arb.).

¹¹ The employé was instructed by his foreman to block a car in the testing room about 400 feet from the scene of the fatality, but during the absence of the foreman voluntarily left his work to assist other workman in loading a heavy heater coil on a flat car. While he was helping the wire rope which held the heater coil broke, and the coil fell upon and fatally injured him. A claim for double compensation, on the ground that the injury occurred by reason of the serious and willful misconduct of the employer, was filed by the widow, but was dismissed. *Malewicki v. American Mut. Liab. Insur. Co.*, 2 Mass. Wk. Comp. Cases, 366 (decision of Com. of Arb.).

¹² (Wk. Comp. Act Wis. § 2394—9 [5] a) *Hickox v. Beloit Concrete Co.*, Rep. Wis. Indus. Com. 1914—15, p. 37.

¹³ *Higgins v. Hanover & Butler*, Rep. Wis. Indus. Com. 1914—15, p. 37.

the accident was caused by the employé's willful failure to use a safety device provided by his employer, and by his willful failure to obey a reasonable rule regarding the use of a safety device, namely, an insulated tool, compensation was reduced 15 per cent.¹⁴

§ 185. Restriction of employé's rights in insurance contract

It is contrary to the policy of the Minnesota Act to permit the employer and the insurance company to make any collateral agreement which will impair or abridge the employé's right to recover direct from the insurance company (where the circumstances are such as authorize the employé to proceed directly against the insurance company) the full benefits provided for in part 2 of the Act, including reimbursement for medical, surgical, and hospital services, which should have been, but were not, seasonably furnished by the employer. The Legislature can properly regulate the terms of the contract which the employer and the insurance company may enter into, and has done so by requiring that, in so far as policies are issued, they shall provide for compensation according the full benefits of part 2. Since the parties to such an insurance contract are bound to enter into the contract specified in the statute, if at all, they cannot indirectly and secretly enter into a contract which nullifies or abridges the contract which the statute requires them to make, nor can they in any way limit the rights of the employés thereunder. What cannot be done directly cannot be done indirectly and secretly.¹⁵ While this Act does not attempt to regulate the premium which the insured shall pay for his insurance, it does prescribe the contract which shall be made, if any is made, and the insurance company cannot diminish the obligation which the law says shall be assumed.¹⁶

¹⁴ *Busek v. Wisconsin Gas & Electric Co.*, Rep. Wis. Indus. Com. 1914-15, p. 38.

¹⁵ Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 14.

¹⁶ *Id.* The insurer cannot limit its liability under either parts 1 or 2 of the Act, but must assume the full obligations imposed upon the employer by

§ 186. Pensions

Under the Washington Act, if part of a reserve is converted into a lump sum, the pension is to be reduced proportionately.¹⁷ When total disability is probable, monthly allowances, not a lump sum, will be paid.¹⁸ When a workman makes a statement that he has a wife, or a wife and children under the age of sixteen years, but is living apart from them, the Commission requires an affidavit from the workman to show that he is contributing to their support. In the absence of satisfactory proof of this fact, his compensation is rated on the basis of an unmarried man.¹⁹ Pension warrants will be mailed direct to the foreign address of a dependent residing abroad.²⁰

§ 187. Change, suspension, and termination of compensation

The Workmen's Compensation Acts, in so far as they relate to payments to the employé, speak in terms of disability. When the period of disability ceases, compensation ceases.²¹ The right to

the provisions of the Act. In other words, the liability of the insurer cannot be limited to certain specified amounts, as was formerly the practice in writing employers' liability insurance. It follows that policies of insurance are not valid which eliminate the medical attention feature specified in section 18 of the Act. (Gen. Laws 1913, c. 467, § 18; Gen. St. 1913, § 8212) Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 13.

¹⁷ (Wk. Comp. Act Wash. § 7) Rulings Wash. Indus. Ins. Com. 1915, p. 18.

¹⁸ (Wk. Comp. Act Wash. § 5, subd. [3] [d]) Id. p. 17.

¹⁹ (Wk. Comp. Act Wash. § 3) Id. p. 5.

²⁰ (Wk. Comp. Act Wash. § 3) Id. p. 6.

²¹ "The statute speaks in terms of disability. All of its provision being considered, it does not mean that compensation must be paid during a period of actual disability, and also, if a member is lost, during a period equal to the one during which total disability is deemed to continue. It does not provide a specific indemnity for the loss of a member in addition to compensation for disability. The aim of the statute is to afford compensation if the employé is disabled. When the period of disability ends, compensation

compensation for incapacity being peculiar to the employé himself, ceases at his death; ²² but where the employé dies before such compensation is paid, leaving no dependents, the claim for unpaid compensation usually becomes a part of the assets of his estate.²³ However, under the express provision of the Illinois Act, a claim for unpaid compensation previously awarded abates upon the death of

ceases. *Limron v. Blair*, 181 Mich. 76, 147 N. W. 546; *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244.

In *Tatta v. Capitol City Lumber Co.*, 1 Conn. Comp. Dec. 161, where the claimant's incapacity was due largely to psychic depression, he having been discharged from the hospital as "recovered," and it was shown that a gradual return to normal activities and work was the best treatment for him, compensation was terminated.

In *Glidder v. Haliver*, *The Bulletin*, N. Y., vol. 1, No. 4, p. 10, where the workman had been discharged from the hospital as recovered, and a specialist selected by the Commission testified positively that he was malingering, further compensation was denied.

Upon the medical referee certifying that a man is physically able to return to his work, although he might be nervous, the payments of compensation should be terminated. *Cranfield v. Ansell* (1911) 4 B. W. C. C. 57, C. A. Where a sheriff-substitute found that a hoistman recovering from an injury was able to do work on the level, but would endanger himself to do any climbing, and that to return to work would be the best treatment for him, and upon these facts ended the employer's liability, the question was one of fact for him to decide. *Cunningham v. McNaughton & Sinclair* (1910) 3 B. W. C. C. 577, Ct. of Sess.

²² Additional compensation allowed for permanent incapacity of both legs from paralysis ceased at the employé's death; the right to such compensation being peculiar to the employé, not created for the benefit of his dependents. (St. 1911, c. 751, pt. 2, §§ 9, 10, and § 11, as amended by St. 1913, c. 696, § 1) In *re Burns*, 218 Mass. S. 105 N. E. 601, Ann. Cas. 1916A, 787.

In *Kilbride v. Pratt & Whitney Co.*, 1 Conn. Comp. Dec. 688, it was held that the estate of a deceased workman has no vested interest in compensation for incapacity which would have been payable but for the death, and that the right to such compensation terminated at the death of the workman.

²³ Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 11, p. 29.

The compensation that has actually accrued prior to the death of the employé, and has not been paid to him, becomes a part of his estate, and as such is collectible by his administrator. *Schoenreiter v. Quincy Mining Co.*, Mich. Wk. Comp. Cases (1916) 32.

the employé from some other cause than the injury.²⁴ The survival of claims of dependents is considered in a preceding section.²⁵

The Massachusetts Act provides that any weekly payment may be reviewed by the Industrial Accident Board at the request of the association or of the employé, and that on such review it may be ended, diminished, or increased, subject to the maximum and minimum amounts provided for in the Act, if the Board finds that the condition of the employé warrants such action.²⁶ It is within the power of the Board to decide that for a time compensation shall be suspended, but not ended, with reservation of leave to the employé to apply for further payments under the Act, provided this course in its opinion is required by the facts. It has been the custom under the English Act to award compensation at the rate of a penny a week to keep the case open while payments are otherwise suspended.²⁷ This custom does not prevail in the United States. But it is not necessary, even in England, that this be done in order to keep the case alive, provided the purpose is plain not to terminate the claim definitely, but to keep it open for further consideration and order.²⁸ That the prolongation of incapacity is due to a pre-existing disease does not authorize discontinuance of compensation payments.²⁹

If the workman is disqualified by the injury to continue his reg-

²⁴ Where an award is made to an employé under the Act, and death occurs, not the result of injury, the compensation remaining unpaid at the time of the death abates under section 21 of the Act. *Ticzkus v. Standard Office Co.*, Bulletin No. 1, Ill., p. 176.

²⁵ See § 79, ante.

²⁶ (St. 1911, c. 751, pt. 3, § 12) In *re Hunnewell*, 220 Mass. 351, 107 N. E. 934.

²⁷ *Id.*, supported by *Owners of the Vessel Tynron v. Morgan*, [1909] 2 K. B. 66; s. c., 2 B. W. C. C. 406, and *Griga v. London & Northwestern Ry.*, 3 B. W. C. C. 116.

²⁸ In *re Hunnewell*, 220 Mass. 351, 107 N. E. 934; *Taylor v. London & Northwestern Ry.*, [1912] A. C. 242, 245.

²⁹ *Hills v. Oval Wood Dish Co.* (Mich.) 158 N. W. 214. See § 98, ante.

ular employment, the fact that he procures temporary employment in a different occupation for a few days at equal or greater wages is not conclusive that his disability has ceased.³⁰

Under the English Act, if the employé has his compensation reduced on account of his return to work, and later finds that he is unable to work, or is discharged, and cannot find other light work, his compensation payments must be increased.³¹ The amount of compensation should be reduced, but not suspended, where a workman previously receiving full compensation becomes able to earn

³⁰ *Simonelli v. Sargent & Co.*, 1 Conn. Comp. Dec. 553; *Hanley v. Union Stockyards Co.* (Neb.) 158 N. W. 939.

³¹ A finding upon medical evidence which reduced the payments of compensation to 1d. a week does not bar a review applied for by the workman, alleging that he could not get work because of incapacity. *Sharman v. Holliday & Greenwood, Ltd.* (1904) 6 B. W. C. C. 147, C. A. (Act of 1897). Where a collier recovered, and his compensation was reduced to 1d. a week, but he was unable to get light work, and broke down while trying to do his old work, he was entitled to review. *Walton v. South Kirby, Featherstone & Hemsworth Colliery, Ltd.* (1912) 5 B. W. C. C. 640, C. A. Where a judge, assuming that the employers of a workman who was liable to breakdowns in an injured knee as a result of an injury would find him employment which he could do, awarded only 1d. a week, but the man applied for review because he could not get work, he was entitled to full compensation. *Thomas v. Fairbairn, Lawson & Co., Ltd.* (1911) 4 B. W. C. C. 195. Where an injured workman was dismissed after doing light work for his employer for a year and a half, and found himself unable to get any work elsewhere, he was entitled to review upon these grounds. *McDonald v. Wilsons & Clyde Coal Co., Ltd.* (1912) 5 B. W. C. C. 478, H. L. Where the employers of a boiler maker, who had lost an eye by accident, paid compensation amounting to 1d. a week and gave him employment at the same wages as he received before, but later discharged him, and he was able to get work only as a casual laborer, the amount of the compensation was increased. *Brown v. Thornycroft & Co., Ltd.* (1912) 5 B. W. C. C. 386, C. A. Where, after a judge had reduced the weekly compensation received by a butcher's mate on a ship for loss of the top of a finger to 1s., estimating that his chances of employment were reduced that much, the workman tried and was unable to obtain work on account of his physical condition, such fact was a change in circumstances sufficient to justify an increase to 15s. per week, which was awarded. *Radcliffe v. Pacific Steam Navigation Co.* (1910) 3 B. W. C. C. 185, C. A.

something in an insane asylum, to which he has been sent because of insanity, although the insanity was not in consequence of the accident.³² Where a collier, after receiving an agreed weekly compensation for six weeks for an injury to his eye, returned to his work at his former wages, and was dismissed two weeks later, when part of the mine was closed down, it was held that his compensation had been terminated by mutual consent when he returned to work.³³

§ 188. — California

Where the disability is partial, but the loss of earning capacity total, by reason of inability to compete in the open labor market, the employer may secure a reduction of the compensation to a basis of partial disability by offering the employé light and accessible employment which he is able to perform in his disabled condition. Upon the tender of such employment the compensation is thereby reduced to 65 per cent. of the difference between the former wages and the wages offered him for such light work.³⁴ Where the employer, before his injured employé is entirely recovered and able to resume the work he was doing at the time of the accident, offers easier work at the same wages as were paid before the injury, the employé, if able to perform such easier tasks at that time, must either accept the offer or forfeit all further disability compensation.³⁵ But where the employé shows apparent total disability,

³² Slater v. Blyth Shipbuilding & Dry Docks Co., Ltd. (1914) 7 B. W. C. C. 193, C. A.

³³ Bradbury v. Belworth Coal & Iron Co. (1900) 2 W. C. C. 138, C. A.

³⁴ Lindh v. Toyland Co., Inc., 2 Cal. I. A. C. Dec. 646. If the employer furnishes the employé such work as he can perform, thereafter until the termination of the temporary disability the employer is chargeable only with 65 per cent. of the difference between the wages paid for the light work procured and the wages the employé was receiving at the time of his injury. Acrey v. City of Holtville, 2 Cal. I. A. C. Dec. 587.

³⁵ Denehy v. Panama-Pacific International Exposition Co., 1 Cal. I. A. C. Dec. 109.

the burden is on the employer to show a definite earning capacity in the employé.³⁶ If there is serious insubordination and drunkenness, persisted in by an injured employé during his treatment, suspension of compensation in so far as the disability is continued or aggravated by the intoxication, or unreasonable refusal to abide by the medical treatment, will be authorized.³⁷ Where, after findings and award on the basis of partial disability, it appears that such disability has become total, the indemnity will be increased to that for total disability.³⁸ Where it appears, after a temporary total disability indemnity has been awarded, that the injuries sustained are permanent in nature, and not temporary, the findings and award will be amended, after proper notice to all parties and opportunity to be heard, to change the compensation from that based on temporary disability to that for permanent disability. The defend-

³⁶ *Larnhart v. Rice-Landswick Co.*, 1 Cal. I. A. C. Dec. 557. In view of the provision of the Act that due regard shall be had to the ability of the injured employé to compete in an open labor market, in order to justify the reduction of the compensation from that for total disability to partial disability it is necessary to show that the disability of the injured person does not wholly prevent his competing in the open labor market. *Raily v. Island Transportation Co.*, 2 Cal. I. A. C. Dec. 608.

³⁷ *Hill v. Guardian Casualty & Guaranty Co.*, 1 Cal. I. A. C. Dec. 415.

Where a workman with a fractured jaw, after being discharged from the hospital with instructions to return to have it dressed, at once indulged to great excess in alcoholic liquors, contrary to the instructions of his physician, which resulted in increase of disfigurement and impairment of the function of the jaw, the Commission held that in all such cases there will be a forfeiture in whole or in part of compensation, in this case diminution of the award one-third, reducing the compensation from 74 weeks to 48 weeks. *Kelliber v. Great Western Power Co.*, 2 Cal. I. A. C. Dec. 378. Where, on four occasions between the date of injury and the date of operation performed on his foot, the applicant had been confined in a hospital for intoxication, and upon two occasions had been confined in a padded cell, while this did not relieve the employer of liability, in such cases the employé will suffer a reduction in the allowance of compensation, although it cannot be determined to just what extent the disability was prolonged. *Mitchell v. Occidental Forwarding Co.*, 2 Cal. I. A. C. Dec. 336.

³⁸ (Roseberry Act) *Manfredi v. Union Sugar Co.*, 2 Cal. I. A. C. Dec. 920.

ant will be credited on his account of the permanent disability with all payments he may have made upon the basis of temporary disability.³⁹ Where, after an award of continuing total disability compensation for injury resulting from a fracture of the skull of the workman, it is discovered that the continuing disability was proximately due to a syphilitic condition of the workman, of origin prior to the accident, and not due to the accident, an order will be made terminating such disability indemnity.⁴⁰

In this state, "whenever in case of injury the right to compensation would exist in favor of any employé, he shall upon the written request of his employer, submit from time to time to examination by a practicing physician. * * * So long as the employé, after such written request of the employer, shall fail or refuse to submit to such examination, or shall in any way obstruct the same, his right to begin or maintain any proceeding for the collection of compensation shall be suspended, and if he shall fail or refuse to submit to such examination after direction by the Commission, or any member or referee thereof, or shall in any way obstruct the same, his right to the weekly indemnity which shall accrue and become payable during the period of such failure, refusal or obstruction, shall be barred."⁴¹ Where an employé does not abide

³⁹ *Hey v. Pacific Coast Casualty Co.*, 1 Cal. I. A. C. Dec. 38.

Where an injured employé is awarded by the California Commission for a short temporary total disability caused by an injury to the ends of two fingers, and some months later it is shown by competent medical advice that a slight permanent partial disability has resulted from the accident, the Commission will, after notice and an opportunity to be heard is given to all the parties in interest, order that the findings and award be amended to allow compensation for the permanent partial disability, deducting therefrom the benefits previously paid to the applicant upon the basis of the temporary disability. *Karas v. Northwestern Pacific Ry. Co.*, 2 Cal. I. A. C. Dec. 84.

⁴⁰ *Cianetti v. Fremont Consolidated Mining Co.*, 2 Cal. I. A. C. Dec. 947.

⁴¹ (Wk. Comp. Ins. & Safety Act Cal. § 21) This provision of the Act will be strictly enforced. *Bianchini v. Selby Smelting & Lead Co.*, 2 Cal. I. A. C. Dec. 195.

Where an employé, after receiving written notice to submit to a medical

by the instructions of his physician, and thereby greatly increases his disability, the employer is not required to pay compensation for a longer period than the employé would have been disabled, had his injury taken the normal course. Compensation is not payable for such portion of the illness as is due to the injured employé's own actions aggravating his disability.⁴² But, in justice to the patient, the Commission will require the fact of insubordination, lack of co-operation with the physician, or reprehensible conduct to be clearly established before it will sanction the cutting off of the treatment and the compensation payments allowed by law.⁴³ The employé must co-operate with the physician in effecting a cure.⁴⁴ Where an employé is disabled, but it appears that he might be cured by an operation or hospital treatment, the California Commission has ruled that, if the employer offers such operation and treatment at his own expense, as well as disability indemnity during the disability caused by the treatment, the employé must accept it, or forfeit his right to compensation.⁴⁵ A temporary partial dis-

examination at a reasonable time and place fixed by the employer, fails or refuses to submit to such examination, his right to commence and maintain proceedings for the collection of compensation is by section 21 suspended during the period of his refusal, and an application filed for compensation during the period must be dismissed. *Id.*; *Parini v. Selby Smelting & Lead Co.*, 2 Cal. I. A. C. Dec. 192.

But the notice must be in writing. Where an injured employé is directed by his employer to go to a certain physician for examination, and either misunderstands the direction or refuses to abide by it, and does not report for examination, if the direction is given orally, the failure to submit to examination is not a bar to the proceedings for compensation. *Brain v. Eisfelder*, 2 Cal. I. A. C. Dec. 30.

⁴² *Smrakar v. Pacific Lumber Co.*, 2 Cal. I. A. C. Dec. 87.

⁴³ *Hill v. Guardian Casualty & Guaranty Co.*, 1 Cal. I. A. C. Dec. 415.

⁴⁴ The employer may select the physician to treat the injured person, and it is incumbent upon the employé, if he accepts the services tendered, to co-operate with such physician in effecting a cure. *Rainey v. McClain*, 1 Cal. I. A. C. Dec. 57.

⁴⁵ The reasonable cost of an operation to relieve an injured workman from the consequences of an industrial accident, with compensation for the period

ability award for hernia will be terminated upon offer by the employer or his insurance carrier, at its own expense, of an operation for the cure of the hernia, and its rejection or acceptance by the employé, and its satisfactory outcome.⁴⁶

of disability caused by the operation, was awarded him, and the employer required to tender at its own cost suitable surgical and hospital facilities for the operation, and if the applicant then declined the operation, the defendant was to be freed from all liability. *Haley v. Hardenburg*, 1 Cal. I. A. C. Dec. 127. Where medical experts determine that an operation will probably greatly aid applicant's recovery from injury, the Commission will make the payment of compensation conditional upon the injured man's acceptance of an operation when it is tendered by the employer or insurance carrier. *Aylward v. Oceanic Steamship Co.*, 2 Cal. I. A. C. Dec. 95. It being shown that traumatic neurosis may be cured by proper scientific treatment, the Commission will make its award upon the basis of a temporary partial disability, with a provision that if the employer shall tender proper hospital and medical treatment for at least thirty days to cure the injured employé, with full compensation during the period of his treatment, and, being undergone, it is successful, compensation may be discontinued. It also provided that, if the injured employé refuses to accept such hospital treatment, compensation may thereupon cease. *Finley v. San Francisco Stevedoring Co.*, 2 Cal. I. A. C. Dec. 174. Where it seems probable at the time of the award that the applicant will require a surgical operation thereafter to remove the disability, the award may provide that, upon operation being recommended by competent surgical authority and being undergone, the employer shall pay the reasonable cost of the operation and a full disability benefit during the resultant incapacity, but if the applicant refuses to submit to an operation after its being so recommended, all disability payments shall cease during the continuance of his refusal. *Gordon v. Evans*, 1 Cal. I. A. C. Dec. 94. Where, owing to mistaken diagnosis and inadequate treatment, the employé continues to be totally disabled after the ninety-day limit has expired, but it appears that with proper treatment he could be entirely cured, the Commission will make an award for temporary total disability payments to continue during the disability, but conditioned that if the employer or his insurance carrier tender proper treatment to cure and relieve the applicant from the effects of the injury, the applicant must accept the treatment, or forfeit further compensation. *Johnson v. Pacific Surety Co.*, 1 Cal. I. A. C. Dec. 560.

⁴⁶ An employé having a serious hernia is handicapped practically 50 per cent. in his industrial activities. Since his employer cannot be required to furnish medical treatment after the expiration of the ninety days from the date of the accident, a temporary partial disability award should be made in favor of such employé so injured, in the sum of 50 per cent. of 65 per cent. of

§ 189. Release

A settlement made by an employer and the giving of a release by the injured workman ordinarily bars a claim by such workman.⁴⁷ A release executed by the employé, releasing his employer from compensation liability, will not, however, bar the right of any other person, such as his dependents.⁴⁸ Nor does a release by the deceased employé's widow bar an action by the personal representative for the benefit of infant children.⁴⁹ A release of the employer from liability for compensation will not release the third person whose negligence caused the injury, where no negligence of the employer contributed to the injury.⁵⁰ Nor will a settlement between his employer and the employé, releasing all claims on account of the injury, include a claim for malpractice against physi-

his average weekly earnings, to terminate, however, upon the tender of the employer or his insurance carrier, at its own expense, of an operation for the cure of the hernia, and its rejection or acceptance by the employé and its satisfactory outcome. *Brandt v. Globe Indemnity Co.*, 1 Cal. I. A. C. Dec. 309.

⁴⁷ (Wk. Comp. Act Wash. § 8) *Rulings Wash. Indus. Ins. Com.* 1915, p. 19.

⁴⁸ An employé cannot, by making a settlement with a third person, preclude his wife from recovering compensation for his subsequent death as a result of the injuries. The widow's right to compensation can be discharged only by herself, where she is the sole dependent, or by those authorized to act in her behalf. (St. 1911, c. 751, pt. 2, §§ 6, 7, 22) *In re Cripp*, 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828; *Williams v. Vauxhall Colliery Co.*, [1907] 2 K. B. 433, 436; *Howell v. Bradford Co.* (1911) 104 L. T. R. N. S. 433.

In an action under the Wisconsin Act it was held that a payment to deceased for one day's work lost by reason of his disability, and execution by him of a release by which he released the company from all claims which he might have under the Compensation Act, did not affect the claim of his widow for compensation for his death. *Milwaukee Coke & Gas Co. v. Indus. Com.*, 160 Wis. 247, 151 N. W. 245.

As to effect in general of settlement to bar dependent's claim, see § 78, ante. As to settlement agreements in general, see § 202, post.

⁴⁹ (Wk. Comp. Act 1911, § 2, par. 12) *West Jersey Trust Co. v. Phila. & Reading R. R. Co.*, 88 N. J. Law, 102, 95 Atl. 753.

⁵⁰ *Jacowicz v. Delaware, L. & W. R. R. Co.* (1915) 87 N. J. Law, 273, 92 Atl. 946, Ann. Cas. 1916B, 1222.

cians who attended the employé.⁵¹ A release to the third party whose negligence caused the injury, given without consideration and without the approval of the employer's insurer, does not bar an action by the employé against the insurer for compensation.⁵² It may, however, be evidence of the employé's election to take damages, instead of compensation, and so bar a claim for the latter.⁵³ A release from compensation liability, given by an employé's guardian, does not bar an action for damages, where the injured employé, by reason of his minority and illegal employment, was not within the Compensation Act.⁵⁴ An agreement for additional specific compensation for the loss of three fingers, but not stating that it is intended to cover all claims for additional compensation, does not bar an award of additional compensation for an injury to the hand arising out of the same accident.⁵⁵

It has been stated that while, as a matter of law, the authority of an employer under the California Act to exact the execution of any form of contract or release as a condition precedent to the paying of compensation duly awarded, further than a plain receipt which, when the final payment is made, may probably be made a receipt in full of all claim, is doubtful, no reasonable beneficiary of the Act should object to releasing a right which he ought not

⁵¹ (Gen. St. 1913, § 8195 et seq.) *Vilta v. Dolan* (Minn.) 155 N. W. 1077.

⁵² (Wk. Comp. Act, §§ 29, 33) *Woodward v. E. W. Conklin & Sons, Inc.*, 171 App. Div. 736, 157 N. Y. Supp. 948.

⁵³ In *Gilliland v. Kearns*, 1 Conn. Comp. Dec. 277, where an accident was sustained under circumstances creating a legal liability for damages in a third party, and the claimant prior to the hearing had executed a release on valuable consideration discharging said third party from all liability in connection with the accident, it was held he had exercised his option to claim compensation or damages, and could not recover compensation. (Wk. Comp. Act, pt. B, § 6.)

⁵⁴ *Stetz v. F. Mayer Boot & Shoe Co.* (Wis.) 156 N. W. 971.

⁵⁵ (St. 1913, c. 445, § 1, as amended by St. 1914, c. 708, § 6 [e]) *Lemieux v. Contractors' Mut. Liab. Insur. Co.*, 223 Mass. 346, 111 N. E. 782; *In re Hunnewell*, 220 Mass. 351, 107 N. E. 934.

to possess when he receives the full value of the right he does possess under the Act.⁵⁶ All settlements and releases for compensation executed between employer and employé in Minnesota must be approved by a judge of the district court before they can be filed with the labor commissioner.⁵⁷ It has been held in Massachusetts that the signing of a settlement receipt did not bar the employé from asking for a hearing before the Committee of Arbitration because of its refusal to reimburse him on account of his outlay for medical services.⁵⁸

A release may be rescinded for mutual mistake of law. A party who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, but has knowingly deceived and misled that other into a mistaken conception of his legal rights, cannot shield himself behind the doctrine that a mere mistake of law affords no ground for relief.⁵⁹

§ 190. Contracting out

A common provision of the Compensation Acts that any agreement by the employé to waive his right to compensation shall be void ⁶⁰ is not retroactive.⁶¹

⁵⁶ *Reed v. Zelinsky*, 1 Cal. I. A. C. Dec. 496.

⁵⁷ (Wk. Comp. Act, § 22; Gen. St. 1913, § 8216) *Op. Atty. Gen. on Minn. Wk. Comp. Act*, Bul. 11, p. 15.

⁵⁸ *Ducy v. American Mut. Liab. Insur. Co.*, 2 Mass. Wk. Comp. Cases, 513 (decision of Com. of Arb.).

⁵⁹ *Carpenter v. Detroit Forging Co. (Mich.)* 157 N. W. 374.

⁶⁰ See text of various Acts. (Wk. Comp. Law N. Y. § 32.)

A contract signed by an employé before going to work, absolving the employer from all obligations resulting from any accident he might subsequently meet, is not binding, as the contract entered into between the employer, employé, and the state of Illinois, when they accepted the provisions of the Workmen's Compensation Act, is controlling, and all previous contracts en-

⁶¹ Laws 1913, c. 174, p. 312, prohibiting "contracting out," is inapplicable where the accident happened before its passage. *Blackford v. Green*, 87 N. J. Law, 359, 94 Atl. 401.

§ 191. Assignment of compensation rights

Compensation rights cannot ordinarily be assigned or subjected to the payment of debts.⁶² Relative to this prohibition it has been said: "The exemption of awards from assignment or charge is necessary in order to protect the injured employé and his dependents. If the claim were made assignable, he could sell it for a small sum, and thus deprive his dependents of benefits to which they are entitled. The compensation also is made exempt from his debts on the same principle that wages are now exempt. The justice and fairness of this should be conceded by all."⁶³ Under the recognized rules of statutory construction,⁶⁴ a provision validating an assign-

tered into are merged. *Chicago Savings Bank & Trust Co. v. Chicago Rys. Co.*, Bulletin No. 1, Ill., p. 104.

A provision in the lease of a dredge, whereby the owner and employer each exempted the other from liability for the other, did not operate to release the employer from liability for injuries to the owner while he was operating a gasoline launch as employé. *In re Powely*, 169 App. Div. 170, 154 N. Y. Supp. 426.

⁶² See text of various Acts.

The right to compensation from the state insurance fund cannot be assigned. (Wk. Comp. Act, § 41) *In re Oscar Berg*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 102.

⁶³ (Wk. Comp. Act Wash. § 10) *Rulings Wash. Indus. Insur. Com.* 1915, p. 20.

⁶⁴ "When the intention can be collected from the statute, words may be modified, altered, or supplied, so as to obviate any repugnancy or inconsistency with such intention." *Lewis' Sutherland's Statutory Construction* (2d Ed.) vol. 2, § 347. "The intention of an act will prevail over the literal sense of its terms." *Id.* § 348. "The presumption is that the lawmaker has a definite purpose in every enactment, and has adapted and formulated the subsidiary provisions in harmony with that purpose. * * * *That purpose is an implied limitation on the sense of general terms.*" *Id.* § 369. "Words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provision." *Id.* § 376. "A thing which is not within the intent and spirit of a statute is not within the statute, though within the letter." *Id.* § 379. "The real intention, when accurately ascertained, will always prevail over the literal sense of the terms. * * * Statutes are likewise to be construed in reference to the principles of the

ment of the workman's cause of action to the insurer must be limited to its special purpose, and construed as impliedly repealing or modifying the existing law as to the nontransferability of personal injury claims only so far as necessary to effectuate such purpose.⁶⁵

§ 192. Apportionment

Apportionment of compensation between dependents will ordinarily be made equitably in proportion to the respective contributions made by deceased for their support.⁶⁶ Surviving brothers and sisters, who are not dependent upon the earnings of the deceased workman, are not entitled to a share of the compensation along with a dependent mother, who received her support from him.⁶⁷ In New Jersey, the trial judge need not apportion compensation between a widow and child of a deceased employé, where such apportionment is not specially applied for.⁶⁸ The provision of the New Jersey Act relative to distribution of compensation to children applies only to children of the deceased workman, and not to his brothers and sisters.⁶⁹ Where a deceased workman is survived by a reputed wife, found to be totally dependent on him and a member of his family, and by his legal wife and a minor child, for whose main-

common law; for it is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely required." 1 Kent's Commentaries (14th Ed.) 462.

⁶⁵ (Wk. Comp. Law, § 29) *United States F. & G. Co. v. New York Rys. Co.*, 93 Misc. Rep. 118, 156 N. Y. Supp. 615.

⁶⁶ Where a minor contributed small sums, averaging not over 50 cents a week, to his father for tobacco, money and groceries amounting to \$5 a week to his mother, and money estimated at 50 cents a week, and some clothing, to his sister, the death benefit was apportioned at the rate of one-sixth to the father, one-sixth to the sister, and two-thirds to the mother. *Anderson v. American Straw Board Co.*, 1 Conn. Comp. Dec. 11 (affirmed by superior court on appeal).

⁶⁷ *Matecny v. Vierling Steel Works*, 187 Ill. App. 448.

⁶⁸ *Taylor v. Seabrook*, 87 N. J. Law, 407, 94 Atl. 399.

⁶⁹ *Connors v. Public Service Electric Co.* (N. J. Sup. 1916) 97 Atl. 792.

tenance he was legally liable, the compensation may, in the discretion given the California Commission by a provision authorizing it to apportion death benefits among the dependents in proportion to their respective needs, be equally divided between such beneficiaries.⁷⁰

That decedent was a member of the family of his brother, who was partially dependent upon him, does not make the brother a "next of kin," entitled to compensation under the Massachusetts Act, in preference to decedent's surviving father.⁷¹ Under the Connecticut Act, where the deceased workman leaves two dependent daughters, one over 18 dependent in fact, and one 17 dependent both presumptively and in fact, the total death benefit may be awarded to the latter until she reaches the age of 18, and thereafter be divided equally between the sisters.⁷²

The insurer cannot litigate by appeal the proportions of the division of a death benefit after a decree apportioning same, from which the dependents themselves do not appeal.⁷³

The word "portions" as used in the federal Act, refers to the division of the compensation among the claimants, and not to its division into weekly or monthly payments, and the Secretary is authorized to direct that one beneficiary receive a larger and another a smaller portion; his authority in this regard may even justify his direction that the whole compensation be paid to one beneficiary, to the exclusion of the others.⁷⁴

⁷⁰ (Wk. Comp., etc., Act Cal. § 19 [e]) *Rossi v. Standard Oil Co.*, 2 Cal. I. A. C. Dec. 307.

⁷¹ (St. 1911, c. 751, pt. 2, § 6, and part 5, § 2) *In re Kelly's Case*, 222 Mass. 538, 111 N. E. 395.

⁷² *Maher v. N. Y., N. H. & H. R. R. Co.*, 1 Conn. Comp. Dec. 82 (affirmed by superior court).

As to payment to representatives in general, see § 79, ante.

⁷³ *In re Janes* (1914) 217 Mass. 192, 104 N. E. 556.

⁷⁴ *In re Brinkley*, Op. Sol. Dept. of L. (1915) 603.

ARTICLE V

TREATMENT AND FUNERAL EXPENSE

DIVISION I.—EXPENSES OF MEDICAL, SURGICAL, AND HOSPITAL TREATMENT

Section

- 193. Rights, duties, and liabilities in general.
- 194. Massachusetts.
- 195. Failure or neglect of employer—Procurement of services and treatment by employé.
- 196. Where physician is furnished by employer.
- 197. Change of physician or service.
- 198. Expense for which employer is liable.
- 199. Recovery by physician.
- 200. Services of nurse or member of the family.

DIVISION II.—FUNERAL EXPENSES

- 201. Provisions allowing funeral expenses.

DIVISION I.—EXPENSES OF MEDICAL, SURGICAL, AND HOSPITAL TREATMENT

§ 193. Rights, duties, and liabilities in general

The common legislative requirement that the employer bear the burden of reasonably necessary medical and surgical treatment of his injured employé was not intended as a charity to one, or as a penalty to the other, but as the recognition of the economic truth that such expense is a legitimate element in the cost of production, and should be placed upon the product as directly as practicable, using the employer as the first necessary step. The legislative idea is that an employer is so specially interested in his injured employé being restored as soon as practicable as to be most likely to provide proper medical and surgical treatment.⁷⁵ Since the employer must

⁷⁵ *City of Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A. 1, Ann. Cas. 1915B, 847.

pay the cost, he is given the privilege of selecting the physician and services requisite to proper treatment.⁷⁶ This is a privilege, however, which must be exercised without unnecessary delay.⁷⁷ By necessary implication there is reserved to the employer, under ordi-

⁷⁶ The plain purpose of this section is to impose upon the insurer the duty of providing reasonable medical and hospital services and medicines when they are needed. Manifestly, the workman is not permitted generally to select his own physician or hospital, but should accept that which the law thus requires to be provided for him. (St. 1911, c. 751, pt. 2, § 5) *In re Panasuk*, 217 Mass. 589, 105 N. E. 368. Where services or supplies of the character indicated by the provision requiring that the employer promptly provide for the injured employé "such medical, surgical or other attendance or treatment, nurse or hospital service, medicine, crutches and apparatus as may be required or be requested by the employé during the sixty days after the injury," are needed or are reasonably or properly requested by the employé, the employer must provide same, using his own judgment and exercising his own choice, so long as he does not make an unreasonable selection as to the person who shall render such services and as to the nature of the supplies, and it is only when he fails to provide that the employé may do so at the employer's expense. Where the employer has not failed in his duty in this respect, the employé cannot designate the particular individual who shall render the required services. *Keigher v. General Electric Co.*, 158 N. Y. Supp. 939. Inasmuch as the employer or his insurance carrier must pay the disability indemnity, if the disability is not relieved, and must pay full death benefits or permanent disabilities, in addition to the medical and surgical charges, if incompetent physicians or hospitals aggravate the injury, the statute gives the party who must pay the cost the right to select the physician and hospital. *McNamara v. United States Fidelity & Guaranty Co.*, 1 Cal. I. A. C. Dec. 138.

⁷⁷ *Scott v. Aetna Life Ins. Co.*, 1 Cal. I. A. C. Dec. 343.

Where evidence shows an unreasonable delay on the part of the employer and his insurance carrier in offering medical treatment to the employé, the latter will be awarded the reasonable cost of such services which he himself has contracted for. *De Mott v. Stone & Webster Construction Co.*, 1 Cal. I. A. C. Dec. 187. By the term "seasonable" the law means "in due season," "opportune," "timely," which, in most cases of physical injury, means forthwith, inasmuch as delay causes danger of infection. In a city or other populous community, an insurance carrier or employer should have its physician in charge of the injured employé, if not in time to render first aid, at least within a very few hours, certainly as soon as it is necessary to change an emergency dressing. Failure to do this forfeits the right to designate

nary circumstances, reasonable opportunity to exercise the privilege, and the right of the employé to obtain such treatment, or for

who shall furnish medical treatment. *Scott v. Ætna Life Insurance Co.*, supra.

Where an employer's foreman has knowledge of the injury on the day it happened, Saturday, but no steps are taken by the defendants to furnish medical attention until the following Monday, and the injured man has, in the meantime, secured the services of another physician, who continues to treat him until his cure, the defendants must pay the reasonable value of the services rendered by the employé's physician. While the law gives the employer the right to select the physician, it does not allow him to sleep upon that right. If he does not furnish medical attention "seasonably," the employé may secure medical attention at his employer's expense. *Simpson v. Paraffine Paint Co.*, 1 Cal. I. A. C. Dec. 76. Where an employer is notified at the outset of the serious condition of his employé, caused by an infected wound, and the insurance carrier offers the services of its own physician on the same day, Tuesday, but, the physician not being present and the case urgent, an arrangement is made to meet this physician later in the afternoon, but he does not get into communication with the employé until the following Friday, after a serious operation has been performed, the insurance carrier has not seasonably tendered medical treatment, and is liable for the reasonable value of the treatment procured elsewhere. *Jameson v. Bush*, 1 Cal. I. A. C. Dec. 507. Where an employé sustains a fracture and is taken to a physician by his employer, who later calls in another physician, and the employé, without further instructions from his employer, retains the second physician and dismisses the first, and where instructions as to medical treatment are not furnished by the insurance carrier for nearly a week, and not until after the employé has completed final arrangements for his treatment and is about to undergo or has just undergone an operation, the tender of medical treatment by the insurance carrier is not made seasonably, and it is liable for the reasonable value of treatment rendered to the employé by a physician of his own choice. *Hotchkiss v. Boyer*, 2 Cal. I. A. C. Dec. 51. Where the employer or insurance carrier is notified at once of the accident and instructs its physician to treat the injured employé, and the physician, after making a superficial examination, neglects the patient for five days, though requested to call, and the employé in the meantime secures other medical attention, the employer or his insurance carrier has not seasonably furnished medical attention within the meaning of the Act, and is therefore liable for the reasonable value of services contracted for by the employé. *Bailey v. Wheeler Co.*, 1 Cal. I. A. C. Dec. 142. Where a series of delays of the employer and insurance carrier to provide medical treatment occurred, during which time the applicant went to her own physician, and then, after a mistaken diagnosis by the insurer's physician, she again went to her own physician and received

the same to be obtained in his behalf, at the expense of the employer, is contingent upon such opportunity having been accorded,⁷⁸ and proper notice of the injury having been given,⁷⁹

necessary treatment, the defendants are chargeable with all such treatment received. *Allard v. Browne*, 2 Cal. I. A. C. Dec. 489. Where an employé accidentally sustains a hernia which is irreducible, and immediate operation is therefore required, and notice is given to the insurance carrier the day of the happening of the accident, and an operation is performed by the employé's physician within two or three days thereafter, the insurer not having tendered medical treatment of its own selection within such period, it is liable for the reasonable cost of the operation, for the reason that, in view of the urgency of the case, it did not seasonably tender treatment. *Viglione v. Montgomery Garage Co.*, 2 Cal. I. A. C. Dec. 87.

⁷⁸ *City of Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847. The privilege accorded the employer requires as an incident reasonable time to exercise it after notice of the need therefor. Competency of an injured employé to procure medical and surgical treatment, or for such to be procured in his behalf, at the expense of the employer, under the Workmen's Compensation Act, exists for the reasonable time after the injury required for such employé to afford the employer opportunity to exercise his privilege; it is then suspended if the employer exercises such privilege, but revives and relates back to the time of the suspension, if necessary, if the employer unreasonably neglects or refuses to exercise such privilege. *Id.*

⁷⁹ The law does not cast upon employers the duty of active vigilance to discover cases of personal injury to their employés, but casts upon the latter such vigilance as they can reasonably exercise to bring such injuries to the attention of employers, with their need and desire for medical and surgical treatment to be provided. *City of Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847. Where an employé is derelict in not reporting the fact of injury to his employer in time to give the latter opportunity to select the surgeon to treat him, no award of cost of medical and surgical care will be made. *Jenkins v. Pieratt*, 1 Cal. I. A. C. Dec. 114. Where an employé receives a slight injury, and does not notify the employer until after he has procured all necessary medical treatment himself, and the employer, not knowing of the happening of any accident, did not have opportunity to furnish medical treatment of his own selection, then the employer is not liable for the reasonable cost of medical treatment secured by the injured employé. *Morrish v. Brookmiller*, 2 Cal. I. A. C. Dec. 76.

Where an injured employé notifies his employer that his hand has been injured, but omits to inform the employer of the cause of the injury, or to connect it with the employment, or with any accident, and no request is made

except where the employer has actual knowledge dispensing with the necessity of such notice.⁸⁰ But this does not militate against

for medical treatment, the employer is not given notice to supply medical services, and is not liable for the expenses thereof. If he then, after infection setting in, himself employs a physician and nurse at an exorbitant expense, and the employer, if he had been notified, could have secured the same or better treatment at a reasonable expense, and prompt medical attention would have prevented the disability which followed the infection, the employer has been prejudiced by the failure to give notice, and is not liable for the expenses incurred. *Himes v. Powers Investment Co.*, 2 Cal. I. A. C. Dec. 1035. Where neither employer nor employé are acquainted with the provision of the Act, and an employé reports very informally to the employer that he has received an accidental injury, neither party realizing the importance of such notice, nor appreciating the responsibility cast upon the employer thereby, nevertheless, such informal statement is sufficient to give the notice required by law, and make the employer liable for the reasonable value of medical and surgical services furnished the employé on account of the injury. *Conner v. Acme Cement & Plaster Co.*, 1 Cal. I. A. C. Dec. 143.

⁸⁰ *Gardiner v. State of Cal. Printing Office*, 1 Cal. I. A. C. Dec. 21.

The only burden placed upon the injured employé is to let his employer, or the employer's superintendent or other person in authority, know that he has been injured. Knowledge of the fact of injury on the part of the employer or his subordinates constitutes all the opportunity to designate and furnish the necessary medical and surgical treatment which the employer needs in the contemplation of the law. *Scott v. Ætna Life Insurance Co.*, 1 Cal. I. A. C. Dec. 343. An employer, having actual knowledge of the accidental injury of his employé, is bound to furnish necessary medical and surgical attendance, and upon his neglect to do so is liable for the reasonable charges incurred by the injured employé in that behalf (*Coleman v. Guilfooy Cornice Works*, 1 Cal. I. A. C. Dec. 31), though all parties are under the impression that the injury is slight and will not amount to anything (*Larson v. Holbrook, McGuire & Cohen*, 2 Cal. I. A. C. Dec. 105).

Where an employé sustains an accident and tells a fellow employé to notify the captain of the ship upon which he is working, and the fellow employé testifies that he told the captain that the applicant got hurt and wanted a permit to go to the Marine Hospital, and both applicant and the captain were ignorant of their rights and duties under the Act, and the captain testifies that no report of the injury was made to him, but that he understood the applicant was sick with rheumatism, such evidence establishes sufficient notice to the employer to render him liable for medical and surgical treatment. *Connolly v. California Salt Co.*, 2 Cal. I. A. C. Dec. 115.

In *Ezykowski v. F. B. Dashiell Co.*, 1 Conn. Comp. Dec. 236, where the

the employé's right to obtain medical and surgical treatment at the expense of his employer in the interim between the happening of the injury and time for notice to the employer of the employé's needs,⁸¹ subject to the right of the employer or insurer to change physicians at the close of the emergency treatment.⁸² The right to be supplied with medical services is independent of the right to disability compensation,⁸³ and the forfeiture of the right to med-

claimant was not entitled to medical expense, because of not giving notice and of neglect in securing treatment, but later suffered a new injury, and the employers had knowledge of the second injury, medical expenses were allowed for 30 days after the second injury.

Where an employé was injured, and reported the injury to the foreman at 8 o'clock the following morning, and was advised by the foreman to see a doctor, the employer was liable for medical bills arising out of the accident, not to exceed \$200. *Eide v. Horn*, Bulletin No. 1, Ill., p. 44; *City of Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847.

⁸¹ Where emergency treatment is imperative, as where a skull is fractured, the employé is entitled to the expense incurred, even though the employer had no opportunity to tender treatment by his own physician. *Travelers' Insur. Co. v. Spaulding & Bros.*, 1 Cal. I. A. C. Dec. 575. The Compensation Act contemplates that adequate treatment be provided by the employer. The most important treatment at the time of the injury is to ascertain the nature and extent of the injury, and where a fracture is involved this can seldom be done with adequate appliances, such as facilities for taking X-ray photographs, and an employé is justified in going at once to where a correct diagnosis of his case can be made. *Miller v. Aetna Springs Co.*, 2 Cal. I. A. C. Dec. 781. An injured employé is justified in seeking emergency treatment on the day of his injury from any physician, unless specifically directed by the employer or insurance carrier, prior to securing such treatment, as to where to go. The cost of such emergency treatment is a proper charge against the employer or insurer. Where, however, medical treatment is tendered by them in seasonable time after the first aid, the injured employé must discontinue treatment by the physician called in and accept the treatment tendered by the employer, or else bear the cost of the treatment himself. *Robitson v. Panama Fruit Co.*, 1 Cal. I. A. C. Dec. 385.

⁸² See § 195, post.

⁸³ *Casanegri v. Madera Sugar Pine Co.*, 1 Cal. I. A. C. Dec. 589.

In *Pelham v. Burstein*, 1 Conn. Comp. Dec. 49, where there were no surviving dependents, an award was made for medical expenses.

ical services does not affect the right to such other compensation.⁸⁴ Where the employer and employé, both knowing that the status of the practitioner provided is not that of a regular physician and surgeon, but that he has had considerable practice as a bonesetter, agree in selecting him, they are estopped from later making the point that he is not a regularly educated physician.⁸⁵

Under the California Act, in ordinary cases of varicose ulcers, due to injury, the employé will be allowed medical treatment and appliances to cure and relieve from the effects of the ulcer, but will be allowed no disability indemnity. In cases of a more serious nature an award will be made for the cost of a radical operation to effect a permanent cure, where such an operation is deemed necessary by a competent surgeon, together with a disability indemnity while the employé is incapacitated as a result of the operation, but nothing further.⁸⁶ Under a provision of the Kansas Act which contemplates no compensation for medical attendance except where the workman dies, a deduction should be allowed for an amount paid by the defendant to a physician for attending the employé.⁸⁷

A policy of insurance cannot be lawfully issued which eliminates the obligation of the insurance company to indemnify an employer who has performed the statutory duty to furnish medical, surgical, or hospital service. Nor can such insurance company, after having issued such a policy, lawfully enter into any collateral contract or agreement which in any way restricts or modifies the obligations assumed by it by the terms of the policy.⁸⁸ Employés of Ohio em-

⁸⁴ *Id.*; *Cochran v. Whiting Wrecking Co.*, 1 Cal. I. A. C. Dec. 186; *Ruprecht v. Red River Lumber Co.*, 2 Cal. I. A. C. Dec. 864.

⁸⁵ *Hodge v. Hoffman*, 1 Conn. Comp. Dec. 322.

⁸⁶ *Keen v. Scott Co.*, 2 Cal. I. A. C. Dec. 533.

⁸⁷ (Wk. Comp. Act, § 12, subd. e, and section 11, subd. a [3], as amended by Laws 1913, c. 216, § 5) *Cain v. National Zinc Co.*, 94 Kan. 679, 148 Pac. 251 (on rehearing; former opinion in 146 Pac. 1165).

⁸⁸ *Op. Atty. Gen. on Minn. Wk. Comp. Act*, Bul. 9, p. 12. See § 185, ante.

ployers who have elected to pay compensation direct are entitled to receive the same amounts to cover expenses for medical attendance as employés of those who have contributed to the state insurance fund are entitled to receive from the fund.⁸⁹ If a California employer is insured, his insurance carrier should inform him in advance exactly what he is to do in case of accident with reference to medical and hospital treatment. If he fails to follow the instructions so given, an issue may arise between the insurer and insured under the contract of insurance, but the rights of the injured employé are not jeopardized thereby.⁹⁰ A provision of the Oregon Act authorizing the Commission to provide hospital accommodations for workmen "who are entitled to benefits hereunder" does not apply to workmen injured before the approval of the Act.⁹¹ Where the employer is insured, the insurance company must reimburse him for the pecuniary loss sustained in case he himself has furnished services at his own expense, or make good the amount paid by the employer to his employé in a case where the employer has failed to furnish the services, and the employé has provided such services at the employer's expense. If the services have been seasonably furnished by the employer, the injured employé cannot, of course, recover anything for such items, either from the employer or the insurer.⁹²

§ 194. — Massachusetts

The obligation to furnish medicinal and hospital services for the first two weeks after the injury is imposed by the express words

⁸⁹ *Robison v. Newark Reflector Co.*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 167.

⁹⁰ *Scott v. Aetna Life Insurance Co.*, 1 Cal. I. A. C. Dec. 343.

⁹¹ Under Const. art. 4, § 1, providing that any Act referred to the people shall take effect and become a law when it is approved by a majority of the votes cast and not otherwise, *Workmen's Compensation Act*, § 23, authorizing the Commission to provide hospital accommodations, did not apply to a

⁹² *Op. Atty. Gen. on Minn. Wk. Comp. Act*, *Bul.* 9, p. 14.

of the Massachusetts Act. This duty must be performed, or reasonable efforts made to that end, before the statutory obligation is satisfied.⁹³ "Furnish" means to provide or supply. Its significance may vary with the connection in which it is found. As said by the Supreme Judicial Court, it is used here to describe a duty placed on the insurer respecting a workman who receives "a personal injury arising out of and in the course of his employment." Such a person manifestly is presumed by the Act to be under more or less physical disability, and hence not in his normal condition of ability to look out for himself. The word "furnish" in such connection imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief. Reasonably sufficient provision for rendering the required services must, of course, be made. Then either express notice must be given to the employé, or there must be such publication or posting of the information as warrants the fair inference that knowledge had reached the employé. If the insurer has made adequate arrangements for the care of those to whom the duty is owed in the event of injury, and then by conspicuous notices posted in places frequented by the employé, in a language capable of being read by him, has given full information of that fact, and directions as to the steps to be taken by the injured employé in order to avail himself of such arrangements, a very different question is presented than that which is presented when this is not done. This might go a long way toward proving compliance with the requirements of the statute. But where notice, though posted in front of the place where the employé works, is not such as to challenge his attention, he being an illiterate foreigner, and the notice being in the English language, it is insufficient, though it would have been sufficient if he had been able to read the

workman injured before approval of the Act at a referendum election on November 4, 1913. *Salem Hospital v. Olcott*, 67 Or. 448, 136 Pac. 341.

⁹³ In *re Panasuk*, 217 Mass. 589, 105 N. E. 368.

English language. The insurer has readily accessible means of ascertaining the nationality of employés insured by it and their degree of intelligence. If among them are those who cannot read or speak the English language, this circumstance requires greater effort on its part in order to comply with the statute.⁹⁴

§ 195. Failure or neglect of employer—Procurement of services and treatment by employé

The duty of employers to furnish their own surgeon is a correlative of their right to do so.⁹⁵ The employer's failure to promptly provide proper medical or surgical treatment renders him liable for the reasonable value of such services procured by the employé,⁹⁶

⁹⁴ *Id.*

⁹⁵ *Vaughn v. American Coal Co.*, 1 Conn. Comp. Dec. 617.

⁹⁶ Where the employer and insurer neglect to provide surgical treatment reasonably required, and the injured employé procures such treatment, his claim therefor should be allowed. (*Wk. Comp. Act*, §§ 15a, 34, subd. 2) *Mass. Bonding & Insur. Co. v. Pillsbury*, 170 Cal. 767, 151 Pac. 419. If an employé who has elected to come under part 2 is injured while working for an employer also under part 2, it is the duty of the employer to furnish such services (those specified in section 18 of the Act) as may be reasonably required at the time of the injury, and thereafter during the disability of the injured employé, but not exceeding 90 days. If the employer fails to furnish the injured employé with such services, the employé can procure the same and recover the value thereof from his employer, not exceeding, however, \$100, or in special cases \$200. *Op. Atty. Gen. on Minn. Wk. Comp. Act*, Bul. 9, p. 14. Where the employer has notice or reason to believe that medical and surgical treatment is necessary, and does not seasonably offer the same, he will be liable for the expenses of such treatment necessarily incurred by the injured employé within 90 days of the accident. *Peres v. Wand*, 1 Cal. I. A. C. Dec. 607. The law places the obligation upon the employer to provide necessary medical and surgical attendance, and knowledge of the accidental injury of an employé and the reasonable opportunity given to provide the requisite treatment are sufficient to charge the employer, neglecting to provide it, with the reasonable expense incurred by the employé in that behalf. *Gardiner v. State of Cal. Printing Office*, 1 Cal. I. A. C. Dec. 21. Where an employer, knowing of an injury to an employé at the time it was received, but believing it to be caused by disease, and not by accident, fails to provide medical treat-

provided the employé's conduct in respect to reporting his injury and related matters has not been unreasonable, in view of his in-

ment or to notify his insurance carrier, and it is found later that the injury was caused by accident, the employé is entitled to have paid by the insurance carrier the reasonable value of medical service and hospital treatment furnished to her by physicians of her own choice. *Loustalet v. Metropolitan Laundry Co.*, 1 Cal. I. A. C. Dec. 318.

Where an employer did not furnish any medical service to the injured employé, who obtained it for himself, the workman was entitled to reimbursement to the amount of such services made necessary by the injury. *Ducy v. American Mut. Liab. Insur. Co.*, 2 Mass. Wk. Comp. Cases, 513 (decision of Com. of Arb.). A foreigner, who was unable to read, write, or understand the English language, received a personal injury, and reported it to his foreman. No information was given him as to his rights with regard to medical attendance, nor was any effort or offer of medical attendance made by his employer, or any representative of the employer or insurer. It appeared in evidence that a certain typewritten notice in English was posted near the place where the employé performed his work. He afterwards called in a physician of his own selection, and the insurer declined to pay the bill, and also asked for a ruling that the Committee of Arbitration had no jurisdiction over a dispute concerning the nonpayment of a bill for medical services. It was held that the insurer was required to pay the physician's bill. *Panasuk v. American Mut. Liab. Insur. Co.*, 2 Mass. Wk. Comp. Cases, 338 (decision of Com. of Arb., affirmed by Indus. Acc. Board, also by Sup. Jud. Ct., 217 Mass. 589, 105 N. E. 368). The employé received a serious injury, but no attempt was made by either the insurer or employer to furnish medical attendance of any kind, though the employé was sent home in a carriage supplied by the employer, and nothing was said to her about medical attendance. Upon her arrival home she sent for a physician, a specialist in injuries such as she had sustained. He gave her skillful and helpful treatment, and presented a reasonable bill for the services rendered. The Committee of Arbitration held that the insurer did not furnish medical attendance, and that he must pay the bill of the physician. *Flanagan v. American Mut. Liability Insur. Co.*, 2 Mass. Wk. Comp. Cases, 441 (decision of Com. of Arb., affirmed by Indus. Acc. Bd.).

In *Pampuro v. Murray Bros.*, 1 Conn. Comp. Dec. 674, where the employer's physician, being called twice by the employé because the injured member he had been treating had become swollen, refused to attend, saying it was unnecessary, and the employé then procured his own physician, without any further notification to his employer, the employer was held liable for the expense of the employé's physician. In *Vaughn v. American Coal Co.*, 1 Conn. Comp. Dec. 617, it was held that where the employer was tardy in providing a physician for a serious case, and then provided a physician for one occasion only,

telligence and other circumstances of the particular case.⁹⁷ The employer must, upon the happening of an accident, at once instruct the employé regarding the medical and surgical treatment to be fur-

allowing the employé to remain in ignorance of his rights and duties, and on finding that another physician had been engaged, and being notified that he would drop the case if they so required, declined to disturb the situation, the employer was liable for the expense incurred. In *Coller v. Donohue*, 1 Conn. Comp. Dec. 654, where the employer knew that the employé had been hurt, but took no steps to provide a physician, he was held liable for medical expense incurred by him. Where the employers did not furnish the necessary medical, surgical, and hospital treatment, taking the position that the workman was not under the Act at the time of the accident, such action was neglect and refusal such as renders them liable for the expense incurred by the employé. *Vojacek v. Schlaefer*, Rep. Wis. Indus. Com. 1914-15, p. 8.

Competent physician. In *Reed v. Orient Music Co.*, 1 Conn. Comp. Dec. 36, it was held that a chiropractor was not a competent physician for the employer to provide to care for his employés. Where he furnished a chiropractor, who after three treatments discharged the employé, telling him he was able to work, and the employé continued to receive treatment from his own physician, the employer is liable for the reasonable cost thereof. In this case Commissioner Chandler said: "The notion of competency, when embodied in a legislative act, connotes conformity to some prevailing standard. * * * There are numerous schools and cults enjoying limited patronage and making divers claims of ability to alleviate pain and cure disease, whose merits it is not necessary for me to consider. * * * When * * * the employer, operating under this statute undertakes to provide an exponent of any such school or cult as 'competent,' and the question of competency has to be passed upon by the Commissioner, the measure of competency then becomes the prevailing standards of society, not the judgment or convictions of the [employer] however sincerely or disinterestedly exercised. * * * While it is not without the limits of possibility that some person or group of persons, either by reasoning on theoretical grounds, or by experimentation, or even accident, might discover a new and better method than that generally practiced and taught, such a contingency is highly improbable, and the employer under this Act who provides a practitioner of any such unusual method, contrary to the prevailing standards of society and the preference and consent of the injured employé, fails to conform to the provisions of section 7 of part B of the Act."

⁹⁷ In *Philp v. International Silver Co.*, 1 Conn. Comp. Dec. 448, where the employer put notices containing warning against danger of blood poisoning from a scratch and directing workmen to report at once, the notices being printed in English, in the pay envelopes, and a Greek workman, unable to read, speak, or understand English, did not go to a doctor until two or three

nished. He must specifically instruct what to do and to whom to report. If the employé is not so instructed, and secures treatment on his own behalf, the employer is liable for the reasonable value of such treatment, even though he was ready and desirous of furnishing medical aid according to his own plans.⁹⁸ Wherever a large employer has provided no adequate hospital facilities for serious cases, the California Commission will sanction the taking of employés so injured out of the hands of the employer's physician and placing them in a proper hospital and under the care of a proper physician.⁹⁹ A definite offer is required of the employer.¹ If he

days after the injury, and, aside from showing his finger to the foreman, did not report the injury for some time, it was held, in view of his lack of intelligence, his conduct was not unreasonable, and that the employer was liable for medical expenses. In *Forte v. Waterbury Mfg. Co.*, 1 Conn. Comp. Dec. 685, where, though the employer maintained an emergency hospital, it was not shown that any rules had been passed or brought to the attention of the workmen requiring report of injury to such hospital, and an illiterate foreigner reported his injury to his foreman the day after, and that he was receiving medical attention therefor, but no offer of medical services was made to the employé, nor did the foreman report the injury to the proper officers, it was held that the employé had given sufficient notice, and his medical expense was awarded. In *Reese v. Yale & Towne Mfg. Co.*, 1 Conn. Comp. Dec. 154, it was held that where a workman told his foreman of an injury to his foot immediately, and on going to his employer's emergency room and seeing the shades drawn and the door closed, supposed the room was closed because it was a holiday and only a few of the men were working, and then went home, and summoned his own physician that night, he was justified in so doing, and the employer was held liable for his medical expense.

⁹⁸ *Deneny v. Panama-Pacific International Exposition Co.*, 1 Cal. I. A. C. Dec. 109.

⁹⁹ *Campbell v. L. E. White Lumber Co.*, 4 Cal. I. A. C. Dec. 33.

¹ Where an employer does not definitely or clearly notify an injured employé, at a time when the employé is mentally competent to make decisions, that he would furnish medical and hospital service free of expense to the employé, and it does not appear that the employé knowingly rejected any such offer, the employer is liable for the expense of medical and hospital treatment incurred by the employé. *Trueblood v. County of Los Angeles*, 2 Cal. I. A. C. Dec. 988. In *Bradley v. Waterbury Clock Co.*, 1 Conn. Comp. Dec. 179, it was held that where the plaintiff gave no notice of the injury, a slight scratch,

does not offer or furnish the services in a seasonable time, the employé must not delay in procuring them himself.² The fact that it cannot be known until some time after the injury which of two employers is responsible does not relieve the responsible employer from providing necessary medical treatment after he has notice or knowledge of the injury.³ The employer is liable for all reasonable consequences of his neglect to furnish the services, such as infection resulting from poor treatment applied by the employé himself,⁴ incompetency of the physician the employé selects,⁵ and infec-

which became infected and necessitated the amputation of parts of the third and little fingers, until after he was taken to the hospital, but, on then giving notice, the employer took no action, nor made any offer of medical treatment, such employer is liable for the reasonable expense incurred, more than a passive willingness to furnish treatment being required of him.

² In delaying surgical treatment for more than two months after the injury, applicant not only jeopardized her own interests, but the interests of her employer, and in fact slept upon her own rights to demand medical and surgical treatment at the expense of her employer, and so forfeited them. *Ash v. Barker*, 2 Cal. I. A. C. Dec. 577.

³ *Foley v. A. T. Demarest & Co.*, 1 Conn. Comp. Dec. 661.

⁴ Where disability was aggravated by conscientious, but improper, treatment given the injury by the injured employé herself, and infection resulted, which would have been avoided had the employer promptly furnished medical services, the employer was liable for the medical expenses consequent upon the aggravation. *Forgues v. Southern Pacific Co.*, 2 Cal. I. A. C. Dec. 1038.

⁵ Where a surgeon of applicant's own selection does not diagnose the case correctly upon first examination, the employer is not relieved of liability for the results of such mistake by not having furnished the treatment. *Mitchell v. Occidental Forwarding Co.*, 2 Cal. I. A. C. Dec. 336. Where an injured employé is treated by an incompetent physician not licensed to practice in the state, and the treatment given the employé makes his injury worse, or causes permanent disability, and the employer has had sufficient opportunity to provide competent medical aid, and has failed to do so, the employer must compensate his injured employé for all disability caused by his injury, including the aggravation thereof by malpractice. Employers and insurance carriers must not sleep on their rights to designate the treatment that is to be had, and if they are negligent or careless in arranging for treatment, they cannot be absolved from the consequences of their neglect. *Stockwell v. Waymire*, 1 Cal. I. A. C. Dec. 225.

tion due to delay and uncertainty as to what physician he should call.⁶ Where an employer or insurance carrier consents to the employé obtaining his own physician, it is liable for the reasonable cost of his services,⁷ even though the assent be only passive.⁸ But if services are procured unnecessarily, when another good physician is in charge or is offered, the employer is not liable.⁹ Nor is he lia-

⁶ Where an injured employé, failing after notice to his employer to receive medical assistance, goes first to one physician, and then to another, and then to a physician in a third town, in uncertainty what to do, and because of this indecision the infection requires amputation of the arm at the elbow, instead of merely a finger, the employer is responsible for the disability resulting and for the medical and surgical expense. *Sams v. Komas & Dorros*, 2 Cal. I. A. C. Dec. 285.

⁷ Where the employé, with the consent of his employer, selected a physician and was treated by that physician practically until his recovery, the insurance carrier could not then substitute its physician against the wishes of the employé. *Fly v. San Diego Transfer Co.*, 2 Cal. I. A. C. Dec. 714. Where an insurance carrier discovers that an injured employé of its insured is being treated by his own physician, and offers to pay the bill when rendered if it is in accordance with the fee schedule of the Commission, and the physician subsequently renders a bill to an extent beyond that authorized in the fee schedule, such insurance carrier has waived its right to insist upon treatment of the injured employé by physicians of its own choice, and is liable for the reasonable value of the services of the physician procured by the employé. *Devlin v. Smith*, 1 Cal. I. A. C. Dec. 418.

⁸ Where an employé was injured, and upon notifying the employer was asked if he wanted to go to a certain hospital for treatment, to which he replied that he would go to his own doctor, in the absence of any dissent, the employer was liable for medical services rendered by the doctor of the employé's selection. *Read v. Bowman*, 2 Cal. I. A. C. Dec. 681.

⁹ *Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, 96 Atl. 1025.

In *Wyrwas v. Bigelow-Hartford Carpet Co.*, 1 Conn. Comp. Dec. 326, where the employer's physician rendered first aid treatment to the injured workman, and then, sending him home, went for additional materials, but on arriving at the house, prepared to give further treatment, was told another physician had been summoned, and that his services were not required, it was held the employé had exercised his option to pay and provide his own physician, and that the employer was not chargeable for medical expense (Wk. Comp. Act, pt. B, § 7). In *Searles v. Connecticut Co.*, 1 Conn. Comp. Dec. 97 (affirmed by the superior court on appeal), it was held that where an em-

ble for doctor and hospital bills where he is given no chance to name the attending physician.¹⁰

§ 196. Where physician is furnished by employer

If the physician which the employer selects prematurely discharges the employé as cured, and the employé procures further treatment, the employer must stand the expense thereof.¹¹ The

ployé, suffering with a hernia sustained by accident, went to his employer's physician, and was told that an operation was advisable and necessary, but said physician refused to perform or direct an operation because the workman had had a prior hernia, and he, suffering great pain, went to his own physician, and after notifying his employer that he was about to undergo an operation, and receiving no offer of treatment, had the operation performed by his own physician, he was justified in so doing, and the employer was liable for the reasonable expense incurred.

Where an employé told his employer's representative that he was suffering some physical ailment, refused an offer of the services of one of the company doctors, went home, and was examined by his own physician, and was later operated on in pursuance of his own arrangements, he could not hold the employer liable for the amount of such expense; that right being given only where the employer neglects or refuses to provide the services. *Reseberg v. Hamilton Mfg. Co.*, Rep. Wis. Indus. Com. 1914-15, p. 14.

¹⁰ *Bakiewicz v. National Brake & Electric Co.*, Rep. Wis. Indus. Com. 1914-15, p. 11.

In *Sirica v. Scovill Mfg. Co.*, 1 Conn. Comp. Dec. 171, it was held that where the workman understood that he could have his injured hand treated at an emergency hospital provided by his employer, and could have the services of a skilled physician free of charge, but declined and selected his own physician, he must stand his own expense.

¹¹ Where an employé is treated by physicians indicated by the employer, or his insurance carrier, is discharged by them as cured, and subsequently obtains treatment from other physicians, being in fact afflicted with traumatic neurosis after the date of his discharge, the employer or insurer is liable for the reasonable cost of the subsequent treatment. *Hakala v. Jacobsen-Bade Co.*, 1 Cal. I. A. C. Dec. 328. Where an employé is given treatment by a physician designated by the employer, or the latter's insurance carrier, and the physician discharges the employé as cured, but thereafter the employé obtains treatment from another physician of his own choice for the same injury, and it is shown to the satisfaction of the Commission that the disability had not terminated at the time of his first discharge, he is entitled to an award for

employer is also responsible for a mistaken diagnosis of the case by its own physician.¹² It is within the province of a surgeon placed in charge by the employer to make all necessary arrangements for such treatment, consultation, and assistance as in his judgment are reasonably required to cure and relieve the patient from the effect of the injury, and the expense is properly chargeable against the defendant.¹³ In the absence of evidence which clearly establishes serious malpractice, it will be assumed that injured persons will recover as speedily when in the care of one surgeon as another, where such surgeons are of standing in the community and are regularly licensed to practice their profession, and their credentials show that they have had regular training to prepare them for doing surgical work.¹⁴ The amount of services furnished by the em-

the reasonable value of surgical treatment furnished by the second physician. *Douglas v. J. & J. Drug Co.*, 2 Cal. I. A. C. Dec. 164.

¹² While an employer or insurance carrier is justified in acting upon the recommendation of its physician that no disability was sustained by an employé claiming to have been injured, the employé is not deprived of his right to compensation and medical attention at the expense of the employer, where such diagnosis was in fact erroneous, and the employé was in fact disabled. *Wayman v. Huff*, 1 Cal. I. A. C. Dec. 358. Such advice does not absolve the employer or his insurer from the consequences of a mistaken diagnosis and consequent inadequate treatment. The rights of the injured employé are not lost by reason of the mistakes of physicians whom the employer or his insurance carrier designate to furnish medical treatment. *Johnson v. Pacific Surety Co.*, 1 Cal. I. A. C. Dec. 560.

¹³ *Swain v. Pacific Telephone & Telegraph Co.*, 2 Cal. I. A. C. Dec. 360. When the employer's physician in charge of an injured employé, not desiring to assume sole responsibility of treating a grave injury, acquiesces in the suggestion of the family of the injured employé to call in consultation another surgeon, and co-operates with and operates under the direction of the surgeon so called, the necessity of such assistance is presumed. *Id.*

¹⁴ *Tennant v. Ives*, 2 Cal. I. A. C. Dec. 862.

In the absence of convincing testimony, the Commission will not presume that, if the employé had been in the hands of a physician furnished by the defendants, he would have been more quickly cured than if in the hands of any other surgeon authorized to practice in the state. *Telford v. Healy-Tibbitts Cons. Co.*, 3 Cal. I. A. C. Dec. 41.

ployer after the statutory time limit has expired is not to be deducted from the disability compensation.¹⁵ It may be of advantage to the employer to continue medical treatment in an endeavor to gain a cure and relieve himself from further disability indemnity payments. If he desires to do so, the California Commission has decided that it will use its power to require the employé to submit to such treatment, and will authorize a suspension of payments on refusal to accept or co-operate with the treatment thus offered.¹⁶

§ 197. Change of physician or service

An employer or insurer may demand a change of physicians at the close of the emergency treatment immediately following the injury, or within a reasonable time thereafter, but cannot delay for several days beyond that, and until arrangements for the continuation of treatment have been entered into, and then make such demand, particularly where the patient is seriously ill.¹⁷ If the services are offered by the employer within a reasonable time, and are

¹⁵ The California Commission is without authority to deduct from the compensation due an injured employé the cost of medical services furnished at the expense of the employer after the expiration of 90 days from the date of the accident. While the employer is under no duty to furnish medical treatment after 90 days, the cases in which the Commission can allow deductions from compensation due are limited by section 29 of the Act to the situations mentioned therein, which do not include the present case. *Cypher v. United Development Co.*, 1 Cal. I. A. C. Dec. 425.

¹⁶ *Hakala v. Jacobsen-Bade Co.*, 1 Cal. I. A. C. Dec. 328.

¹⁷ *Jameson v. Bush*, 1 Cal. I. A. C. Dec. 507. In case of an injury of serious character, that physician should be summoned by either party who can be the most quickly obtained, and he should render such first aid as the necessities of the case require. This is a proper charge against the employer and its insurance carrier, no matter by whom furnished. Immediately thereafter, the employer should instruct his injured employé what physician is to have charge of his case, and to what hospital he shall go, if any. *Scott v. Aetna Life Insur. Co.*, 1 Cal. I. A. C. Dec. 343. If they fail to furnish a physician seasonably, they cannot require the employé to change physicians when they get ready to furnish one. The employer has a right to select the physician. He must take the initiative, and must act promptly in so doing. If

refused by the employé, the employer is released from liability for medical and surgical treatment.¹⁸ Where an employer or insurance carrier offers an employé his choice of a truss or an operation for

he fails to do so, he cannot afterward require the injured person to change his physician. *Bassett v. Thomson Graf Edler Co.*, 1 Cal. I. A. C. Dec. 60.

Where an employé was not instructed at once by the employer as to where to go for medical treatment at the expense of the employer, and before receiving such notice has incurred reasonable expenses for treatment and made arrangements for its continuance, he is not required, upon receipt of notice by the employer, to dismiss his own physician and put himself under the medical attention offered by the employer. *Denehy v. Panama-Pacific International Exposition Co.*, 1 Cal. I. A. C. Dec. 109. Where an employé is seriously injured, and a physician is called at the instance of the employer, and performs a necessary capital operation, and the insurer does not tender a physician until after the operation has been performed, it is too late for the insurance carrier to insist upon a change of physicians. It is an unreasonable request and an improper undertaking to change physicians immediately after a capital operation has been performed. Such change should be made only when it becomes manifest that the operating surgeon is wholly unfit to take care of the case. *Matteoni v. Roberts & Clark*, 1 Cal. I. A. C. Dec. 356.

¹⁸ *Kelley v. Pacific Electric Ry. Co.*, 1 Cal. I. A. C. Dec. 150.

Where proper medical and surgical services to relieve an injured employé were at once tendered by the defendants and refused without adequate cause, the employé thereupon procuring the services of his own physician, he was not entitled to have any allowance made for the charges incurred by him for services rendered. *Eby v. Weaver*, 2 Cal. I. A. C. Dec. 715. If an injured employé continues with medical treatment of his own selection after the employer's insurer has seasonably tendered proper medical attention, he must stand the cost himself. On the other hand, if he continues such treatment by arrangement of the insurance company, the duty of the latter to pay for such treatment arises through its contract with the physician, and is not a liability imposed by the Compensation Act. The Industrial Accident Commission is therefore without jurisdiction to render an award for the reasonable value of services in either event. *Ely v. Maryland Casualty Co.*, 1 Cal. I. A. C. Dec. 335. Where the employer or his insurance carrier notifies an injured employé seasonably that he will be treated free of charge by the physician furnished by the former, and direct him to go to such physician, the employé is not justified in going elsewhere for medical aid, and the employer and his insurer are not liable for the cost of any medical attention given the injured workman by any other physician. *Newkirk v. Union Ice Co.*, 1 Cal. I. A. C. Dec. 166. Where an employé is tendered and refuses surgical treatment which would necessitate hospital care, and later is treated by his own physician

the treatment of his hernia, and a truss is chosen, but before a required approval of this settlement by the California Commission the employé requests an operation, and it appears that he is entitled to relief, he will be required to refund the cost of the truss before being tendered an operation at the expense of the insurance carrier.¹⁹ If they furnish medical treatment, and the employé becomes dissatisfied and forsakes the treatment for that of his own procuring, unless the furnished treatment is inadequate or inefficient, he must bear the expense he incurs;²⁰ but, if the services are inefficient or

and incurs necessary hospital expenses, the employer is not liable for such expenses. *Koponen v. Union Lumber Co.*, 2 Cal. I. A. C. Dec. 1055.

Where a clerk was asked to bind a slight laceration of an injured hand of an employé, and subsequently infection occurs, and with knowledge that there was an employer's physician available, the employé's mother calls in a different physician to treat the hand, and a few days thereafter, when the employer received notice of the injury, offer was made of the services of the company physician, which the employé refused, the employer is not liable for the medical expense incurred. *McKnight v. American Can Co.*, 2 Cal. I. A. C. Dec. 427.

¹⁹ *Taylor v. Spreckels*, 2 Cal. I. A. C. Dec. 62.

²⁰ The right to medical and surgical treatment is forfeited if the injured man, without warrant, forsakes the medical service supplied by the employer. *Casanegri v. Madera Sugar Pine Co.*, 1 Cal. I. A. C. Dec. 589; *Evans v. Pacific Coast Casualty Co.*, 1 Cal. I. A. C. Dec. 140.

Where the employer, the county of Los Angeles, had placed the applicant in the county hospital after his injury, and he later became dissatisfied and left the hospital without the consent of the employer, the county is not liable for the reasonable value of medical treatment furnished by other than its own hospital or physicians. *Van Lanker v. County of Los Angeles*, 1 Cal. I. A. C. Dec. 107. Where it is shown that the injured employé, while receiving hospital and medical treatment furnished by the employer, and, contrary to the wishes of his employer and the advice of the attending physician, gives up such treatment and secures elsewhere and of his own selection other medical treatment, he is not entitled to reimbursement for the charges of the services incurred by him. (Commissioner French dissented on the ground that the facts to him showed an implied permission to secure medical treatment elsewhere.) *O'Connor v. Yosemite Lumber Co.*, 2 Cal. I. A. C. Dec. 334. Where it is understood by the workmen of the defendant employer generally, and by the applicant in particular, that the employer maintains a hospital upon its grounds in which all the employés are entitled to treatment free of charge for

inadequate, the employé is justified in changing to his own physician, and will be allowed the reasonable cost of the services.²¹

accidental injuries received by them, and the applicant after treatment at such hospital becomes dissatisfied and secures other treatment of his own choice, without the consent of the employer, he is not entitled to an award for the cost of the treatment rendered by his physician, in the absence of proof that the employer's hospital service was inefficient or inadequate. *McBride v. Union Iron Works*, 1 Cal. I. A. C. Dec. 376. Where the cost of maintaining a hospital for the treatment of injured employés upon the grounds of the employer is wholly or partly defrayed by an association of the employés, or by small assessments deducted from the wages of the employés, and an injured employé receives treatment from such hospital for a time, but becomes dissatisfied and procures treatment of his own choice, the employer is not liable for such treatment. The employer having designated such place as a place where his employés can obtain treatment free of cost to them (as far as the actual cost of the treatment is concerned), the only question is as to the duty of the employer to refund the cost of treatment to the hospital association. While this is a fit subject for legislative control, it is one with which the Industrial Accident Commission has nothing to do as the law now stands. *Id.* The failure of the employer to disclaim liability for treatment elsewhere on being informed of it does not make him liable for such outside treatment, in the absence of express consent to its being furnished at his expense. *Id.* Where an injured employé becomes dissatisfied with the medical treatment furnished by his employer, and procures other treatment of his own selection, and is thereafter operated upon by his own physician, and it is claimed by the employer that such operation was unjustifiable, and unnecessarily prolonged the workman's disability, such claim is not a defense against liability for compensation for the whole period of disability actually sustained. It is, however, a good defense against liability for the cost of medical treatment procured by the applicant, following his refusal of further treatment supplied by the defendant. *Tennant v. Ives*, 2 Cal. I. A. C. Dec. 169.

²¹ The California Commission will exact from the physician and surgeon whom the employer selects the utmost care and attention of persons injured by accident. But testimony of injured persons as to neglect or poor treatment by physicians or at hospitals supplied by the employer, unsupported by evidence of physicians in charge, is to be carefully scrutinized, as persons in pain and bedridden are wont to regard all hospitals as places of torment. Unless such poor treatment be clearly established, an employé abandoning medical attention or hospital accommodations furnished by his employer does so at his own cost. *Kelley v. Pacific Electric Ry. Co.*, 1 Cal. I. A. C. Dec. 150. Where the employé is dissatisfied with the advice given him by the

The employer's assent to a change of physicians does not bind the insurer, where the original services were furnished by it.²²

physician or surgeon first selected by the insurance company or employer, and after the communication of such dissatisfaction he is directed to another surgeon, who is found to be out of town, and thereupon he selects his own family physician, he is entitled to reimbursement for the cost of such services. *Mass. Bonding & Insur. Co. v. Pillsbury*, 2 Cal. I. A. C. Dec. 480, 170 Cal. 767, 151 Pac. 419. Where an employé, who had sustained a fracture of the right clavicle, was on the day following put by the employer in the care of a physician and told that some one else would be called, if desired, but such physician who attended him, because of lack of facilities in the country town, had no means of determining, and did not definitely determine, the nature and extent of the injury, and the employé, after remaining for two days longer, without receiving or asking for further medical treatment, left the town and entered a hospital in San Francisco, where the fracture was discovered and expert treatment given, the employer was liable for such treatment. *Miller v. Ætna Springs Co.*, 2 Cal. I. A. C. Dec. 781. Where the medical treatment accorded an injured employé was shameful and utterly inadequate, and likely to result in death, and the refusal of the physician of the employer to permit the employé to go elsewhere for treatment was unjustifiable, the employer must pay the full medical bill incurred by the employé in securing proper treatment. *Campbell v. L. E. White Lumber Co.*, 3 Cal. I. A. C. Dec. 33.

In *Patralia v. American Brass Co.*, 1 Conn. Comp. Dec. 412, where the physician furnished by the employer to treat claimant's hernia supplied a truss, and, that giving no relief, furnished a second, and told claimant to go back to work in a couple of days, and he, trying to work, was unable to do so, and was then denied the privilege of seeing the physician because of the expense, whereupon he submitted to an operation by a surgeon of his own choice, it was held the employer had failed to promptly provide proper treatment, and was liable for the expense of the operation incurred by the employé.

An employé, not being satisfied with the medical services furnished by the insurer's physician, engaged his own physician and claimed compensation on account of his liability to his physician for the services rendered him. It was agreed that the employé was justified in changing physicians, and was held that he was entitled to a reasonable allowance for the services he secured. *O'Brien v. Employers' Liab. Assur. Corp. Ltd.*, 2 Mass. Wk. Comp. Cases, 398 (decision of Com. of Arb.).

²² Where an injured employé, while under treatment by a physician and at a hospital admittedly supplied by the insurance carrier, abandons such treatment without adequate cause or justification, and without the knowledge of the insurance carrier, and procures at his own expense other hospital and

§ 198. Expense for which employer is liable

Medical and surgical services have been held to include dental work,²³ and first aid treatment,²⁴ and expense necessarily incurred by him in furnishing two physicians,²⁵ and securing a physician from a distance;²⁶ but not treatment by a Christian Science practitioner,²⁷ or the expense of an artificial limb.²⁸ The fact that the

medical treatment, with his employer's consent, the insurance carrier is not liable for the medical and hospital charges incurred by him, notwithstanding his employer's consent. *Spring v. J. G. Miller Co.*, 3 Cal. I. A. C. Dec. 4.

²³ Where the accident causes the loss of several teeth, but no other injuries or loss of working time, the employé is entitled to compensation for the reasonable value of dental services rendered to cure and relieve him from the consequences of the accident. *Day v. Lincoln Sightseeing Co.*, 1 Cal. I. A. C. Dec. 269.

²⁴ An employé must not refuse first aid treatment at the hands of the person designated by the employer to render first aid services and provided with

²⁵ In *Wessman v. Bloomfield*, 1 Conn. Comp. Dec. 336, it was held that, while the Act requires the furnishing of only one physician, if the employer sees fit to furnish two different physicians or surgeons, he must pay them both.

²⁶ In *Hodge v. Hoffman*, 1 Conn. Comp. Dec. 322, where the employer consulted the employé as to what surgeon should be called to treat the fracture, and in pursuance of this discussion secured a surgeon from a town 23 miles away, the employer was liable for the reasonable value of the services rendered, though their cost was considerably more than they would have been had a surgeon been secured in the town where claimant resided.

²⁷ Where the ailments of the applicant indicated necessity for surgical treatment, and she had relied for two months largely upon treatment by a Christian Science practitioner, regardless of what may be said in favor of treatment at the hands of Christian Science practitioners for other ailments occasioned by industrial accidents, the California Commission cannot hold that such treatment may reasonably be required to cure and relieve as these words are used in the Compensation Act. *Ash v. Barker*, 2 Cal. I. A. C. Dec. 577.

As to competency of physician furnished or offered, see § 195, note 96, ante.

²⁸ In *Pedroni v. C. W. Blakeslee & Sons*, 1 Conn. Comp. Dec. 670, it was held that the medical, surgical, and hospital expenses required of the employer by section 7 of part B of the Act did not include the expense of an artificial limb, where the injury necessitated the amputation of the natural limb.

claimant was not sent to a hospital, such treatment not being necessary in view of the extent of the injury, does not entitle him to recover the value of his board during incapacity.²⁹ The California Act limits the extent of the medical services for which the employer is liable to 90 days, and after that time the Commission can neither compel the employer to furnish, nor the employé to accept, such services.³⁰ The Michigan limit is 3 weeks, commencing when it is first needed,³¹ and in Iowa there is a double limit of \$100 in cost or two weeks in time.³² In Minnesota the court has no right to

the proper equipment for this purpose, merely because such person is not a physician or person skilled in such treatment. The law of California requires every considerable employer of labor to keep in his camp a first aid kit, in order that any injury may be washed with antiseptic solution and dressed in a way to keep dirt out of it and avoid infection, and it is the duty of every injured employé to submit to that treatment until the services of a physician can be obtained. But where an employé refuses first aid treatment tendered him, for the reason that no physician was present to administer it, the employer is not discharged thereafter from his duty to furnish treatment by a physician. *Gregory v. Merrill Metallurgical Co.*, 1 Cal. I. A. C. Dec. 408.

²⁹ *Hurlowski v. American Brass Co.*, 1 Conn. Comp. Dec. 6.

³⁰ (St. 1913, c. 176, § 15 [a]) *Burkard v. San Francisco Breweries, Ltd.*, 2 Cal. I. A. C. Dec. 365.

Where, owing to mistaken diagnosis and inadequate treatment, the 90-day period during which medical treatment can be required of the employer or insurance carrier has elapsed without effecting a cure, the Commission has no power to require the employer or insurance carrier to furnish further treatment, nor can it require the injured person to devote any part of his disability indemnity to procuring treatment. *Johnson v. Pacific Surety Co.*, 1 Cal. I. A. C. Dec. 560.

There was a similar decision under the Roseberry Act. *Marshall v. Ransome Concrete Co.*, 2 Cal. I. A. C. Dec. 923.

³¹ Claimant was injured while in the exercise of his ordinary duties, but serious effects did not develop until more than eight weeks after the accident occurred. Payment for medical and hospital services was disputed on the

³² An employer is required to furnish the injured employé with reasonable surgical, medical, and hospital services and supplies, but he need not furnish any in excess of a cost of \$100 or for more than two weeks following the necessity for medical attention. *Op. Sp. Counsel to Iowa Indus. Com.* (1915) p. 30.

award medical expenses in excess of \$100, unless a special application is made for the excess, and then not in excess of \$200.³³ The provisions made by the Wisconsin Act for medical aid are probably more liberal than the provision made by any other Compensation Act in the United States.³⁴ The time limit under this Act is 90 days. Where part of the medical expense which is sought to be charged to the employer was incurred after the 90-day maximum period had expired, and the remainder without knowledge on the part of

ground that they were rendered more than three weeks after the accident, but the Board held that an employer must furnish the injured employé medical and hospital service, not exceeding three weeks in point of time, beginning at the time the injury requires it. (Wk. Comp. Act, pt. 2, § 4) *In re Hart*, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 18.

³³ State ex rel. Anseth v. District Court (Minn.) 158 N. W. 713.

³⁴ In the report of the Wisconsin Industrial Commission, 1914-15, it is said: "The Wisconsin Act provides more liberal medical aid than any other Compensation Act in the United States. In this respect the law is eminently wise. On economic grounds alone it is cheaper for the employer to save an arm by an expensive operation than to pay indemnity for the loss of an arm. It is for the interest of the employer to give the best medical attendance; that it is also for the interest of the workman and of the community goes without saying. There is reason to believe, however, that medical service in this state is costing too much. The Commission's records indicate that physicians and hospitals received over \$400,000 for services rendered under the Compensation Act during the last fiscal year. This is nearly one-half the total amount paid directly to injured workmen and their families. It is probable that the Compensation Act has very greatly increased the income of the medical profession as a whole. Hundreds of serious injuries which doctors formerly treated on a charity basis are now paid cases. This is as it should be. The medical profession ought not to be called upon to take care of injured workmen for less than the service is fairly worth. On the other hand, since the pay is certain and the number of cases large, the fees should not be exorbitant. A great number of physicians, including the recognized leaders of their profession, have shown a spirit of co-operation and have rendered highly skilled service at very moderate cost. Some, however, have been disposed to feel that the employer or the insurance company is rich and to render bills based upon that assumption. Chapter 241 of the Laws of 1915 gives the Commission power to pass upon the reasonableness of medical and hospital bills in disputed cases. It is hoped that a basis of charge can be agreed upon which will be fair to all parties concerned."

the employer that the workman had sustained an accident, or that he was in need of treatment, the claim will be dismissed.³⁵ The date of the injury, from which the employer is liable for medical expense under these Acts, is the time when the injury becomes effective, and causes illness.³⁶

The liability of the employer is limited to services required by the accident, and if the accident causes an extension of a prior condition and disability, and an operation is performed to cure the entire abnormality, the employer is only liable for that portion of the expense which is required to repair the injury caused by the accident.³⁷ He is liable only for "reasonable expense," which is to be the ordinary cost of like treatment,³⁸ and not increased because

³⁵ *Oberts v. Wisconsin Telephone Co.*, Rep. Wis. Indus. Com. 1914-15, p. 24.

³⁶ *Barton v. N. Y., N. H. & H. R. R. Co.*, 1 Conn. Comp. Dec. 227. In *Peterson v. H. B. Beach & Sons*, 1 Conn. Comp. Dec. 469, it was held that an employé is entitled to 30 days' medical treatment in addition to the day on which he is injured. In *Kiniavsky v. New Haven Carriage Co.*, 1 Conn. Comp. Dec. 119, it was held that the day of injury is not to be counted in figuring the 30 days for which the employer must furnish medical treatment; he is liable for 30 full days, beginning the day after the injury.

³⁷ *Loustalet v. Metropolitan Laundry Co.*, 1 Cal. I. A. C. Dec. 318.

³⁸ The amount allowed for medical and hospital services will in no case exceed such as is ordinarily charged and paid for similar services in the community where they are rendered. In *re David Bruns*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 5. Expenses incurred by an employé in excess of sum awarded were here declared unreasonable and not given. *United States Fidelity & Guaranty Co. v. Rosenbach*, 1 Cal. I. A. C. Dec. 92.

Reasonableness of charges and expenses.—Reasonable medical charges for setting and treating two broken ribs would not exceed \$15. *Demott v. Stone & Webster Construction Co.*, 1 Cal. I. A. C. Dec. 187. Where a son gives up employment in which he is earning \$3 a day to care for his injured father, from May 28 to July 2, \$90 is the reasonable value of such services. *Kelley v. Manley*, 2 Cal. I. A. C. Dec. 318. Where the physician in charge, while convinced of the futility of an operation to save the workman's life, calls in three other physicians to consult with as to the proper course, the workman dying next day without the performance of an operation, a charge of \$10 each for the consulting physicians was a reasonable charge and such services were such "as may reasonably be required." *Schlegel v. Frankfort General*

it is he or the insurer who must pay.³⁹ The reasonableness of a charge depends on the position of the average employé, not on the

Insur. Co., 2 Cal. I. A. C. Dec. 491. In *Razziuni v. John Salter & Son*, 1 Conn. Comp. Dec. 687, a physician's charge of \$3 for dressings of a fracture of the great toe, accompanied by infection, done at the home of the patient a mile and a quarter from the physician's office, he furnishing all gauze and other materials, was held reasonable and approved. In *Swanson v. Sargent & Co.*, 1 Conn. Comp. Dec. 433, where it was necessary, in order for the claimant to reach the office of the physician furnished by his employer, to hire a horse and wagon, and later to pay car fare, such expense was held reasonably included under "medical aid," and was chargeable to the employer (Wk. Comp. Act, pt. B, § 7). In *Beinotovitz v. National Iron Works*, 1 Conn. Comp. Dec. 623, where it appeared highly probable that, had the employé been paying his own bill, he would have been sent to the public ward of the hospital, instead of a semiprivate, and would there have received the services of a physician without extra charge, and treatment entirely adequate to the nature of his injury, the surgeon's bill for attendance upon him was disapproved; it being especially emphasized that it was the surgeon claiming remuneration who had sent him to the semiprivate ward. In *Johnson v. Spring Glen Farm, Inc.*, 1 Conn. Comp. Dec. 593, where the physician called up the president of the respondent company shortly after he was taken to the hospital, and discussed the treatment to be provided, the president agreeing that the workman be sent to a private ward, where his surgeon's bill would be extra, a bill of \$100 for the operation and \$1 each for 54 dressings was held reasonable and approved. In *Christophson v. Turner Construction Co.*, 1 Conn. Comp. Dec. 591, a hospital bill for \$259.36, including a special male nurse, rendered necessary because the patient was for a time violently insane, and attendance and room at \$18 per week for 3 ⁴/₇ weeks, was approved, in addition to the physician's bill. The injury consisted of a broken collar bone and a fracture at the base of the skull, and by excellent care provided the employé entirely recovered. It appearing that the hospital made no profit, and that the exigencies of the particular case called for unusual treatment, the charge was held reasonable. In *Barton v. N. Y., N. H. & H. R. R. Co.*, 1 Conn. Comp. Dec. 227, it was held that, while ordinarily the public ward in a hospital is ample provision of hospital treatment, where such public ward is filled, it is reasonable for the workman to be treated in a semiprivate ward costing \$3 per week more. In *Peterson v. H. B. Beach & Sons*, 1 Conn. Comp. Dec. 469, on the approval or disapproval of a physician's

³⁹ The amount allowed for reasonable expenses of medical and surgical treatment should be the fair value of the service as such—neither more nor less because of the employer being liable therefor. *City of Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847.

financial position of the particular man treated.⁴⁰ As said in a Connecticut case: "The amount to be charged by the physician is not to be determined by what the insurance company or the industrial corporation is able to pay. It is not to be determined by the phy-

bill of \$82 rendered for 41 treatments to the workman's eye in 27 days, the Commissioner by agreement of the parties made a private investigation, and finding that, though oculists always made a book charge of \$2 for such treatments, in cases like the present, where the workman's wages were low, they discounted the bill or rendered some treatments free, reduced the bill to \$50. In *Wessman v. Bloomfield*, 1 Conn. Comp. Dec. 336, where, though the bill of \$26 was not in the abstract improper, it appeared that deductions were usually made in case of patients in poorer circumstances, a deduction of \$5 was made by the commissioner. In *Hodge v. Hoffman*, 1 Conn. Comp. Dec. 322, where it appeared from medical testimony that, had a surgeon been secured in the town where the claimant resided, \$5 would have been a reasonable charge therefor, but the surgeon agreed upon had to travel 23 miles, and that, by reason of the special nature of his business, any loss of business due to his absence would be serious, \$25 was held to be a reasonable charge for each treatment, and was awarded, together with \$50 for the initial treatment in reducing the fracture. In *Mazura v. Elington*, 1 Conn. Comp. Dec. 296, where a physician gave preliminary treatment and then took the workman to a hospital, it was held that at the time claimant entered the hospital he came under the charge of the physician there, and the bill of the former physician for services rendered to the employé in the hospital was disallowed. In *Malone v. H. R. Douglas, Inc.*, 1 Conn. Comp. Dec. 297, where the claimant had been treated in a public ward of the hospital, a surgeon's bill for \$100 for a hernia operation was disallowed, on the ground that the public generally in other than compensation cases, when treated in the public ward, were not required to pay extra for operations. While it was admitted that, if the employé had been in a private ward and paying the bill himself, the amount would have been reasonable, it was found that the charges in the public ward covered the cost of any necessary operation, and that the employer could not be required to pay more than the public generally for like treatment. In *Prohaska v. American Typewriter Co.*, 1 Conn. Comp. Dec. 116, a surgeon's bill of \$155 for two amputations of a phalange of a finger, and 35 dressings, was held unreasonable and reduced to \$98. Fifty dollars was a reasonable fee for the service required in an operation for the radical cure of hernia, the physician who performed the service rendering a bill for \$100. *Shaw v. Mass. Employés' Insur. Ass'n*, 2 Mass. Wk. Comp. Cases, 501 (decision of Com. of Arb.).

⁴⁰ *Greenock v. Drake*, 2 Cal. I. A. C. Dec. 379.

sician's estimate of the disposition and social qualities of the insurance adjuster or attorney. It is not to be determined by what the particular physician whose bill is being considered has been in the habit of charging and collecting in like cases. A physician who is treating a compensation case is supposed to charge and collect from the employer or the employer's insurer as much, and only as much, as the profession in general in his locality would ordinarily charge and collect from a workman of like standard of living, if he was injured at home and had to pay his own doctor's bill."⁴¹ The burden of proof to establish to a reasonable certainty the reasonableness of charges for medical and surgical treatment is on the employé;⁴² but judicial notice may be taken of such information as to such charges as is a matter of general public knowledge.⁴³

In California the question of reasonableness is determined, in the event of disagreement, by the medical director of the Commission,⁴⁴ on the basis of the schedule of reasonable cost prepared by the Commission.⁴⁵ The Commission may require that itemized

⁴¹ Peterson v. H. B. Beach & Sons, 1 Conn. Comp. Dec. 469.

⁴² City of Milwaukee v. Miller, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847. The reasonableness of an employé's claimed expenses reasonably incurred for medical and surgical treatment being disputed by credible evidence, and not supported by other than opinion evidence of the person most interested, the trial tribunal should apply ordinary common sense and experience to the matter—not being bound, or necessarily efficiently influenced, by the verification of such interested one—and fix the allowable amount at such sum as appears to it to be reasonable, and, where the claim is obviously exorbitant, should not allow it, in the whole, regardless of how strongly supported by evidence from the mouth of the interested party. *Id.*

⁴³ In Armenis v. Kerr, 1 Conn. Comp. Dec. 338, it was held that the Commissioner may take judicial notice of such information as to medical charges as is a matter of general public knowledge, and the reduction of the physician's bill to accord with the standard of living and position of the workman, was based upon such judicial notice.

⁴⁴ Simpson v. Paraffine Paint Co., 1 Cal. I. A. C. Dec. 76.

⁴⁵ The reasonable value of services rendered an injured employé by a physician of his own selection will be determined by the Commission upon

statements of such services be rendered, to insure that such charges are made in accordance with its schedule.⁴⁶ Where an injured employé is treated by a physician of his own selection, and has contracted to pay, or has paid, for the services of such physician a sum in excess of that prescribed by this schedule, he is entitled to be reimbursed only to the extent of the amount allowed by the schedule. As to the balance the Commission cannot give any relief as between the physician and injured employé. The question is one of private contract, to be determined elsewhere.⁴⁷ A further sum for medical aid will be allowed under the Illinois Act where it is shown that it was necessary to procure the service of a physician other than that furnished.⁴⁸

§ 199. Recovery by physician

Where a physician is entitled to an allowance for the reasonable value of medical services rendered to an employé, he may apply for the determination of his claim;⁴⁹ but he cannot recover where the expense for treatment was not incurred by or on behalf of the injured employé.⁵⁰ Nor can he recover for services to which the employé is otherwise entitled, or which are free to him.⁵¹ His right

the basis of the fee schedule adopted by it, which schedule has been prepared to represent the reasonable cost of treatment rendered an injured man of an earning capacity of approximately \$1,000 per year if there were no insurance carrier or employer to pay his expenses. *Devlin v. Smith*, 1 Cal. I. A. C. Dec. 418.

⁴⁶ *Conner v. Acme Cement & Plaster Co.*, 1 Cal. I. A. C. Dec. 143.

⁴⁷ *Devlin v. Smith*, 1 Cal. I. A. C. Dec. 418.

⁴⁸ *Cegrelski v. Lehon Co.*, Bulletin No. 1, Ill., p. 35.

⁴⁹ *Fly v. San Diego Transfer Co.*, 2 Cal. I. A. C. Dec. 714.

As to reasonableness of charges, see § 198, ante.

⁵⁰ *Mahan v. Frankfort General Insurance Co.*, 2 Cal. I. A. C. Dec. 530.

⁵¹ Where a member of a fraternal order, having sustained an injury, called upon his lodge physician for such medical services as he was entitled to receive free of charge by reason of his membership, and received such

to a lien, and to recover, where he is engaged by the employé, is dependent upon the right of the employé.⁵²

services, since no expense had been incurred by the employé, the physician rendering the services had no right of recovery against the insurance carrier for the reasonable value thereof. *Mahan v. Frankfort General Insur. Co.*, 2 Cal. I. A. C. Dec. 530. Where the injured employé, having paid a regular monthly assessment of 75 cents to a physician stationed at a work camp, entitling him to treatment when injured, receives such treatment from such physician, and without any expense incurred other than the prior assessments, the employer is not liable to the employé for the value of such treatment, there being no medical expenses incurred within the meaning of the Act. *Dahl v. Jensen*, 2 Cal. I. A. C. Dec. 749.

⁵² The right of a physician hired by an employé to secure from the employer or the latter's insurance carrier the reasonable value of services rendered the injured employé is derived through the right of the employé to compensation, and where the employé is not entitled to compensation for disability or medical treatment, his physician cannot recover in an action against the employer directly. *Newkirk v. Union Ice Co.*, 1 Cal. I. A. C. Dec. 166. Where the employer is not liable for medical services rendered an injured employé because of the failure of the employé to give sufficient opportunity by notice or demand, no lien can be declared in favor of the physician upon the compensation due the employé. *Green v. Burke*, 1 Cal. I. A. C. Dec. 591. The Act does not authorize a lien where the medical services for which a lien is sought were rendered after the expiration of ninety days after the injury. (Wk. Comp., etc., Act Cal. § 29, subd. [b] [2]). *Id.*

In *Coughlin v. R. Wallace & Sons*, 1 Conn. Comp. Dec. 652, where the employé engaged his own physician, and the employer, on being notified two days later, made proper arrangements with its own physician to treat the injury, the employé's physician could not recover against the employer for services rendered. In *Shapiro v. New Haven Carriage Co.*, 1 Conn. Comp. Dec. 508, it was held that where a workman requiring treatment for stomach trouble had his injured finger treated at the same time, without reporting his injury to his employer in any such way as to indicate that medical treatment was necessary, the physician could not recover against the employer. In this case the employé made no claim for such compensation. In *Ross v. Aberthaw Construction Co.*, 1 Conn. Comp. Dec. 533, where it was shown that the employé was intoxicated on the morning of the injury, and quarrelsome, and had in the course of an altercation with the fellow workman who struck him called such workman a vile name, it was held that, since the injury did not arise out of and in the course of his employment, there could be no recovery against the employer by the physician for his services. In *Racujja*

In California, in order to make a claim for services in treating an injury a lien against the award, it is essential that notice in writing be given to the employer of the claim.⁵³ An award directing that a physician's fee be paid directly is invalid, where it does not fix the amount of the fee, or name the person entitled thereto, or show that the required written notice of claim was given.⁵⁴

Where an injured workman was taken by the employer's foreman to a physician, who informed the insurance carrier that he was treating the workman, and made his charge against the carrier for the services, and not against the employé, the California Commission had no jurisdiction to award a lien to the physician upon compensation due the applicant; the physician's compensation being a question of contract between the physician and the employer.⁵⁵

v. National Folding Box & Paper Co., 1 Conn. Comp. Dec. 522, where, without neglect or wrongdoing on the part of his employers in providing medical and surgical treatment, the employé incurred a debt of \$30 for the services of another physician, such physician cannot recover against the employer, where that employer had neither expressly nor impliedly consented to his employment. On application to the superior court for execution of an award against the employer for medical services made in *Vaughn v. American Coal Co.*, 1 Conn. Comp. Dec. 617, Judge Case declined to authorize an execution in favor of the physician, except in favor of the actual claimant, the employé.

A doctor, who attends an employé of a farmer for injury sustained, cannot claim for medical services rendered, as a farmer is not operating under the provisions of the Act. *Poling v. Brown*, Bulletin No. 1, Ill., p. 21.

A physician has no direct cause of action against an employer for services rendered an injured employé, even though the value of such services has been fixed by the Commission and made a part of the award, and the employé has attempted to assign that portion of the award to his physician. He has only a lien upon the award. *Bloom v. Jaffe*, 94 Misc. Rep. 222, 157 N. Y. Supp. 926.

⁵³ *McCay v. Bruce*, 2 Cal. I. A. C. Dec. 975.

⁵⁴ (Wk. Comp. Law, St. 1913, p. 294, § 29) *Pacific Coast Casualty Co. v. Pillsbury Indus. Acc. Com.*, 171 Cal. 319, 153 Pac. 24.

⁵⁵ *Paul v. Johnson Bros.*, 3 Cal. I. A. C. Dec. 32.

§ 200. Services of nurse or member of the family

The employer or his insurance carrier are only chargeable for the services of nurses where the physician in charge either authorizes, requires, or consents to the employment of a nurse.⁵⁶ Expense for services of a nurse, as such, after the limit of time fixed by statute, are not chargeable, nor at all thereafter, except by allowance of the maximum percentage of disability indemnity.⁵⁷ A claim by a member of the family of the injured employé, not a professional nurse, for remuneration for nursing done for the employé, will not be made a charge against the employer or insurance carrier. To do this would open a door for unskillful treatment and charges that should not be made a burden upon industry. It is usually to be presumed that members of the family and relatives will, through their affection, render any aid possible to the injured employé, without cost.⁵⁸ But, in case of injury requiring hospital

⁵⁶ *Hughes v. Degen Belting Co.*, 1 Cal. I. A. C. Dec. 203.

⁵⁷ *City of Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847.

⁵⁸ *Wayman v. Huff*, 1 Cal. I. A. C. Dec. 358.

A claim for nursing by the injured employé's mother not allowed, where the attending physician did not order nursing. *Forbes v. County of Humboldt*, 2 Cal. I. A. C. Dec. 887. Where the injured employé is nursed by his sister at her house, where he boarded, it being a case which could be adequately treated at home without a trained nurse, the sister is not entitled to an allowance against the employer for such nursing, she not being a trained nurse. *Jolley v. O'Shea*, 2 Cal. I. A. C. Dec. 569.

Deputy Commissioner William C. Richards, of Syracuse, disallowed a claim presented by a wife for nursing her husband, where she was not a graduate nurse. (Wk. Comp. Act, §§ 13, 24) *Dunham v. Phelan & Sullivan*, *The Bulletin*, N. Y., vol. 1, No. 9, p. 30.

No allowance for nursing services will be made, where they were rendered by a member of the family, who rendered them in connection with her duties as housekeeper. In *re David Burns*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 5.

The common rule in the law of negligence that the wrongdoer cannot mitigate his liability, by taking advantage of relief furnished by one's wife, family, friends, or otherwise, has no application to cases under the Workmen's

treatment, an award will be made for services rendered and appliances furnished to the injured employé by another member of his family in lieu of such treatment and in accordance with the consent and direction of the physician in charge, especially where the member rendering such services gives up his regular employment, in order to do so.⁵⁹ Also where the attending physician advises, but does not insist, that the patient be sent to a hospital, and the family or dependents do not have him removed, and there is no specific demand that he be sent to a hospital, or a specific refusal to do so, the insurance carrier is not exempted from the requirement to pay for the reasonable value of services rendered to the patient at his home.⁶⁰

DIVISION II.—FUNERAL EXPENSES

§ 201. Provisions allowing funeral expenses

A provision making the employer liable for funeral expenses does not take away the right to the custody and burial of the dead, or authorize the employer to contract for funerals with an undertaker in such a way as to arbitrarily fix the number of carriages or to decide in certain cases that no carriages shall be provided. These are matters for the family or next of kin to decide and arrange for, provided the expense is reasonable and does not exceed the limit fixed by

Compensation Act. That eliminates all penalizing features, and limits compensation to the injured person, aside from indemnity for disability, to expenses or liabilities actually incurred. *City of Milwaukee v. Miller*, 151 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847.

⁵⁹ *Kelley v. Manley*, 2 Cal. I. A. C. Dec. 318.

Where an injured employé required a nurse's care, and was cared for by the woman keeping the boarding house where he lived, she not being a trained nurse, but giving up her work to attend him, the employer is chargeable for an allowance for three weeks' nursing at \$12 per week. *Dexter v. People's Cloak & Suit Co.*, 2 Cal. I. A. C. Dec. 567.

⁶⁰ *Hughes v. Degen Belting Co.*, 1 Cal. I. A. C. Dec. 203.

law.⁶¹ No award can be made for services rendered by a relative of the deceased workman in connection with his funeral, where it does not appear that any money was expended by him.⁶² The present New Jersey Act provides for burial expenses in all cases, but before the amendment of 1914, these expenses were not allowable in that state unless there were no dependents.⁶³ Where the applicant has not personally incurred the burial expenses for the burial of the deceased employé, and his award as a dependent is small, and the undertaker has already received more than the reasonable burial expense fixed by the California Act, none of a large balance due will be recognized as a lien on the award.⁶⁴ The provisions of this Act as to liens for burial expenses do not allow a lien or an order for the direct payment to the undertaker of cost of a

⁶¹ *Konkel v. Ford Motor Co.*, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 29.

A workman was killed while at work and left no dependents. In accordance with section 8, pt. 2, of the Compensation Act, his employer was liable for the funeral expenses, not exceeding \$200. He made a contract with an undertaker, the applicant, to furnish and conduct the funeral for \$75, and further agreed to pay \$15 for the cemetery lot. Applicant presented a bill for \$104, stating that the extra \$14 was for three carriages furnished for friends of the deceased who attended the funeral. The employer refused to pay the extra \$14, claiming that it was an overcharge, and that the agreement excluded carriages. The Board held that the right to the custody and burial of the dead belonged to the family, next of kin, near relatives, and friends of the deceased, and that the Compensation Act does not assume to take away or interfere with this important right. *Id.*

⁶² *Tirre v. Bush Terminal Co.*, 172 App. Div. 386, 158 N. Y. Supp. 883.

⁶³ Prior to the amendment of 1914 to the Workmen's Compensation Act, funeral expenses were not recoverable, when there are dependents to whom compensation has been awarded. (P. L. 1914, p. 499) *Hammill v. Pennsylvania R. R. Co.*, 87 N. J. Law, 388, 94 Atl. 313; *Taylor v. Seabrook*, 87 N. J. Law, 407, 94 Atl. 399. P. L. 1911, p. 134, as amended by P. L. 1913, p. 302, § 2, pars. 11, 12, 14a, did not obligate the employer to pay burial expenses, where there were dependents to whom compensation had been awarded. *Central R. Co. of N. J. v. Kellett*, 86 N. J. Law, 84, 90 Atl. 1005.

⁶⁴ *Heffernan v. Morse Detective & Patrol Service Co.*, 2 Cal. I. A. C. Dec. 364.

burial lot and transportation of the remains in an amount exceeding \$100, unless the person entitled to the death benefit so requests.⁶⁵ Where there are no surviving dependents, an award for burial expenses may be made in Connecticut.⁶⁶

⁶⁵ (Wk. Comp. Act, § 15 [c]) *Sigman v. Columbia Oil Producing Co.*, 3 Cal. I. A. C. Dec. 2.

⁶⁶ *Pelham v. Burstein*, 1 Conn. Comp. Dec. 49.

CHAPTER VIII

SETTLEMENT OF CONTROVERSIES

Section	
202.	Article I.—Settlement by agreement.
203-208.	Article II.—Remedies.
209.	Article III.—Legal proceedings in general.
210-215.	Article IV.—Notice and claim.
216-222.	Article V.—Evidence.
223-236.	Article VI.—Proceedings before special tribunal.
237-250.	Article VII.—Proceedings in court.
237-238.	Division I.—Original proceedings.
239-245.	Division II.—Review of decision of special tribunal.
246-250.	Division III.—Review by higher court.
251-252.	Article VIII.—Costs and attorney's fees.

ARTICLE I

SETTLEMENT BY AGREEMENT

Section	
202.	Amicable settlements.

§ 202. Amicable settlements

When amicable agreements in settlement of injuries are made under statutory authority, the terms of the statute must be complied with.¹ In some states it is essential that such agreements be

¹ The statute recognizes and provides for agreements in settlement of injuries between the association and the employé, if entered into in accordance with the terms of the Act. (St. 1911, c. 751, pt. 3, § 15; part 3, § 4, as amended by St. 1912, c. 571, § 9; and pt. 5, §§ 2, 3) *Pigeon's Case*, 216 Mass. 51, 56, 102 N. E. 932, Ann. Cas. 1915A, 737; *Cripp's Case*, 216 Mass. 586, 588, 104 N. E. 565, Ann. Cas. 1915B, 828; *Barry v. Bay State St. Ry. Co.*, 222 Mass. 366, 110 N. E. 1031.

In *Miller v. N. Y., N. H. & H. R. R. Co.*, 1 Conn. Comp. Dec. 349, where the injured workman had signed a release in consideration of \$400, relinquishing all claims against the respondent, but such amount was not in accord with the Compensation Act, an award was made for the proper amount, deducting therefrom the \$400 already paid to the claimant; the Commission hold-

presented to a court or commission and approved before they become valid and binding.² Reasonable settlements, made in good

ing that the Compensation Act was part of the contract of employment, and that any settlement made must be strictly in accordance with the Act (Part B, § 2, Wk. Comp. Act).

In *Haberski v. Peck, Stowe & Wilcox Co.*, 1 Conn. Comp. Dec. 278, it was held that a Commissioner may reopen a claim settled by voluntary agreement, where it appears that such agreement does not conform to the Act. In this case it was held sufficient under the Act, and further compensation was denied.

² Where an insurance carrier makes a cash settlement with an injured employé, in satisfaction of all claim as indemnity for permanent partial disability, such agreement is voidable, unless made with the approval of the California Commission, and will be disregarded when in opposition to the provisions of the Compensation Act. *Fontes v. Scott's Express Co.*, 2 Cal. I. A. C. Dec. 829. The injured employé, in spite of any unapproved agreement, can at any time claim and have his full rights determined by the Commission. An unapproved settlement will expose the employer or insurance carrier to the risk of again paying compensation in accordance with the provisions of the Compensation Act. *Id.* The execution of a release in full settlement of liability for compensation by an injured employé, in consideration of the payment of a sum of money, is not binding in the absence of approval thereof by the Commission. If there is no such approval, an application may be subsequently filed, and the total amount which may be due to the applicant under the law will be awarded, deducting therefrom any payments previously made. *Barozzi v. Bertin & Lepori Co.*, 1 Cal. I. A. C. Dec. 484.

Under section 23 of the Illinois Act, an employé cannot waive any compensation he may be entitled to, without the approval of the Board. If an employé under the Act has sustained an injury, and has not been paid all the compensation he is entitled to, any settlement made by him, or release executed, without the approval of the Board, is not binding. *Cass v. Great Lakes Dredge & Dock Co.*, Bulletin No. 1, Ill., p. 99; *Fitt v. Central Illinois Public Service Co.*, Bulletin No. 1, Ill., p. 129. Such release acts only as a receipt, and the amount paid should be deducted from the total amount payable. *Fitt v. Central Illinois Public Service Co.*, Bulletin No. 1, Ill., p. 129. Section 18 of the Act, which provides, "All questions arising under this Act, if not settled by agreement of the parties interested therein, shall, except as otherwise provided, be determined by the Industrial Board," is qualified by section 23, which prohibits waiver of any provisions of the Act, except with the approval of the Board. *McClennan v. Allith Prouty Co.*, Bulletin No. 1, Ill., p. 116. No settlement wherein any amount of compensation is waived, will be final without such approval. *Id.*

Inasmuch as the settlement made with the applicant was made without ref-

faith and not in violation of the statute, will ordinarily be upheld,³ but a settlement which exposes the employé to loss or hardship and is not in the public interest will not be approved.⁴

erence to the Workmen's Compensation Act, such settlement would not become binding until approved by the Industrial Accident Board; but the amount will be treated as equitably applying upon the compensation to which she was entitled under the Act. *Marshall v. City of Detroit*, Mich. Wk. Comp. Cases (1916), 57.

In *State ex rel. Duluth Diamond Drilling Co. v. District Court of St. Louis County*, 129 Minn. 423, 152 N. W. 838, the Supreme Court said: "The statute contemplates that the court shall supervise and control all matters and proceedings under the Act. In case the parties effect an amicable settlement, such settlement must be presented to the court, and be approved by him as in accordance with the Act, before it becomes valid and binding."

Where an employer paid a workman's attorney \$25 as a compromise adjustment of his claim, \$15 of which was for medical services, such agreement did not release the employer under the Wisconsin Act for two reasons: First, that, the workman being a minor, the agreement could only operate to reduce the amount of his legal claim, without affecting the right itself; and, second, because it was not filed with the Commission for review as required by the Act. *McCutcheon v. Marinette, Tomahawk & Western R. R. Co.*, Rep. Wis. Indus. Com. 1914-15, p. 13.

³ "There is nothing in the Act to prevent an adult workman, before entering a claim, and before any weekly payment has been made, from coming to an arrangement, by way of compromise with his employer, to accept a sum of money in satisfaction of his claims." *Cozens-Hardy, M. R.*, in *Ryan v. Hartly* (1912) 5 B. W. C. C. 407, C. A. Where a workman, who had not claimed nor been given compensation for his injury, accepted a sum equal to a week's wages in satisfaction of his claim, he was entitled to do so. *Id.*

Approved settlements: A settlement whereby the workman received \$1,040.07 for the loss of an eye, due to a fragment of steel lodging in it while he was testing a rivet. *Southerland v. Cowell Lime & Cement Co.*, 2 Cal. I. A. C. Dec. 994. A settlement agreement to pay \$433.65 for medical expenses and \$11.25 weekly for 146 weeks, for a fracture of a workman's leg between the knee and ankle. *Pennington v. Geo. W. Pennington Sons, Inc.*, 2 Cal. I. A. C. Dec. 994. A compromise agreement whereby the claimant, a waitress, received \$100 for injuries in the thigh due to the accidental discharge of a rifle

⁴ The Commission, and not the employer or insurer, is by virtue of the Act made responsible for the execution of its provisions, and unless a settlement is in the public interest and does not expose the employé to loss or hardship, it will be disregarded whenever the public interest requires. *Fontes v. Scott's Express Co.*, 2 Cal. I. A. C. Dec. 829.

Relative to the agreement authorized by the Connecticut Act, Commissioner Beers said: "It is quite true that the agreement contemplated by the Compensation Act is not a compromise in the common-law sense of the term, and is not expected to follow a series of dickerings on one side and the other, where the claimant is trying to get as much as he can and the respondent is trying to get off as cheaply as possible. However, where parties appear by

by a fellow employé. *Curry v. Hull*, 2 Cal. I. A. C. Dec. 994. An agreement awarding the workman's dependent family \$3,125, in a lump sum, for his accidental death. *Clark v. Fruit Dispatch Co.*, 2 Cal. I. A. C. Dec. 993. *Connecticut*. In *Treiber v. Weibel Brewing Co.*, 1 Conn. Comp. Dec. 547, where the employé, suffering a strain of his back in the course of his employment, had for many years been subject to rheumatism and sciatica, and it was difficult to discover just how far the incapacity was due to one cause or the other, a compromise agreement for one-half average weekly wages for 10 weeks and full medical expense was approved. In *Daigle v. Steele & Johnson Mfg. Co.*, 1 Conn. Comp. Dec. 196, where the cause of the workman's death was exceedingly uncertain, and both parties agreed that it would be impossible to prove a causal connection between the injury and death, a compromise of \$5 per week for 38 weeks was approved. In *Trumbull v. Trumbull Motor Car Co.*, 1 Conn. Comp. Dec. 304, brought by the widow of respondent's employé, drowned by the sinking of the *Lusitania*, a settlement permitting the insurer to deposit with a trust company a lump sum equal to the present worth of the payments awarded, to be paid by them to the claimant as such payments fell due, was approved, and the amount of such lump sum determined. In *Allaire v. Copping*, 1 Conn. Comp. Dec. 288, where the claim made was of doubtful character, and both parties agreed that it would probably be impossible to prove any causal connection between the injury and employment, but respondent offered a lump sum of \$172.50 in compromise settlement of the claim, such settlement was approved. In *Flotat v. Union Hardware Co.*, 1 Conn. Comp. Dec. 5, it was held that, where the insurer agreed to pay the workman one-half his average weekly wages for a period of 9½ weeks as compensation for an accident whereby his thumb was slit half way to the first joint, this amount equaling that awarded by the schedule for the loss of one-half the first phalange of the thumb, such agreement should be approved. In *Coons v. John De Michiel & Bros.*, 1 Conn. Comp. Dec. 446, where claimant, an American 47 years of age and a man of intelligence, alleging loss of sight of his eye, but realizing the difficulty of proving that the loss was due to the injury received, agreed to accept \$450 in full settlement, such compromise was approved, though he would have been entitled to more, had he been able to prove his case.

As to release, see § 189, ante.

counsel, it is perfectly legitimate for them to make, under the advice of counsel and after a fair and frank statement to the Commissioner, agreements as to facts, and unite in requesting awards. In the process of making these agreements, it is perfectly legal and proper for counsel to bear in mind that a fact which cannot be proven does not for all practical purposes exist, and to a certain extent to estimate chances, and bear those chances in mind in taking certain positions as to the facts before a Commissioner. Any other rule would require a contest on each relevant point carried out to the bitter end, and would ignore that policy of give and take which is a proper incident, not only of most business transactions, but of most human transactions.”⁵ In a proceeding under this Act, where, owing to a mistake of facts, the insurer, not knowing that the claimant had returned to work, continued to pay compensation under a voluntary agreement for total incapacity, the amount so overpaid was ordered refunded.⁶

Under a statute providing that the compensation to be made may be determined by agreement, by arbitration, or, “in default of agreement or arbitration, be determined and enforced by action in any court of competent jurisdiction,” an effort to agree on compensation or procure it by arbitration is not a prerequisite to the bringing of an action to enforce it.⁷

Under the provision of the Wisconsin Act that “every compro-

⁵ *Fiorio v. Ferrie*, 1 Conn. Comp. Dec. 459.

⁶ *Brown v. Sheffield Scientific School*, 1 Conn. Comp. Dec. 419.

⁷ (Laws 1911, c. 218, § 36). The statute does not provide that an effort to agree or to procure an arbitration is a prerequisite to the bringing of an action. It is true that in most cases compensation is adjusted by agreement, but adjustment by either agreement or arbitration involves the voluntary action or consent of the parties, and nothing in the Act indicates that either is or can be compelled to adopt one method of adjustment rather than another, or that an effort to obtain one must be made before another is available. *Ackerson v. National Zinc Co.*, 96 Kan. 781, 153 Pac. 530; *Halverhout v. S. W. Milling Co.*, 97 Kan. 484, 155 Pac. 916. The phrase “in default of arbitration” means practically the same as though the words “in the absence or omission of an agreement or arbitration” had been used. *Id.*

mise of any claim for compensation * * * shall be subject to be reviewed by and set aside, modified or confirmed by the Commission upon application made within one year from the time of such compromise," where a compromise was agreed on and confirmed without a hearing, it could properly be set aside within a year, though the claimant, to secure a second award, proceeded as if making an original claim.⁸

The Michigan Act contemplates an agreement and settlement made without contingency or condition, and not one based on a possible or probable event that may render it inoperative.⁹ A settlement agreement procured through misrepresenting to the workman his legal rights may be set aside by the Industrial Board.¹⁰ An agreement between a workman and the employer's insurer, when entered into under this Act after ample opportunity for investigation, and approved by the Industrial Accident Board, and an order for compensation entered pursuant thereto, is conclusive, in a subsequent proceeding to terminate compensation, that the cause of the injury to the workman's eye was a splash of molten lead, and that the defect therein did not result from a cataract.¹¹

⁸ *Menominee Bay Shore Lumber Co. v. Indus. Com.*, 162 Wis. 344, 156 N. W. 151.

⁹ *Carpenter v. Detroit Forging Co.* (Mich.) 157 N. W. 374.

¹⁰ *Id.*

¹¹ (Pub. Acts 1912, Ex. Sess., No. 10) *Spooner v. Estate of P. D. Beckwith*, 183 Mich. 323, 149 N. W. 971.

ARTICLE II

REMEDIES

Section

- 203. Deprivation of other remedies.
- 204. Willful and intentional injuries.
- 205. Washington.
- 206. New York.
- 207. Arizona.
- 208. Election of remedies after event.

§ 203. Deprivation of other remedies

This legislation is usually substitutional, rather than supplemental or cumulative, and therefore exclusive¹² of other statutory¹³ and common-law remedies, so that, where the parties are subject

¹² The remedy afforded by the Workmen's Compensation Act, in cases where the employer and employé have elected to come within its provisions, is exclusive. (Laws 1911, c. 218, as amended by Laws 1913, c. 216) *McRoberts v. National Zinc Co.*, 93 Kan. 364, 144 Pac. 247; *Shade v. Cement Co.*, 92 Kan. 146, 139 Pac. 1193, Ann. Rep. Kan. B. of L. 1913, p. 184. The Legislature intended by this Act to take away from employés who become subject to its provision all other remedies against their employers for injuries happening in the course of their employment and arising therefrom, and to substitute for such remedies the wider compensation given by the Act. *King v. Viscoloid Co.*, 219 Mass. 420, 106 N. E. 988. Since the adoption of the Minnesota Compensation Act, the questions of liability and the amount thereof are to be determined by the Compensation Act. *Lindstrom v. Mutual S. S. Co. (Minn.)* 156 N. W. 669. The purpose and effect of the Workmen's Compensation Act is to control and regulate the relations between an employer and his employés. As between them the remedies there provided are exclusive, when both are under the Act at the time of the accident. *Smale v. Wrought Washer Mfg. Co.*, 160 Wis. 331, 151 N. W. 803. Where an employé is embraced within the provisions of the federal Compensation Act, and is injured, the time lost can only be paid in the manner and in accordance with the conditions named in that Act. (Dec. Comp. of Treas.) Op. Sol. Dept. of L. (1915) 785.

¹³ Where a deceased employé by his agreement, either express or implied, had accepted and become bound by the provisions of section 2 of the Workmen's Compensation Act (P. L. 1911, p. 136), his personal representatives cannot maintain an action under the Death Act (P. L. 1848, p. 151; 2 Comp.

to a Compensation Act, all their rights arising under it are to be settled by the agencies there provided, and not as in actions at common law.¹⁴ Acts held to be cumulative and alternative do not impair the workman's common-law remedy, except where he elects to receive compensation.¹⁵ But where both employer and employé have elected to come within and be bound by the provisions of such an Act, the action must be brought pursuant to and in accordance with its terms, while, when the employer has elected not to be bound, the parties are remitted to their actions at law and are governed in all respects by the rules and principles of law applicable to such actions, excepting alone as to the matter of the defenses of assumed risk, fellow servant, and contributory negligence.¹⁶ In some states, both the common-law action for damages and the

St. 1910, p. 1907) for damages for death, even though the only dependents decedent left surviving him were aliens, not residents of the United States. *De Biasi v. Normandy Water Co.* (D. C.) 228 Fed. 235; *Gregutis v. Waclark Wire Works*, 86 N. J. Law, 610, 92 Atl. 354.

¹⁴ *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1.

Plaintiff, having alleged that he has elected to apply to the Industrial Accident Commission for compensation, cannot bring an action under the Employers' Act, unless he shows by his pleading and proof that the Industrial Accident Commission has determined that the injury was caused in whole or in part by the failure of the employer to install and maintain the safety appliances required by that Act. *Jenkins v. Carman Mfg. Co.* (Or.) 155 Pac. 703.

¹⁵ The rights of the servant under this statute, and of the servant as an individual under the common law or the statutes, are alike remedies open to him. *Matter of Jensen*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276. The Act is but cumulative and alternative, and does not impair the latter remedy. The Act affects such remedy only when the individual as a servant elects to receive compensation under the Act. The reason for the statutory declaration as to election is founded upon the common-law rule that there should not be a double satisfaction for the same injury. *Walsh v. N. Y. C. & H. R. R. Co.*, 204 N. Y. 58, 62, 63, 97 N. E. 408, 37 L. R. A. (N. S.) 1137; *Gambling v. Haight*, 59 N. Y. 354; *Miller v. New York Rys. Co.*, 171 App. Div. 316, 157 N. Y. Supp. 200.

¹⁶ *Crooks v. Tazewell Coal Co.*, 263 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C, 304.

statutory right of action for death are abolished, where the Compensation Act affords a remedy, not only as against the employer,¹⁷ but as against a third person.¹⁸ It is otherwise where the Compensation Act affords no such remedy.¹⁹ The right to compen-

¹⁷ *Gregutis v. Waclark Wire Works*, *supra*.

Where, on the death of a workman, there is nothing to prevent the application of section 2, his administrator cannot sue the employer under the Death Act. (*Wk. Comp. Act N. J. § 2*) *De Biasi v. Normandy Water Co.* (D. C.) 228 Fed. 235.

¹⁸ The right of civil action for the death of a workman, where the accident occurs at the plant of the employer, is abolished by the Workman's Compensation Act, not only as against the employer, but as against a third person. (*Sess. Laws Wash. 1911, c. 74, §§ 3, 5*) *Meese v. Northern Pac. Ry. Co.* (D. C.) 206 Fed. 222. An action could not be maintained against the physician for aggravation of the injuries; such aggravation being covered by the compensation paid. *Ross v. Erickson Construction Co.*, 89 Wash. 634, 155 Pac. 153. An employé cannot hold the president of the corporation employing him individually liable for his injuries. *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154. The Act contains its own declaration of legislative policy, in reciting in section 1 that the common-law system, in dealing with actions by employés against employers for injuries received in hazardous employment, is inconsistent with the modern industrial conditions, uneconomic, unwise, and unfair, and that as the welfare of the state depends upon its industries, and even more upon the welfare of its workingmen, the state of Washington, in the exercise of its police and sovereign power, declares its policy to withdraw all phases of the premises from private controversy, regardless of questions of fault, and to the exclusion of every other remedy, proceeding, or compensation, except as provided in the act, "and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this Act provided." *Id.*

¹⁹ The Connecticut Act provides that any employer who shall not comply with the insurance requirements of the Act—i. e., either furnish proof of his financial ability to pay compensation direct to his employés, or file acceptable security guaranteeing the performance of his obligation, or take out insurance on his liability—shall be liable as he would be, had he not accepted part B, but does not relieve him from liability under part B to compensate his employé for injuries for which the latter could not recover at common law. (*Wk. Comp. Act, pt. B, §§ 30, 42*) *Bayon v. Beckley*, 89 Conn. 154, 93 Atl. 139. The right of a workman to recover for an injury not covered by

sation is purely statutory,²⁰ and therefore a deceased workman's administrator can sue under an Act only when authorized by statute.²¹

In Iowa, if the amount of damage sustained by the injured employé is in excess of the compensation paid, the injured employé may sue the third party for such amount, even though he has al-

the schedules of the Compensation Act remains the same as before passage of the Act. (Wk. Comp. Act, Laws 1914, c. 41, §§ 10, 11, 15) *Shinnick v. Clover Farms Co.*, 169 App. Div. 236, 154 N. Y. Supp. 423. The particular intent of the Legislature, exempting from the operation of section 1 of the Act employers who do not have in their employment more than five employés, controls the general provisions of that part of section 4 which declares that the provisions of section 1 shall be applied in all actions for damages against employers who are nonsubscribers to the association. In this view, section 4, being construed with section 2, should be interpreted to mean that the employés of nonsubscribing employers may recover judgment against their employers for all damages sustained by reason of any personal injuries received in the course of employment, or by reason of death resulting from such injury, and the provisions of section 1 of the Act shall be applied in all such actions, provided that such employers had in their employment more than five employés. This construction harmonizes the apparent conflict between the two sections and permits both to stand. (Acts 33d Leg. c. 179; *Vernon's Sayles' Ann. Civ. St. 1914*, §§ 5246h-5246zzzz) *Hodges v. Swastika Oil Co.* (Tex. Civ. App.) 185 S. W. 369. The law does not in any way attempt to abridge the remedies which an employé of one person may have at law against a third person for a tort which such third person commits against him, unless it be such a case as is provided for by section 2394—6, St. 1913 (chapter 599, Laws 1913). *Smale v. Wrought Washer Mfg. Co.*, 160 Wis. 331, 151 N. W. 803. An employé, injured on his employer's premises by the negligence of the employer, but under such other circumstances as to prevent recovery under the Compensation Act, may nevertheless bring an action under the common law against his employer for such injury. *Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 11, p. 24.*

An employé, whose ear was bitten by a horse, so that amputation was necessary, was entitled to sue for damages, since such injury was not covered by the provision made in the Compensation Act for "other cases in this class of disability." *Shinnick v. Clover Farms Co.*, *supra*.

²⁰ *Massachusetts Bonding & Ins. Co. v. Pillsbury*, 170 Cal. 767, 151 Pac. 419.

²¹ (Wk. Comp. Act N. J.) *De Biasi v. Normandy Water Co.* (D. C.) 228 Fed. 235.

ready recovered full compensation in accordance with the provisions of the Iowa Workman's Compensation Act.²²

In Massachusetts, a minor employé cannot waive his parent's right of action for his injuries.²³

The Illinois Workmen's Compensation Act of 1913, being elective, did not repeal the Mining Act, and therefore did not take away the right of action under the Mining Act.²⁴

The Factory Act of Kansas is not repealed by the Compensation Act. It remains in full force, but it cannot be invoked by an employé to whom the benefits of the Compensation Act are available, and who has elected to accept them. Where, however, the employer has elected not to accept the latter Act, the employé is free, notwithstanding his own acceptance, to bring an action under the Factory Act.²⁵

Where a workman was hired in New Jersey after the taking effect of the New Jersey Workmen's Compensation Act of 1911, c. 95, and nothing was done by either the employer or employé to avoid the application of the compensation plan, he could recover only under the Workmen's Compensation Act, not under the New Jersey law permitting a larger possible recovery.²⁶

²² Op. Sp. Counsel to Iowa Indus. Com. (1915) p. 32. The injured employé may proceed against both the employer for his compensation and against the third person who caused the injury to recover damages, and the amount of damages which he may recover from such third person is not limited by the amount of compensation to which he is entitled under the Workmen's Compensation Act. (Code Supp. 1913, § 2477m6) Id.

²³ (St. 1911, c. 751, pt. 1, § 5; pt. 2, § 5) *King v. Viscoloid Co.*, 219 Mass. 420, 106 N. E. 988.

²⁴ *Eldorado Coal & Min. Co. v. Mariotti* (1914) 131 C. C. A. 359, 215 Fed. 51, 7 N. C. C. A. 966.

²⁵ (Gen. St. 1909, §§ 4676-4683, and Laws 1911, c. 218, amended by Laws 1913, c. 216) *Smith v. Western States Portland Cement Co.*, 94 Kan. 501, 146 Pac. 1026.

²⁶ *Wasilewski v. Warner Sugar Refining Co.*, 87 Misc. Rep. 156, 149 N. Y. Supp. 1035.

§ 204. — Willful and intentional injuries

As used in a provision of some Acts authorizing recovery by the workman from the employer, in addition to payment from the accident fund, where the injury results from deliberate intention of the employer to cause injury, the words "deliberate intention" imply that the employer must have determined to injure an employé and used some means appropriate to that end; there must have been a specific intent, and not merely carelessness or negligence, however gross.²⁷ The words "willful act" refer, not only to an act done intentionally with a purpose to inflict injury, but include acts which show utter disregard of consequences.²⁸ The failure to guard a circular saw in compliance with a statutory safety regulation, to prevent it from throwing off slivers, is an "intentional injury" within the provision that in such case the Illinois Act shall not affect the employer's civil liability.²⁹ In Ohio, where the employer has paid the premiums and posted the necessary notice, there can be no recovery for negligence or want of ordinary care; but if the injury

²⁷ (Laws 1913, p. 204, § 22) *Jenkins v. Carman Mfg. Co.* (Or.) 155 Pac. 703.

A deliberate act is one the consequences of which are weighed in the mind beforehand. It is prolonged premeditation, and the word, when used in connection with an injury to another, denotes design and malignity of heart. It has been defined so many times that it is difficult to select any one definition which covers every phase in which the word is used, but some of the most apt are: "The word 'deliberate' is derived from two Latin words, which mean, literally, 'concerning' and 'to weigh.' * * * As an adjective * * * it means that the manner of the performance was determined upon after examination and reflection—that the consequences, chances, and means were weighed, carefully considered, and estimated." *Craft v. State*, 3 Kan. 451; *Jenkins v. Carman Mfg. Co.*, supra. "Deliberation is prolonged premeditation." *State v. Speyer*, 207 Mo. 540, 106 S. W. 505, 14 L. R. A. (N. S.) 836. "Deliberation is that act of the mind which examines and considers whether a contemplated act should or should not be done." *United States v. Kie*, Fed. Cas. No. 15,528b.

As to the right to double compensation, see § 184, ante.

²⁸ *McWeeny v. Standard Boiler & Plate Co.* (D. C.) 210 Fed. 507.

²⁹ (Wk. Comp. Act 1911, § 3) *Forrest v. Roper Furniture Co.*, 267 Ill. 331, 108 N. E. 328.

results from a willful act, or from violation of statute or ordinance, or order of any duly authorized officer, which statute or ordinance, or order, was enacted to protect the life and safety of the employé, the employé can either take the benefits provided under the Act or sue in court to recover.³⁰

§ 205. — Washington

Under the Washington Act, employés as members of the public have their rights against third persons the same as before its enactment.³¹ The right to recover upon an accident policy is not affected. That right rests upon a contract which is independent of the subject treated by the statute, and with parties with whom it has no concern.³² Where an employer was notified of a shortage due, on its adjustment, with demand for payment within 30 days, and a workman was injured during that time before payment was made, the employer, on making payment within the time, was entitled to the benefit of the Act, and the injured workman could not maintain an action in the courts.³³ Where the driver of a truck was injured in the installation of a dynamo in obedience to instructions, and the employer had not defaulted in payments to the accident fund, the injured employé's claim for damages was governed by the Workmen's Compensation Act; an action for damages

³⁰ (Wk. Comp. Act, 102 Ohio Laws, p. 528, §§ 20—1, 20—2) *McWeeny v. Standard Boiler & Plate Co.* (D. C.) 210 Fed. 507. The Ohio statute contains no definition of "willful act," but New Jersey in its Workmen's Compensation Act (P. L. 1911, p. 134, § 3, par. 23) has defined the term "willful negligence." *Id.*

Where the employer, in erecting an iron tank, ordered the use of a derrick, knowing of defects in consequence of which the derrick collapsed, the employer was guilty of a "willful act," and liable, though it had complied with the Workmen's Compensation Act. *Id.*

³¹ (Wk. Comp. Act Wash. § 1) *Rulings Wash. Indus. Ins. Com.* 1915, p. 3.

³² *Ross v. Erickson Constr. Co.*, 89 Wash. 634, 155 Pac. 153.

³³ (Sess. Laws Wash. 1911, c. 74, § 4) *Barrett v. Grays Harbor Commercial Co.* (D. C.) 209 Fed. 95.

being authorized only where the employer is in default in such payments.³⁴ An employé, relying on the Act as withdrawing an action from the courts, must plead and prove compliance with the Act.³⁵

§ 206. — New York

The Legislature, in enacting the New York Act, did not intend to deprive an employé of the right to recover damages for injuries not constituting disabilities within the meaning of the statute.³⁶ Before the amendment of 1916, no provision was made in the statute for any rate of compensation for injuries which did not disable the employé, but which constituted injury to him through disfigurement or otherwise, as by loss of an ear or part thereof.³⁷

This Act does not deprive the injured employé of his common-law remedy against a third person by whose negligence he may be injured, although at the time of injury he was pursuing his duties under the terms of his employment.³⁸ It follows as an inevitable corollary of this proposition that if the employé be injured in the course of his master's employment, through negligence of the master, while the latter is engaged in an enterprise altogether independent of and unrelated to the business, in which the employé was employed, the master, as to that enterprise, must be regarded as a third person.³⁹ Thus where a driver in the employ of a brewery was injured while making a delivery of beer to a saloon keeper at

³⁴ *Repogle v. Seattle School Dist. No. 1*, 84 Wash. 581, 147 Pac. 196.

³⁵ *Acres v. Frederick & Nelson, Inc.*, 79 Wash. 402, 140 Pac. 370.

³⁶ While the New York Compensation Act is the exclusive remedy for injuries covered by it, an employé may recover damages for an injury not covered by the Act, but by the common law. *Shinnick v. Clover Farms Co.*, 169 App. Div. 236, 154 N. Y. Supp. 423.

³⁷ (Laws 1914, c. 41, §§ 10, 11, 15) *Shinnick v. Clover Farms Co.*, 90 Misc. Rep. 1, 152 N. Y. Supp. 649. (See, in this connection, the 1916 amendment, Laws 1916, c. 622.)

³⁸ *Lester v. Otis Elevator Co.*, 169 App. Div. 613, 155 N. Y. Supp. 524.

³⁹ *Winter v. Peter Doelger Brewing Co.*, 95 Misc. Rep. 150, 159 N. Y. Supp. 113.

premises entirely disconnected with the brewery, the remedy given by the Workmen's Compensation Act could not be regarded as exclusive, though the brewery company happened to be the owner of the premises where the accident occurred.⁴⁰

The provision that "the liability prescribed * * * shall be exclusive" does not release the employer from liability for damages in an action for negligence brought on behalf of dependent brothers and sisters, since these relatives of the workman are not included as dependents under the Compensation Act, and since the Constitution forbids the abrogation of any right of action to recover damages for injuries resulting in death.⁴¹

As used in a provision that "failure to secure the payment of compensation shall have the effect of enabling the injured employé or his dependents to maintain an action for damages in the courts as prescribed by section 11," which provides, in case of death of the employé, his legal representative may at his option elect to claim compensation under the Act or to sue for damages, the phrase "legal representative" means dependent, and not executor or administrator.⁴²

§ 207. — Arizona

Under the laws of Arizona, an employé who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow servant defense, and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. (2) Employers' Liability Act, which applies to hazardous occupa-

⁴⁰ Id.

⁴¹ (Const. N. Y. art. 1, § 18; Wk. Comp. Act, § 11) *Shanahan v. Monarch Engineering Co.*, 92 Misc. Rep. 466, 156 N. Y. Supp. 143.

⁴² *Dearborn v. Peugeot Auto Import Co.*, 170 App. Div. 93, 155 N. Y. Supp. 769.

tions where the injury or death is not caused by his own negligence. (3) The Compulsory Compensation Act, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer.⁴³

§ 208. Election of remedies after event

Where an employé suffers an injury while in the course of his employment, which injury is caused by some person or agency not connected with the employment, he may elect whether to sue the party directly responsible for his injury or make application to his employer for compensation.⁴⁴ As a rule an election to take or sue for compensation is binding,⁴⁵ and takes away the right to pursue any other remedy, which would otherwise be available.⁴⁶ Under

⁴³ Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 Pac. 465. (Const. art. 18, §§ 4, 5, 7, 8; Laws 1912, c. 89; Laws 1912, 1st Sp. Sess. c. 14.)

⁴⁴ McKay v. City Electric Ry. Co., Mich. Wk. Comp. Cases (1916) 63.

An injured workman has the right of election where a third party is liable as well as his employer. Manis v. City of Milwaukee, Bul. Wis. Indus. Com. 1912-13, p. 29.

⁴⁵ Where the employé's administratrix has the right to sue at law or to sue for compensation, her election is binding. (Wk. Comp. Act, pt. 5, § 2; part 3, § 15) Turnquist v. Hannon, 219 Mass. 560, 107 N. E. 443.

⁴⁶ Zilch v. Bomgardner, 91 Ohio 205, 110 N. E. 459; Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 Pac. 465.

Where one has obtained relief under the Washington Compensation Act (Sess. Laws Wash. 1911, c. 74), he cannot by proceedings in admiralty obtain compensation for his injuries. The Fred E. Sanders, 212 Fed. 545. The employé, by his election to take damages, even if received without suit, and under the condition that the cause of action must be released, exercises the option given by the statute. In re Cripp, 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828. This case is supported by Page v. Burtwell, [1908] 2 K. B. 758; Powell v. Main Colliery Co., [1900] A. C. 366. An employé, without consulting his attorneys, may agree to take under the Kansas Act and thereby waive his right of action under the general law. (Wk. Comp. Act Kan. § 44) Piatt v. Swift & Co., 188 Mo. App. 584, 176 S. W. 434. Where a workman has obtained compensation from his employer as provided by the Compensation Act, he cannot then sue in the courts for further compensation because of disfigurement or pain and suffering. Connors v. Semet-Solvay Co.,

some Acts an employé who makes application for compensation thereby waives his right to sue in any court.⁴⁷

Under the California Act, commencement of an action is not necessarily a binding election, depriving the employé of his right to compensation, particularly where the action is voluntarily dismissed,⁴⁸ or the court determines that the proper remedy is under the Act, and that the institution of the action is a vain proceeding.⁴⁹

159 N. Y. Supp. 431. (In this connection see 1916 amendment, Laws 1916, c. 622.) If the insurance company makes the payments required of the employer at the time or times required in the Act, then there is no further liability on the part of either the employer or the insurance company. The injured employé cannot recover from both the insurance company and the employer. Op. Sp. Counsel to the Iowa Indus. Com. (1915) p. 24.

Where a workman was injured while driving a truck which came into collision with a street car, and settled with the street car company without suit, after which he died as a result of his injuries, his widow could not recover compensation. (St. 1911, c. 751, pt. 3, § 15) *In re Cripp*, supra.

An employé cannot accept payment in lieu of damages from the person causing his injury and draw compensation from his employer at the same time. Any money so paid should be deducted from the amount of compensation awarded him. *McKay v. City Electric Ry. Co.*, Mich. Wk. Comp. Cases (1916) 63.

Whether release of employer releases third person tort-feasor, see § 189, ante.

⁴⁷ Where a blank signed by the injured employé and sent to the Liability Board of Awards read, "I hereby make application * * * for the payment of moneys out of the state insurance fund on account of the injury," and requested that all necessary blanks be furnished, it was not merely a notice provided for by a rule of the Board, but an "application" within Page & A. Gen. Code, §§ 1465—61, providing that an applicant for compensation waives his right to sue in any court. *Zilch v. Bomgardner*, 91 Ohio, 205, 110 N. E. 459.

⁴⁸ Where the employé has elected to take compensation from his employer, and while he is receiving same, and before he files his application with the Commission, sues the third party, whose negligence caused the injury, and thereafter dismisses such suit before the filing of his application, the filing of the suit does not take away the right to compensation. *Dyke v. Conlon*, 2 Cal. I. A. C. Dec. 814.

⁴⁹ Where an employé sues his employer in the superior court for damages for injuries received in the course of the employment, and the court sustains

But where an employé accepted four weeks' medical and hospital treatment from his employer, and the services of a doctor employed especially to treat him, this constituted such prior election of remedies as to bar his right to begin an action in the superior court.⁵⁰ Likewise, where the applicant before the filing of his claim had received the sum of \$200 from the owner of an automobile which had run him down, as a full settlement and release, and had not received any compensation or medical treatment from his employer before making such settlement, he had exercised his election to seek redress from the person causing the injury and not from his employer, and thereby lost his right to claim compensation against his employer.⁵¹ And where the employé had notified the employer of his injury, and had been visited by the employer and received an accident report to fill out, but had not received medical treatment or compensation from the employer, a settlement with a third person made at this time was made before "making a lawful claim against his employer."⁵²

The Arizona Act controls the rights and obligations of employer and employé, where injury results and the employé exercises his option to accept compensation and the employer refuses to pay, but does not require the employé to elect prior to injury which remedy he will adopt.⁵³

a demurrer to the complaint, because it fails to allege that the employé was injured through the gross negligence or willful misconduct of an elective officer of the corporation employing him, and the employé thereupon makes his application to the Commission for compensation, his act of filing the complaint was a vain proceeding, and not sufficient to constitute a binding election, so far as would bar the employé from his right to compensation. *Broderick v. San Francisco Stevedoring Co.*, 2 Cal. I. A. C. Dec. 293; *San Francisco Stevedoring Co. v. Pillsbury*, 2 Cal. I. A. C. Dec. 298, 170 Cal. 321, 149 Pac. 586.

⁵⁰ *Broderick v. San Francisco Stevedoring Co.*, *supra*.

⁵¹ *Lantis v. City of Sacramento*, 2 Cal. I. A. C. Dec. 680.

⁵² *Id.*

⁵³ *Consolidated Arizona Smelting Co. v. Ujack*, 15 Ariz. 382, 139 Pac. 465.

The mere fact that defendant has paid plaintiff's hospital and doctor's bills during the first three weeks after the injury, as required by the Michigan Act, cannot in any event constitute an election by plaintiff after the injury to accept the Act, especially where there has been no assent on the part of the plaintiff that such payment is in compliance with the act.⁵⁴

Where an employer has not rejected the Connecticut Act, but has neglected to insure his liability as provided by section 30, pt. B, the employé may elect whether he will seek compensation under the Act or sue in the courts for damages, and if he elects to seek compensation the employer must pay.⁵⁵

In Wisconsin, where an injured workman recovered compensation and medical expenses from his employer, but, on later finding out that he had an action against his physician for malpractice, offered to return the amount received, and elected to hold the physician, his former claim had not acted as an assignment of his claim against the physician to the employer, since he was required to elect which he would sue only after he learned of the other right of action.⁵⁶

Where an employé elects, as permitted by the New York Act, to bring a common-law action for damages, his recovery is not limited to the rate of compensation fixed by the Act.⁵⁷ He cannot

⁵⁴ *Grand Trunk Ry. Co. of Canada v. Knapp* (C. C. A.) 233 Fed. 950.

⁵⁵ *Neumann v. Turner*, 1 Conn. Comp. Dec. 130; *Loveland v. Parish of St. Thomas Church*, 1 Conn. Comp. Dec. 14; *Brewer v. Belcher*, 1 Conn. Comp. Dec. 111.

In *Loveland v. Parish of St. Thomas Church*, *supra*, it was held that where the employer accepts the Act, but fails to comply with part B, § 30, by insuring his liability, section 42, part B, providing that he forfeits "all benefits thereunder and shall be liable as if he had not accepted same," being a penalty provision, does not deprive an employé of the right to bring compensation proceedings against such employer, but allows him to choose compensation or damages.

⁵⁶ (Wis. St. 1915, § 2394—25, subds. 1, 2) *Pawlak v. Hayes*, 162 Wis. 503, 156 N. W. 464.

⁵⁷ (Wk. Comp. Act, § 11) *Dick v. Knoperbaum*, 157 N. Y. Supp. 754.

recover, however, in the absence of negligence on the part of the employer.⁵⁸ The election of the decedent's widow to bring a common-law action for damages against a third party does not bar or affect in any way the right of his dependent mother to compensation, her right being separate and independent.⁵⁹ Under the Washington Act, an employé injured off his employer's premises by the act of a third person must elect whom he shall sue, but no duty of electing is imposed on him where he is injured by the third person on the premises.⁶⁰

⁵⁸ (Consol. Laws, c. 67, § 11) *Lindebauer v. Weiner* (1916) 94 Misc. Rep. 612, 159 N. Y. Supp. 987.

⁵⁹ *In re Cahill*, 159 N. Y. Supp. 1060.

⁶⁰ *Stertz v. Indus. Insur. Com. of Wash.* 158 Pac. 256.

ARTICLE III

LEGAL PROCEEDINGS IN GENERAL

Section

209. Practice.

§ 209. Practice

A proceeding under a Compensation Act is not a proceeding at law, and is not altogether governed by the rules of legal proceedings.⁶¹ The procedure under the various Acts is very similar, and many statements relative to the practice under one are pertinent to the practice under the others. The Massachusetts Act, as have most of the Acts, has a procedure all of its own, distinct from the practice in ordinary actions. Where the Act is adopted by the parties, a relation arises between the employé and the employer, under which, in event of a personal injury to the employé, there is to be speedy ascertainment of the new kind of compensation created by the Act, coupled with a voluntary relinquishment by both parties of the right to trial by jury as to matters covered by the Act. As said in a leading case, one main purpose of the Act is to establish between the employé and employer, in place of the common-law or statutory remedy for personal injury, based upon tort, a system whereby compensation for all injuries or death of the employé received in the course of and arising out of the course of the employment, whether through unavoidable accident or negligence, or otherwise (except through his serious and willful misconduct), shall be determined forthwith by a public board, and paid by the insurer. For the accomplishment of these ends a simple method is furnished, operating without delay or unnecessary formality. The practice should be direct and flexible, in order to adapt the remedy to the needs of the particular case. In one aspect a case

⁶¹ *Victor Chemical Works v. Indus. Board of Ill.* (1916) 274 Ill. 11, 113 N. E. 173. Proceedings under the Workmen's Compensation Act to recover compensation take the place of the ordinary action on the case against an employer for damages for causing the death or of injury to an employé. *Id.*

under the Act resembles an action at law, for it seeks ultimately the payment of money. Payments, however, in most instances are made by installments. In another aspect it is akin to the specific performance of a contract, designed to cover the whole range of misfortunes likely to arise in the course of employment in a state with many and diversified industries. Moreover, the compensation is to be paid, not directly by the employer, but by the insurer, who is either the "Massachusetts Employés' Insurance Association" created by part 4 of the Act, or any liability insurance company authorized to do business within the commonwealth. The employé has no immediate relation with the insurer. He is the beneficiary under a contract between the employer and the insurer. A beneficiary under any instrument to which he is not a direct party more naturally looks to equity than to the law for relief.⁶² Giving due weight to the beneficial purposes of the Act, which can be enforced better through the relief afforded by equity, and to the character of the proceeding itself and the parties thereto, it follows that in the main causes under the Act in court should be treated as equitable rather than legal in nature, procedure, and final disposition.⁶³

A proceeding under a Compensation Act is neither an action upon contract nor one of tort, but rather what the statute creating it makes it; that is, a proceeding to enforce a statutory duty or obligation arising out of the relations of the parties, the basis of which is a contract, express or implied.⁶⁴

Under the English Act, the courts regard the employer, whose place, under the West Virginia Act, the Commission takes, as a demurrant to the evidence, when the issue is one of mere sufficiency thereof. If the evidence adduced, or the facts found or disclosed, are uncontradicted and would sustain a verdict of a jury in favor of the claimant, there is liability, as a matter of law, and

⁶² *In re American Mut. Liab. Ins. Co. (Mass.)* 102 N. E. 693.

⁶³ *Id.*

⁶⁴ *Baur v. Court of Common Pleas*, 88 N. J. Law, 128, 95 Atl. 627.

legal duty to pay the claim arises.⁶⁵ Likewise, in West Virginia, in the absence of conflict in the evidence adduced to show a claimant's right to participation in the Workman's Compensation Fund, the Commission is regarded, in the Supreme Court, as a demurrant to the evidence, and, if the evidence would sustain a verdict of a jury in favor of the claimant, the claim is regarded as sufficiently proved. It is the duty of the Commission, under such circumstances, to give the claimant the benefit of inferences arising in his favor from the facts proved, in the absence of direct evidence.⁶⁶

⁶⁵ *Poccardi v. Public Service Commission*, 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299; *Mitchell v. Glamorgan Coal Co.*, 9 W. C. C. 16; *Wright v. Kerrigan*, 4 B. W. C. C. 432; *Owners of Steamship v. Rice*, 4 B. W. C. C. 298.

⁶⁶ *Poccardi v. Public Service Commission*, 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299.

ARTICLE IV

NOTICE AND CLAIM

Section

- 210. Notice.
- 211. Notice to principal.
- 212. Compensation claims—Sufficiency—Abatement.
- 213. Necessity of claim—Waiver.
- 214. Time for presentation—Limitations.
- 215. Federal Act.

§ 210. Notice

A notice which gives the employer opportunity to investigate the accident and knowledge of all material things relating thereto is sufficient to comply with the requirement, common to practically all of the Acts, that notice of injury be given.⁶⁷ The filing of claim

⁶⁷ (Pub. Acts 1912, No. 10, pt. 2, § 15) In *Matwiczuk v. American Car & Foundry Co.* (Mich.) 155 N. W. 412, the court said: "What was done gave the employer every opportunity to investigate the accident, and knowledge of all material things relating thereto, as fully as though an application had been made in a formal way by the widow upon the day when the letter was written. The next day after the injury the employer was notified of it, the result of it, the time and place and cause of its happening, and of the persons who were dependent. This notice was given, not by an outsider, but through the agency of the brother-in-law of the deceased, the brother of the widow. What was done was notice of a claim by the deceased's dependents, made by a person in their behalf. We think it too technical to say that a notice and claim, made within twenty-four hours after the accident, caused to be given, as in this case, in behalf of the widow, who could not make the claim herself, because of the distance from where she lived, which action was ratified by her on being advised of the situation, must fail because the ratification did not reach this country within six months from the time of the accident. To so hold would not be according to the letter or the spirit of the Employers' Liability Act. It is clear that what was done gave the employer notice of the injury, thus affording an opportunity for a full investigation. It also gave notice of who were dependents. We think it is also clear that the company was informed that the brother-in-law, by employing the attorney who wrote the letter giving this information, was seeking to protect the interests of the widow and minor children, who were in Poland, and the inference follows almost as of course that a claim was urged in their behalf, growing out of the death of the husband and father. The language of the statute

for injury with the Industrial Accident Board of Michigan, and the action of the Board in communicating the fact of the making of such claim, constitutes sufficient compliance with the statute in regard to notice.⁶⁸

As used in a provision that notice of injury may be given to "any officer or agent" of a corporation employing the injured workman, and that knowledge of the employer's agent will preclude want of notice from barring recovery, "agent" does not include every person authorized to act for the corporation in its business relations with third persons.⁶⁹ The word is broad enough, however,

indicates that the notice and claim might be in ordinary language, and might be signed by dependents 'or by a person in their behalf,' and what would be more natural than to assume that a brother of the widow in her absence would act for her?"

Where the fact that the applicant was suffering from a sore thumb was reported to the foreman of the department in which she was employed, such notice is sufficient to make the employer liable for the reasonable cost of medical treatment. It matters nothing that the parties thought the injury trivial, as there was abundant experience in the cannery with effects following such injuries to warrant the furnishing of proper treatment. *Pettit v. Mendenhall*, 2 Cal. I. A. C. Dec. 212.

The mere fact of notice over the telephone is sufficient to charge the employer with knowledge of injury to his employé. *Cutaria v. Swieberg*, Bulletin No. 1, Ill., 153.

The fact that the injury was reported to the farm superintendent within a few days, and claim was made for compensation in a letter to the employer within the time required by law, was sufficient notice of applicant's claim. *Shafer v. Park, Davis & Co.*, Mich. Wk. Comp. Cases (1916) 7.

⁶⁸ *Damps v. Michigan Central Railroad Co.*, Mich. Wk. Comp. Cases (1916) 25.

⁶⁹ *In re Bloom*, 222 Mass. 434, 111 N. E. 45.

In *Malkowsky v. Silberovicz*, 1 Conn. Comp. Dec. 136, where the employé gave his employer no notice of the injury, merely telling another workman, not representing the employer, that he "felt bad," and the employer had no knowledge of the injury, such employé was denied an award for medical expense incurred by him.

Where an injured workman informed an overseer, who measured and checked up the time, of his injury, but the employer did not know of the injury until his recovery four months later, the notice to the overseer cannot affect the employer in any way, and he had no notice. *Jackson v. Vickers*,

to include a foreman having superintendence over workmen and their work and acting as the employer's representative, and the one most likely to know of, and whose duty it is to report to the employer, any injuries to workmen.⁷⁰

Notice of the injured employé's application must be given to the person sought to be held liable before any testimony is taken by the California Commission, though the Act is silent on this point. The provision declaring the right "to be present at any hearing" and to "present such testimony as shall be pertinent under the pleadings" implies that such notice shall be given.⁷¹

Actual knowledge may dispense with the necessity of notice.⁷²

Ltd. (1912) 5 B. W. C. C. 430, C. A. Notice that a workman had sprained his ankle, sent by him the following day to the foreman he worked under, is not notice to the employers. *Burrell v. Holloway Bros. (London), Ltd. (1911) 4 B. W. C. C. 241, C. A.* Mentioning the accident to a fireman and a submanager or manager several days after it had happened is not giving notice to the employer. *Hughes v. Coed Talon Colliery Co., Ltd. (1910) 2 B. W. C. C. 159 C. A.*

⁷⁰ (*Wk. Comp. Act*, pt. 2, §§ 17, 18) *In re Bloom*, 222 Mass. 434, 111 N. E. 45.

In Reese v. Yale & Towne Mfg. Co., 1 Conn. Comp. Dec. 154, it was held that where a workman sustained an injury to his foot by the falling of an iron bar, and went immediately to his foreman, in the same room, and told him what had happened, the employer had notice of the accident.

Notice over the telephone to the superintendent by the employé, followed by notice over the telephone by the sister-in-law of the employé to the foreman, is notice to the employer. *Olson v. Hillman's, a Corporation*, *Bulletin No. 1*, Ill., p. 121.

⁷¹ *Carstens v. Pillsbury (Cal. 1916) 158 Pac. 218.*

⁷² *In re McLean*, 223 Mass. 342, 111 N. E. 783; *State v. District Court (Minn.) 156 N. W. 278.*

The injured workman is not required to give written notice of his injury, where the employer has actual knowledge of the occurrence thereof. *State ex rel. Northfield v. District Court (1915) 131 Minn. 352, 155 N. W. 103; Op. Atty. Gen. on Minn. Wk. Comp. Act, Bul. 9, p. 9; (Gen. St. 1913, § 8213) State ex rel. Duluth Diamond Drilling Co. v. District Court, 129 Minn. 423, 152 N. W. 838.*

The insurer contended that no written notice of the injury had been given, in accordance with the requirements of the Act, and therefore that proceedings could not be maintained. It appeared, however, that the subscriber had

Such actual knowledge means, in the case of a corporation, knowledge of the proper corporate agent. It does not mean first-hand knowledge, but such as would be called knowledge in common parlance.⁷³ Where notice is required, it should be given within a reasonable time,⁷⁴ generally a time prescribed by statute, in the

substantial knowledge of the injury to such an extent that any reasonable investigation would have revealed all the material facts and conditions pertaining to the case. It was held that there was sufficient notice. *MacDonald v. Fidelity & Deposit Co. of Md.*, 2 Mass. Wk. Comp. Cases, 529 (decision of Com. of Arb.).

Where a city employé working on the street was injured, and informed the Superintendent of Public Works, having charge of the work, and the superintendent made mention of the matter to the Board of Public Works, the employé's failure to give written notice within three months did not preclude him from obtaining compensation. (*Wk. Comp. Act*, pt. 2, § 18) *Purdy v. City of Sault Ste. Marie* (Mich.) 155 N. W. 597.

In an action to enforce compensation for an injury to an employé, the employer cannot be regarded to have been prejudiced by the failure of the employé to give him formal notice of the injury within ten days after it occurred, where the foreman of the employer knew of the accident when it happened, and sent the employé to the employer's physician, who examined and treated him. *Ackerson v. National Zinc Co.*, 96 Kan. 781, 153 Pac. 530.

Where an employer told a boy who had been injured to stay at home for a few days before he came back to work, he cannot say that he had no notice of the accident. *Stevens v. Insoles, Ltd.* (1912) 5 B. W. C. C. 164, C. A.

A finding of "actual notice" to the employer was equivalent to a finding of "actual knowledge" of the injury. *State ex rel. Crookston Lumber Co. v. District Court* (Minn.) 156 N. W. 278.

⁷³ (*Wk. Comp. Act*, § 2, par. 15) *Allen v. Millville* (1915) 87 N. J. Law, 356, 95 Atl. 130, 1011; *Troth v. Millville Bottle Works* (N. J.) 98 Atl. 435.

⁷⁴ In *Mackay v. American Brass Co.*, 1 Conn. Comp. Dec. 526, where the claimant gave no notice until 18 months after the alleged injury, and made no claim at all, it was held that his rights had been barred by unreasonable neglect.

In *Costa v. C. W. Blakeslee & Sons*, 1 Conn. Comp. Dec. 457, it was said by Commissioner Beers: "The Act does not contemplate that a workman shall use his time and that of his employer going back and forth making reports of injuries which will probably amount to nothing. Furthermore, the men employed are not only not physicians, but are, in many cases, men of no high degree of education or intelligence, and men who will, in the absence of pain, entirely fail to realize the necessity of any particular attention at any

absence of reasonable cause or mistake excusing the delay.⁷⁵ The words "accident, mistake, or unforeseen cause," in a provision that

particular moment. * * * In this case there was really nothing to put an ordinary workman on notice that the injury was one which called for any action. * * * The question of what apparently slight ills to pass over, and what ones to make the subject of investigation and attention, is one involving delicate judgment, and it would be unfair to an employé such as the one in this case to hold him to so high a standard."

⁷⁵ (Pub. Acts 1913, c. 138, § 21; Pub. Acts 1915, c. 288, §§ 3, 13) *Schmidt v. O. K. Baking Co.* (Conn.) 96 Atl. 963. An action was not maintainable under Consol. Laws 1909, c. 31, §§ 200-204, where the notice was served long after the statutory period and there was no sufficient proof excusing the delay. *Connors v. Gross*, 144 N. Y. Supp. 18.

Where the certificate of a certifying surgeon fixed the disablement in a case of nystagmus more than six months before the certificate was given, it was held that it was not reasonable to expect the workman to give notice at the time of disablement, when the surgeon was free to set it at any time before the examination. *Moore v. Naval Colliery Co., Ltd.* (1912) 5 B. W. C. 87, C. A.

Delay held due to reasonable cause: Where a laborer hired to open cess-pools died after two months of illness, and notice was not given until two months after his death, because no one knew, up to that time, that there had been an accident for which compensation might be claimed. *Eke v. Hart-Dyke* (1910) 3 B. W. C. C. 482, C. A. Where a collier believed that he would recover from the disease of nystagmus, from which he was suffering, during the rest consequent upon a strike he knew was about to be called, and so did not give notice until he found that there was no improvement, over six months after the accident. *Moore v. Naval Colliery Co., Ltd.* (1912) 5 B. W. C. C. 87, C. A. Where a workman suffered a fall, and notified his employer the next day, but did not claim compensation, as the only manifest effects were slight swelling in the groin, which appeared and subsided without serious pain three times in thirteen months, but finally discovered he was ruptured and was forced to leave the employment. *Coulson v. South Moor Colliery Co.* (1915) 8 B. W. C. C. 253, C. A. Where a workman noticed no serious effects of an internal strain sustained in November, and worked until the following April, when he discovered an aneurism, and immediately informed his employers. *Tibbs v. Watts, Blake, Bearne & Co., Ltd.* (1909) 2 B. W. C. C. 164, C. A. Where a saleswoman received a shock when part of the premises where she was working were destroyed by fire, but did not know until more than six months later that she was suffering from a disease which had been made much worse by the shock. *Hoare v. Arding & Hobbs* (1912) 5 B. W. C. C. 36, C. A. Where a workman who hurt his elbow in November did not anticipate serious consequences, and did not learn that it was fractured until March 8th,

failure to give notice of the injury due to such cause is excusable and shall not bar compensation, are identical in legal effect with

and then gave the proper notice on March 18th. *Thompson v. Northeastern Marine Engrg. Co., Ltd.* (1914) 7 B. W. C. C. 49, C. A. Where a butcher's canvasser considered his injury received by a fall from a bicycle in September as trivial, first realizing that it was serious on December 26th, and then gave notice of the accident on January 14th, seven days after he had submitted to an operation, and finally died after several other operations had been performed. *Haward v. Rowsell & Matthews* (1914) 7 B. W. C. C. 552, C. A. Where a workman, after an injury to his neck, was told by his physician that the soreness was merely due to muscular rheumatism, and considered the injury trivial, but found after four months that his head was partly dislocated, and gave notice within the following four weeks. *Ellis v. Fairfield Shipbuilding & Engineering Co., Ltd.* (1913) 6 B. W. C. C. 308, Ct. of Sess. When a workman felt no serious effect of an injury to his knee while he continued at work until nine months after the accident occurred, when he became unable to work and gave notice the day before undergoing an operation. *Fry v. Cheltenham Corporation* (1912) 5 B. W. C. C. 162, C. A. Where an insurance agent, thinking his injuries in falling down stairs were only slight, gave no notice, but later becoming completely incapacitated after he had left the employment, gave notice as soon as he became aware of the seriousness of the accident. *Refuge Assurance Co., Ltd., v. Millar* (1912) 5 B. W. C. C. 522, Ct. of Sess. Where a bricklayer did not know that he had ruptured himself in lifting a heavy load, and, though noticing a lump in the groin, thought it inconsequential, but gave notice a month later when he found that he was ruptured. *Zillwood v. Winch* (1914) 7 B. W. C. C. 60, C. A. Where a workman, who racked the muscles in his side, thought he would recover easily, and kept at work for six weeks, and then gave notice when his injury forced him to quit work. *Brown v. Lochgelly Iron & Coal Co., Ltd.* (1907) S. C. 198, Ct. of Sess. Where an old, crippled workman, whose heart was diseased, overstrained it, but, being afraid his employers might refuse to hire him any longer, thought he would not claim compensation if he got well quickly, and gave notice only when he discovered, four months later, that he was permanently incapacitated. *Breakwell v. Clee Hill Granite Co., Ltd.* (1912) 5 B. W. C. C. 133, C. A. Where a workman failed to give notice of his accident, because he expected to recover quickly, because he did not think his injury serious, and because he did not think his injury was due to accident within the Act, being mistaken in all three. *Rankine v. Alloa Coal Co., Ltd.* (1904) 6 F. 375, Ct. of Sess. Where a painter quit work because of sickness on July 15th, and was in bed from August to December, when he gave notice, and the certifying surgeon in February decided he had been disabled by lead poisoning during the last week of July. *Sanderson v. Parkinson & Sons, Ltd.* (1913) 6 B. W. C. C. 648, C. A. Where a seaman, injured in a foreign country,

the words "reasonable cause."⁷⁶ The fact that a workman did not know he was required by law to give a notice is not a mistake dispensing with the notice.⁷⁷ Failure to give, or delay in giving, the

chose to remain there until he had improved, instead of accepting the three opportunities offered him to return as a distressed sailor, being all the time under medical care. *Dight v. Owners of S. S. Craster Hall* (1913) 6 B. W. C. C. 674, C. A.

Delay held not due to excusable mistake: Where a workman, who was injured by a fall upon his head, gave a verbal notice to his employer, who noted it in a book, and gave no other notice, because he thought that was sufficient. *Clapp v. Carter* (1914) 7 B. W. C. C. 28, C. A. Where a workman bruised his thigh, and three days later gave notice to the subcontractor, expecting that he would inform the principal employer, but he did not do so, and consequently the employer did not know of the accident until four months later. *Griffiths v. Atkinson* (1912) 5 B. W. C. C. 345, C. A. Where a workman who was injured kept on working, and gave his employer no notice because he thought he would soon get well, and so not need to claim compensation. *Webster v. Cohen Bros.* (1913) 6 B. W. C. C. 92, C. A. Where a workman gave no notice of an injury to his tongue, a laceration caused by a ragged tooth when he was hit upon the head, for over six months, because he thought there would be no serious result, but after working and taking doctor's treatment for that time had cancer of the tongue set in, causing his death. *Potter v. Welch & Sons, Ltd.* (1914) 7 B. W. C. C. 738, C. A.

Question of fact.—Where a workman informed his foreman of an injury to his knee a few days after it happened in June, but did not notify his employers until November, and the trial judge found his delay was due to a mistake in believing that notice to the foreman was proper and sufficient, the question of mistake was held to be a question of fact, of which there was no evidence in this case. *Pimm v. Clement Talbot, Ltd.* (1914) 7 B. W. C. C. 565, C. A.

⁷⁶ *Donahue v. R. A. Sherman's Sons Co. (R. I.)* 98 Atl. 109.

Where, during the thirty-day period during which he should have given notice of the injury, the workman was desperately ill as the result of a major abdominal operation, and was in a condition of great physical weakness, in a hospital, among strangers, and a considerable distance from his home and his employer's place of business, the fact that he "could have sent word" to his employer did not show such inexcusable neglect as to put the case outside the exception of failure due to "accident, mistake, or unforeseen cause." *Id.*

⁷⁷ *Bramley v. Evans & Sons* (1909) 3 B. W. C. C. 34, C. A.

The allegation that a workman did not give notice because he did not know of the existence of the Compensation Act is not such a mistake as to

statutory notice, is not fatal to recovery, however, where the employer was not prejudiced,⁷⁸ but the burden of proving want of

afford an excuse from giving notice. *Roles v. Pascall & Sons* (1911) 4 B. W. C. C. 148, C. A. Failure of a workman to claim compensation within six months is not excused because he did not know his rights under the Act. *Melville v. McCarthy* (1913) 47 Ir. L. T. R. 57.

Where a housemaid's employers paid her full wages during her incapacity due to an injured knee, and gave her a month's wages when she left the employment, and she made no claim for compensation for nineteen months, because she did not know there was an Act of Parliament entitling her to compensation, her mistake is not such as to justify the failure to notify of the accident and claim compensation. *Judd v. Metropolitan Asylums Board* (1912) 5 B. W. C. C. 420, C. A.

⁷⁸ *Pellett v. Indus. Com. of Wis.*, 162 Wis. 596, 156 N. W. 956; *Stewart v. Pacific Mail Steamship Co.*, 2 Cal. I. A. C. Dec. 583; (Pub. Acts 1913, c. 138, pt. B, § 21) *Schmidt v. O. K. Baking Co.*, 90 Conn. 217, 96 Atl. 963; *Brewer v. Belcher*, 1 Conn. Comp. Dec. 111.

That written notice of the accident was not given to the employer within ten days does not relieve him from liability for compensation, unless he was prejudiced by such lack of notice. *Knoll v. City of Salina*, 98 Kan. 428, 157 Pac. 1167.

Section 20 of the Act is understood by the Commission to refer solely to the employer's being placed at a disadvantage in making his defense on the merits of the claim, and if, because of failure to give notice, the employer's witnesses have gone away, or other sources of evidence cannot be made available for defense, the defendant will be deemed to have been prejudiced, and the claim will be barred; but, where the facts of injury and disability are agreed to, prejudice in making defense to the merits of the claim on the facts cannot be urged as a defense. *Telford v. Healy-Tibbitts Cons. Co.*, 3 Cal. I. A. C. Dec. 41.

Employer not prejudiced.—Where a driver of an ice wagon receives a kick on the leg from a horse, but, believing it not to be serious, makes no complaint, and after six weeks, upon being examined by a physician, it is found that the leg had been partially fractured, and the employer is not misled or prejudiced, the applicant is under the exception contained in section 20 of the Compensation Act, and entitled to compensation. *Yates v. Union Ice Co.*, 2 Cal. I. A. C. Dec. 424. Failure to report an injury to the employer within the period prescribed by law, where such failure is not due to any attempt to mislead or prejudice the employer's right, and where abundant opportunity is afforded the employer to produce any witnesses that might have been produced at an earlier date, does not prejudice the rights of the employer, and does not constitute a defense to the application for compensation. *Johnson v. Sudden & Christenson*, 1 Cal. I. A. C. Dec. 422. Where an employé fails

at the time of an accident to notify his employer of a mere scratch received by him, but does so notify him four days afterward, by which time a serious infection, probably received at the time of the accident, has set in, and the employé had no intent to, and did not, mislead or prejudice his employer by his failure to report, the employer is liable for the necessary medical services. *Wilson v. American Co.*, 2 Cal. I. A. C. Dec. 896. Where a carpenter sustained an accident on the 1st of June, his knee being struck by a falling timber, and he continued to do his work without complaint to the employer until the 7th of June, when the work was completed, the knee paining him slightly from the date of accident during the months of June and July, but not sufficiently to cause him to consult a physician or inform his employer, and about the middle of August his knee began to swell, causing him to go to a physician on the 30th of August, when it was ascertained that he had prepatellar bursitis, and he further neglected to notify his employer of the accident or his injury until the 13th of September, when he filed his application with the Commission, these facts alone did not show an "intention to mislead or prejudice the employer," or that he was "in fact misled or prejudiced thereby," as these words are used in section 20 of the Act. *Telford v. Healy-Tibbitts Cons. Co.*, 3 Cal. I. A. C. Dec. 41, disapproving *Miles v. Huntington Beach Hardware Co.*, 2 Cal. I. A. C. Dec. 422. *New York*. Where the employé did not give notice of his injury, because he did not think, and it did not appear, that it was serious, and the employer made no contention that the accident did not occur, and probably would not have appreciated the danger of the resulting cancer any more than the workman, it was held there was no prejudice by the delay in giving notice. *Richardson v. Builders' Exchange Ass'n*, *The Bulletin*, N. Y., vol. 1, No. 10, p. 18. *Wisconsin*. Where an employé, injured on January 20, did not give his employers notice until April 20, but had no intention to mislead them by not giving notice, and they were not prejudiced by his failure, his action was not barred by his laches. *Bakiewicz v. National Brake & Electric Co.*, Rep. Wis. Indus. Com. 1914-15, p. 11. Where the applicant did not intend to mislead his employer, a municipality, by his failure to serve notice of claim, and the city was not in fact misled thereby, compensation was awarded. *Brown v. City of Mauston*, Bul. Wis. Indus. Com. vol. 1, p. 97. *England*. Where a part of the shop in which a saleswoman was working was burned in December, and she suffered a shock, which was found six months later to have aggravated a nervous disease which she first discovered at that time, the injury not appearing to be serious before that time (August), and gave notice a little over a month later (in October), the employers were not prejudiced in their defense by her delay, as notice could have done them no good if it had been given earlier. *Hoare v. Arding & Hobbs* (1912) 5 B. W. C. C. 36, C. A. Where a waitress told her employer of an accident the same day that it happened, which was in June, but she suffered no illness until August, and then did not know that the illness was caused by the accident until November, but gave notice in November or December, her employers were not preju-

diced. *Eaton v. Evans* (1912) 5 B. W. C. C. 82, C. A. Where a workman did not know that an injury to his knee was serious until he had worked nine months after it occurred, but later, having to submit to an operation upon it, gave his employers notice of the accident the day before his operation, they were not in fact prejudiced. *Fry v. Cheltenham Corporation* (1912) 5 B. W. C. C. 162, C. A. Where an employer's overman visited an injured boy within an hour after the accident, and wrote down the full particulars as they were told him in a book supplied for that purpose by the employers, a contention that they were prejudiced by lack of notice is unsupportable. *Stevens v. Insoles, Ltd.* (1912) 5 B. W. C. C. 164, C. A. Where a workman continued to work for two days after an accident to his foot, then after laying off for a week again worked for six weeks, believing that his illness was due to rheumatism, and then was found to have gangrene in the foot, necessitating its amputation, the employers being fully informed of his progress from time to time, and paying him part wages while he was not working, they were not prejudiced. *Stinton v. Brandon Gas Co., Ltd.* (1912) 5 B. W. C. C. 426, C. A. Where the employer's clerk and cashier, knowing of the accident, visited the injured workman, paid him his wages during his illness, and appointed and paid his substitute, the employer was not prejudiced in his defense, and the fact that they were hindered by his failure to give notice from themselves giving notice to their insurance company is not relevant, as the prejudice must be "in his defense." *Butt v. Gellyceidrim Colliery Co., Ltd.* (1900) 3 B. W. C. C. 44, C. A. Where a workman's old rupture came down while he was working, and, on informing his employer, made an agreement whereby he received half pay while he went to the hospital for an operation, and did not give written notice for more than four months, the employer was not prejudiced by not receiving the notice. *Ralph v. Mitchell* (1913) 6 B. W. C. C. 678, C. A.

Employer prejudiced.—Where notice of injury within thirty days of its occurrence would have enabled the employer to supply medical treatment which would have averted the disability actually incurred, he was prejudiced by want of notice and the claim for compensation is barred. *Tarter v. Associated Oil Co.*, 2 Cal. I. A. C. Dec. 848. *Connecticut.* In *Dube v. Clayton Bros., Inc.*, 1 Conn. Comp. Dec. 441, where a workman alleging traumatic appendicitis gave no notice, except a telephone message saying he had appendicitis and could not work, without mentioning the injury, it was held he could not recover, and that the employer was necessarily prejudiced by having no chance for medical examination, to determine whether there was any connection between his condition and the alleged injury. In *Gaherty v. International Silver Co.*, 1 Conn. Comp. Dec. 403, where the employé did not notify his employer for nearly eight months after the accident, when it was too late to either provide for an examination disclosing the nature of the infection, and the treatment required, or to procure any evidence as to its cause, the employer was prejudiced by lack of notice, and was not liable for compensation. In *Allard v. N. Y., N. H. & H. R. R. Co.*, 1 Conn. Comp. Dec.

385, where the employé did not notify his employer of the injury alleged until six months after it had occurred, the employer had no opportunity to furnish medical treatment, and so avoid prolonged disability, and cannot be held for compensation. In *Burke v. Shepard*, 1 Conn. Comp. Dec. 106, it was held that where an employé failed to report his injury promptly, and did not procure medical treatment, thereby lengthening the period of incapacity, the employer was prejudiced by the want of notice, and was liable only for the normal period of disability. *New York*. Where the cause of claimant's cancer of the bone was doubtful on the evidence presented, but it appeared that the employer had no notice of the injury until after the employé's leg had been amputated and he had recovered, and had had no opportunity to make an investigation as to the accident, or to obtain medical testimony bearing on the cause of the disease, it was held that the employer was prejudiced by the failure to give notice, and that the employé could not recover. *Marcon-tonio v. The Charles Francis Press, The Bulletin*, N. Y., vol. 1, No. 12, p. 16. *England*. Where a workman sought to justify his laches in giving notice by alleging that the employers had not been prejudiced in their defense, but medical evidence showed that the physician was better able to tell whether the rupture was old or new the sooner the examination occurred after the accident, the workman had not established that his employers were not prejudiced. *Nicholls v. Briton Ferry U. D. C.* (1915) 8 B. W. C. C. 42, C. A. Where an injured workman kept on working with a bandage on the hand which had been injured, and it healed, and he attributed subsequent pain to gout, when it was really due to septic poisoning, and then, after discovering the poisoning, waited twenty-two days before giving notice, and died two days after, there was no evidence to justify a finding that the employers were not prejudiced. *Eydmann v. Premier Accumulator Co.* (1915) 8 B. W. C. C. 121, C. A. Where a stage carpenter, after running a splinter in his hand, told the foreman, and died of blood poisoning ten days later in spite of an operation, his employers not being notified until two weeks after his death, the fact that they were given notice of the date of the inquest is not sufficient to show that they were not prejudiced in this case. *Ford v. Gaiety Theater Co., Ltd.* (1914) 7 B. W. C. C. 197, C. A. Where a workman injured his finger on Wednesday, kept on working until Saturday, when the pain forced him to quit, but gave no notice of the accident until Monday, when septic poisoning set in, and necessitated the amputation of the finger, there was no evidence that the employer was not prejudiced, since he might have sent a doctor, and so prevented a cause for compensation from arising. *Walsell v. Russell & Sons* (1915) 8 B. W. C. C. 230, C. A. Where a cotton operator had a cut in his thumb dressed by the first-aid man, but, although the pain continually increased, did not consult a doctor for a month, and gave no notice of the injury to his employer until a short time before the discovery, upon consulting a doctor, of septic poisoning, there was nothing to show that his employers were not prejudiced. *Dalgiesh v. Gartside & Co., Ltd.* (1914) 7 B. W. C. C.

535, C. A. Where a workman told a "leading hand" in July that he had strained himself, and on being discharged in October filed on October 13th, eleven days after his dismissal, a written notice of the accident, which he alleged caused a rupture, and the evidence showed some doubt as to whether the accident in July caused the rupture, the evidence does not justify a finding that the employer was not prejudiced. *Hancock v. British Westinghouse Electric Co.* (1910) 3 B. W. C. C. 210, C. A. Where a navy showed his employer a bruise on his chest sustained from the handle of his pick the day before, and after a lay-off of a few days began work with another employer, and suffered continual pain, an abscess forming in February, three months after which he entered a hospital, and two months after that claimed compensation, there was nothing to show that the employers were not prejudiced in their defense. *Egerton v. Moore* (1912) 5 B. W. C. C. 284, C. A. Where a workman told the overseer measurer of his accident at the time of its happening, but his employer did not learn of it until four months after his recovery, the employer must have been seriously prejudiced, and there was no evidence that he was not. *Jackson v. Vickers, Ltd.* (1912) 5 B. W. C. C. 432, C. A. Where a dock laborer suffered an accident causing acute infective periostitis, and subsequently pyæmia, and the only notice ever given of the accident was an oral notice to the employer's ambulance man some 3½ weeks after the accident occurred, the employers were prejudiced by his failure to give notice. *Coltman v. Morrison & Mason, Ltd.* (1914) 7 B. W. C. C. 194, C. A. Where a workman worked nine days after an accident to his foot, which occurred on December 15th, and was admitted to a hospital on January 2d for the amputation of the foot, but did not notify his employers until April, they were prejudiced by his failure to notify, since at the time of the notice being given the doctors could not tell whether or not the accident caused the disease. *Stronge v. Hazlett, Ltd.* (1909) 3 B. W. C. C. 581, C. A. Where a carpenter alleged that he sent a message that he had sprained his ankle, to his foreman, but the foreman denied it, and written notice was not given until two months later, the employers were prejudiced in that the chance of a thorough investigation of the accident was lost them by the delay in giving notice, and the workman, therefore, cannot recover. *Burrell v. Holloway Bros. (London) Ltd.* (1911) 4 B. W. C. C. 289, C. A. Where a fish porter alleged an injury in being pricked in the finger with a fish bone, and was later operated on for blood poisoning, but gave no notice until four weeks after the accident, and the employer showed that the cause of the blood poisoning might have been determined by the doctors if they had had a chance to make an earlier investigation, and that his witnesses had trouble in remembering accurately on account of the lapse of time, he was held to have been prejudiced in his defense. *Ungar v. Howell* (1914) 7 B. W. C. C. 36, C. A. Where a miner was ordered by his employer's doctor to quit work because a scratch on his hand was becoming worse, after working five days after the accident, but gave no notice for fourteen days, there was no proof that the employers were not preju-

prejudice rests on the claimant.⁷⁹ If the employé gives evidence from which it may reasonably be inferred that the employer has not

diced. *Snelling v. Norton Hill Colliery Co., Ltd.* (1913) 6 B. W. C. C. 506, C. A. Where a cabdriver gave no notice of an accident occurring July 12th until a month later, when he had practically recovered, and his testimony that he gave verbal notice within a day or two of the accident was disputed by the employer, the employer was held to have been prejudiced. *Leach v. Hickson* (1911) 4 B. W. C. C. 153, C. A. Where notice of a second accident, sustained by a workman in the course of doing light work assigned him after the first injury, was not given for 3½ weeks after it happened, but an award for the workman was entered without any finding on the question of notice or any further evidence upon it, such award was set aside because it was not shown that the employers were not prejudiced in their defense. *Lacey v. Mowlem & Co., Ltd.* (1914) 7 B. W. C. C. 135, C. A. Where a workman sustained an injury to his thumb on February 19th, but considered it inconsequential, and then accidentally reopened it on March 10th, and on consulting a physician found he had blood poisoning, which resulted in his death on March 27th, he should have given notice by at least the time he found he had blood poisoning, and the employers were prejudiced by his failure to do so. *Taylor v. Nicholson & Son* (1915) 8 B. W. C. C. 114, C. A.

⁷⁹ Where a workman died after suffering eight days from septic poisoning due to an accident, without giving his employer notice, it cannot be maintained without positive evidence that the employers were not prejudiced in their defense, and to succeed the workman must produce such evidence. *Taylor v. Nicholson & Sons* (1915) 8 B. W. C. C. 114, C. A. Where a workman died on January 21st from an injury received December 23d, and the dependents, claiming compensation, offered no evidence whatever to show that the employer was not prejudiced by not receiving any notice until January 29th, they cannot succeed. *Hunt v. Highley Mining Co., Ltd.* (1914) 7 B. W. C. C. 716, C. A. Where a charwoman fell on her own stairs as a result of a fall the day previous on her employer's stairs, and fractured her kneecap, and notice of the injury was not given for three weeks after, she must discharge the burden of showing that the employers were not prejudiced, and, not having done so, must fail in her claim. *Hodgson v. Robins, Hay, Waters & Hay* (1914) 7 B. W. C. C. 232, C. A. Where a patient in a hospital was found, after being there six weeks, to be suffering of heart strain, and after a month gave notice of an accident and sudden strain alleged to have occurred four months before the notice, and on trial his evidence was not sufficient to prove that the employers had not been prejudiced, his case must fail. *Ing v. Higgs* (1914) 7 B. W. C. C. 65, C. A. Where an injured workman gave oral notice to the employer's manager two days after the accident, but gave no written notice until four and five months later, the three notices which he then gave differing in the particulars of the accident, it must be inferred,

been prejudiced by failure to give notice, the burden of proving prejudice is cast upon the employer.⁸⁰ Any payment of compensation will operate to waive notice.⁸¹ It is frequently required, as by the British Act, that the notice be in writing,⁸² and that it be given as soon as practicable after the injury.⁸³ A defect in the notice

in absence of evidence to the contrary, that the employers were prejudiced by the laches. *Hughes v. Coed Talon Colliery Co., Ltd.* (1909) 2 B. W. C. C. 159, C. A.

Where, in the case of a collier, who was taken to a hospital suffering with an abraded knee four days after the accident, and died there five days later, death being due to blood poisoning, the claimants introduced evidence from which it might reasonably be concluded that the employer was not prejudiced by the fact that no notice was given until after the workman's death, he must produce evidence to rebut such conclusion, or he cannot succeed. *Hayward v. Westleigh Colliery Co., Ltd.* (1915) 8 B. W. C. C. 278, H. L., and (1914) 7 B. W. C. C. 53, C. A.

Question of fact.—Where a sheriff-substitute held that, because a workman had failed to give notice of an accident for three weeks after it happened and left the employ without doing it, the employer was prejudiced, this is a question of fact, and must be decided as such, and not as a question of law determined by a rule. *M'Lean v. Carse & Holmes* (1899) 1 F. 878, Ct. of Sess.

⁸⁰ *Telford v. Healy-Tibbitts Cons. Co.*, 3 Cal. I. A. C. Dec. 41.

⁸¹ (St. 1915, § 2394—11) *Pellett v. Indus. Com. of Wis.*, 162 Wis. 596, 156 N. W. 956.

Payment by the employers of part wages for seven weeks during the illness of a miner suffering from tubercular trouble, which was revived by spraining his ankle, and from which he finally died, is a waiver of notice by the employers. *Davies v. Point of Ayr Collieries, Ltd.* (1910) 2 B. W. C. C. 157, C. A. Where employers paid compensation during a workman's incapacity under an unregistered agreement, but when he later became incapacitated again denied liability, alleging that they were prejudiced by his not giving them notice, they were estopped from setting up this defense by their former payments. *Turnbull v. Vickers, Ltd.* (1914) 7 B. W. C. C. 396, C. A.

⁸² *Stevens v. Insoles, Ltd.* (1912) 5 B. W. C. C. 164, C. A.

What constitutes written notice.—Where a manager entered in a book supplied by the company for that purpose the details of an accident to a boy, as given him by the boy's father in his presence, such entries constituted written notice to the employers of the accident. *Id.*

⁸³ A claim filed at least four months after the injury, if considered as a notice, was not given "as soon as practicable after the happening thereof."

or in its service is no bar to a recovery, unless prejudice has resulted to the employer because of such defect.⁸⁴

While strict conformity with business practices is not required from employes in regard to notice of injury, under the Connecticut Act, where an employé allows his employer to remain in ignorance for a considerable period of time, and then makes claim for compensation or medical fees, the burden of proof rests more heavily upon him than where the injury is promptly reported.⁸⁵ Where the workman gave no notice of the injury to his employer, and the employer had no knowledge whatever of the injury, until notified by the employé's physician one day before the expiration of the thirty-day period, provided for in this Act, the employer is liable for medical expense for that one day only.⁸⁶

§ 211. Notice to principal

Where a contractor against whom a workman has obtained an award under the British Act becomes bankrupt, the workman should give the principal a separate notice and claim before entering claim against him.⁸⁷ Since there is nothing in the California

In re Bloom, 222 Mass. 434, 111 N. E. 45. Notice must be given as soon as practicable. *Leach v. Hickson* (1911) 4 B. W. C. C. 153; *Burrell v. Holloway Bros., Ltd.*, 4 B. W. C. C. 239; *Hunt v. Highley Mining Co., Ltd.* (1914) W. C. & Ins. Rep. 406.

Where notice of a rupture was not given by a workman until the third day after the accident, it was not given as soon as practicable. *Nicholls v. Briton Ferry U. D. C.* (1915) 8 B. W. C. C. 42, C. A. Where a hairdresser's assistant noticed symptoms of dermatitis on January 17th, left the employment the last of March, and gave no notice until in April, such notice was not given as soon as practicable, and there is no ground for recovery. *Petschelt v. Preis* (1915) 8 B. W. C. C. 44, C. A.

⁸⁴ (Laws 1911, c. 218, § 22; Laws 1913, c. 216, § 6) *Roberts v. Packing Co.*, 95 Kan. 723, 149 Pac. 413; *Ackerson v. National Zinc Co.*, 96 Kan. 781, 153 Pac. 530.

⁸⁵ *Waters v. Jewell Belting Co.*, 1 Conn. Comp. Dec. 511.

⁸⁶ *Joeogan v. Hershman*, 1 Conn. Comp. Dec. 229.

⁸⁷ *Meier v. Dublin Corporation* (1912) 2 Ir. R. 129, C. A.

Act requiring an injured employé of a contractor to notify the principal, the principal is liable, notwithstanding any want of notification of the fact of injury, unless the statute of limitations has run.⁸⁸

§ 212. Compensation claims—Sufficiency—Abatement

The compensation claim need ordinarily state no more than the time, place, cause, and nature of the injury.⁸⁹ Any statement, oral or written, made within the proper time, by which the injured em-

⁸⁸ *Neel v. White*, 2 Cal. I. A. C. Dec. 933.

⁸⁹ (St. 1911, c. 751, pt. 2, §§ 15, 23, as amended by St. 1912, c. 571, § 5) *Lemieux v. Contractors' Mut. Liab. Ins. Co.*, 223 Mass. 346, 111 N. E. 782.

Sufficiency of alleged claims.—Where an engine cleaner, who had been injured, made no claim for compensation, except to file an application for arbitration, doing so within the limit of time required for a claim, his request for compensation constituted a recognizable claim, and no other was necessary. *Fraser v. Great North of Scotland Ry. Co.* (1901) 3 F. 908, Ct. of Sess. Where a workman, in making his verbal claim for compensation to the manager of the works, did not state the amount claimed, the court was in error in holding such statement to be necessary. *Thompson v. Gould & Co., Ltd.* (1910) 3 B. W. C. C. 392, H. L., and 2 B. W. C. C. 166, C. A. Where a workman made an oral claim to the manager of the works, but made no claim in writing, the verbal claim was held sufficient. *Id.* Where a workman, whose injury by accident occurred in January, claimed compensation from his employer in May, and then filed a request for arbitration, which was beyond the time limit of the Act set for making claim, it was held that the claim meant in the Act was the claim to the employer, made here in May, which was the real starting of the proceedings. *Powell v. Main Colliery Co., Ltd.* (1900) 2 W. C. C. 29, H. L., and 2 W. C. C. 25, C. A. (Act of 1897). Where an injured workman gave notice and made claim, and received full wages for five weeks during his incapacity, and his wife then asked the employer whether he would compensate her and her children, such cannot be considered as a claim for compensation. *Johnson v. Wootton* (1911) 4 B. W. C. C. 258, C. A. Where an injured workman was offered compensation, and refused it, consulting a lawyer about bringing an action, and afterward changed his mind, but made no claim, the offer which he refused cannot be considered as a claim for compensation made by him. *Devons v. Anderson & Sons* (1911) S. C. 181, C. A. Where, after the death by accident of a workman, the counsel of his dependent father gave notice and said he was instructed to "intimate" that the father would hold the employers liable for compensation, such notice is not a claim, but merely a notice of the accident, and evidence of intention to make a claim. *Bennett v. Wordie & Co.* (1899) 3 F. 908.

ployé makes it known to his employer that he is claiming compensation, is sufficient under the Kansas Act.⁹⁰ An action brought by the employé for damages will serve the purpose of the requirement of this Act that he make claim for compensation within three months, where he amends his petition and asks for compensation under the Act.⁹¹

A claim for compensation on account of injury sustained by an employé in the course of employment, which results in permanent partial disability such as is defined in the schedule contained in section 33 of the Ohio Act, does not abate by reason of the death of such employé from causes other than the injury, even though the amount has not been determined prior to his death.⁹²

§ 213. — Necessity of claim—Waiver

No claim or demand for compensation need be made when the adverse party denies any liability, or where by reason of his acts and attitude it would be unavailing, if made,⁹³ or where liability has been admitted.⁹⁴ Demand is not a condition precedent to the

⁹⁰ (Laws 1913, c. 216, § 6) *Gailey v. Peet Bros. Mfg. Co.*, 98 Kan. 53, 157 Pac. 431.

⁹¹ *Ackerson v. National Zinc Co.*, 96 Kan. 781, 153 Pac. 530.

⁹² *Re Wm. F. Patterson*, vol. 1, No. 7, *Bul. Ohio Indus. Com.* p. 157.

⁹³ *Ackerson v. National Zinc Co.*, 96 Kan. 781, 153 Pac. 530. The general rule is that, where a demand would have been unavailing, if made, proof of demand and refusal is not essential. *Raper v. Harrison*, 37 Kan. 243, 15 Pac. 219; *C. K. & W. R. Co. v. Com'rs of Chase County*, 49 Kan. 399, 30 Pac. 456; *Chapin v. Jenkins*, 50 Kan. 385, 31 Pac. 1084; *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883.

⁹⁴ Plaintiff was injured in defendant's mill, and a doctor attended him before he was removed therefrom. A few days thereafter he called up the mill, and told the timekeeper he wanted a settlement, and wanted a doctor sent out, and was referred to defendant's main office. On calling there he was referred to defendant's attorneys, and in a day or two a doctor was sent out. A little later he went with counsel to see defendant's attorneys about a settlement, which was discussed, but none was made. Shortly thereafter the action was brought, which resulted in a lump sum judgment. The answer

power of the court to entertain proceedings for compensation under the Minnesota Act.⁹⁵ The holder of a claim against an estate for disability compensation under the California Act can maintain a proceeding before the Commission without first presenting claim to the executor or executrix, as required before an action is brought in a court of justice.⁹⁶

While the general statutory requirement as to the presentation of claim against a city applies to demands of injured employes under the Kansas Act,⁹⁷ compensation may be recovered in that state in an action against a city of the second class on a claim not presented as required by the general statutes.⁹⁸ Provisions of city charters regulating the filing of claims against the city have no effect in compensation cases where the matter is covered by the Act.⁹⁹ That

admitted an injury and liability for compensation beginning at the end of the second week of the disability, and averred readiness to pay compensation, and that the plaintiff had been notified thereof and refused to accept. It was held that the claim, required by section 6, c. 216, of the Laws of 1913, to be made within three months after the accident, was rendered unnecessary. *Halverhout v. S. W. Milling Co.*, 97 Kan. 484, 155 Pac. 916.

The carrying on of negotiations with applicant for the settlement of his claim was a waiver of the right to object that claim was not made within the statutory period. *Damps v. Michigan Central Railroad Co.*, Mich. Wk. Comp. Cases (1916), 25.

Where employers paid an injured workman half wages for some time, and tried to obtain an agreement permitting them to pay a lump sum in full compensation, but failed, they were estopped by admitting their liability from pleading lapse of time as a defense. *Wright v. Bagnall & Sons, Ltd.* (1900) 2 W. C. C. 36, C. A. (Act of 1897). Where the employers, in their answer, alleged that they had paid compensation amounting to £2, and that that was the extent of their liability, such allegation is evidence that the workman had made a claim. *Lowe v. Myers & Son* (1906) 8 W. C. C. 22, C. A.

⁹⁵ *State ex rel. Diamond Drilling Co. v. District Court*, 129 Minn. 423, 152 N. W. 838.

⁹⁶ *Waltzer v. Martinez*, 2 Cal. I. A. C. Dec. 951.

⁹⁷ *Knoll v. City of Salina*, 98 Kan. 428, 157 Pac. 1167.

⁹⁸ *Id.*

⁹⁹ The provisions of the charter of the city of Detroit relative to filing claims against the city are superseded by the Workmen's Compensation Act.

the workman fails to make a written demand for compensation within three months after the accident does not preclude recovery where an oral demand is made within that time.¹

§ 214. — Time for presentation—Limitations

The claim must be properly filed within the time prescribed,² unless the case comes within a statutory exception by reason of ex-

which is especially made applicable to every city within the state. *Marshall v. City of Detroit*, Mich. Wk. Comp. Cases (1916), 57.

¹ *Knoll v. City of Salina*, supra.

² Petition must be filed with the clerk, not merely with the judge. *Hendrickson v. Public Service Ry. Co.*, 87 N. J. Law, 366, 94 Atl. 402.

The Illinois Act requires that the claim be made within six months after the accident. *Victor Chemical Works v. Indus. Board of Ill.* (1916) 274 Ill. 11, 113 N. E. 173. The claim papers should be filed within the time specified in rules 4 and 7 of the Rules of Procedure. In *re Harley L. Kelly*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 141.

When it appears from the application and answer that more than eight months have elapsed between the accident and the filing of the application, the cause will be dismissed. *Fox v. Union Oil Co. of Cal.*, 2 Cal. I. A. C. Dec. 414. Where from the application itself and statements of the applicant, corroborated by the answer, it appeared that 6½ months had elapsed since the date of the accident, the action was dismissed, without a hearing to take testimony, for want of jurisdiction. *Calef v. Union Oil Co. of Cal.*, 2 Cal. I. A. C. Dec. 488. Where the applicant sustained an accidental injury to his left eye, and compensation was paid for several weeks thereafter until the applicant returned to work, both parties then believing in good faith that the disability caused by the accident had terminated, and more than six months after the last payment of compensation the condition of the eye again became serious, due to the formation of a cataract, caused by the accident, and involving a probable loss of sight of the eye, and, upon an application for compensation being filed, the defendant raises as a defense that the six months period within which suit must be brought has elapsed, such defense is valid, and the applicant is not entitled to compensation. *Stoll v. Ocean Shore Railroad Co.*, 2 Cal. I. A. C. Dec. 81.

Where the accident causing the injury occurred at 11:30 in the morning, and the claim for compensation was made at 5:30 in the afternoon of the last day of the period of six months immediately following, it was held to be within the statutory requirement. *Peggie v. Wemyss Coal Co., Ltd.* (1910) S. C. 93, Ct. of Sess.

cusable mistake or other reasonable cause.³ Ignorance of the requirements of the statute is not an excusable mistake.⁴ Limitation provisions have been held not to apply to accidental injuries received before their passage.⁵ A provision that "proceedings" must be begun within six months contemplates the filing of a written claim, and letters asking for information as to the rights of an injured workman are not sufficient to institute "proceedings."⁶ It has been held error to find that delay in obtaining the necessary authorization from a workman's widow residing in Italy was such reasonable cause as to make the case an exception to the rule that the claim must be filed within six months after injury, where there is no evidence to support such finding.⁷ As a rule, any payment of compensation operates to extend the time,⁸ unless it be a

³ In re McLean, 223 Mass. 342, 111 N. E. 783.

Reasonable cause.—Where the injury complained of, the loss of an eye, did not result until several months after the accident, the right to compensation was not barred by failure to make claim within the time after the accident set in the statutory limitation. *Kalucki v. American Car & Foundry Co.*, Mich. Wk. Comp. Cases (1916), 390. The mere fact that an employer paid an injured workman half wages is not of itself a reasonable cause for his not making claim until after the period of limitation prescribed by the statute has expired, although it is evidence of such cause. *Lynch v. Lansdowne* (1914) 48 Ir. L. T. 90, C. A.

⁴ In re McLean, 223 Mass. 342, 111 N. E. 783.

⁵ *Birmingham v. Lehigh & Wilkes-Barre Coal Co.* (N. J.) 95 Atl. 242. A claim for compensation under the Workmen's Compensation Act of 1911 (P. L. p. 134) held not barred by the amendment of April 1, 1913 (P. L. p. 314, § 8), where the accident occurred before the amendment, and even though the limitation, as fixed thereby, had expired when the petition was filed. *Baur v. Court of Common Pleas*, 88 N. J. Law, 128, 95 Atl. 627.

⁶ *Johnson v. Engstrum Co.*, 2 Cal. I. A. C. Dec. 788.

⁷ In re Fierro's Case, 223 Mass. 378, 111 N. E. 957.

⁸ Where wages are paid in full in lieu of compensation, the limitation of time within which to commence a proceeding runs from the last payment of such wages. *Turner v. City of Santa Cruz*, 2 Cal. I. A. C. Dec. 991.

Where the injured employé fails to file his application for eight months, but during seven months of disability and to the end of his term of office, during which time he does little or no work, the employing municipality pays

mere payment of medical expenses,⁹ but does not prevent limitations from running from the date of the payment.¹⁰

Where an employé is injured, and fails for six months to receive or claim compensation or claim the reasonable cost of his medical expenses from the employer under the California Act, and subsequently dies within a year from the date of his accident, the dependents of the deceased employé are barred by the statute of lim-

him his salary regularly, such payment is compensation, and extends time for beginning of the operation of the statute of limitations. *Acrey v. City of Holtville*, 2 Cal. I. A. C. Dec. 587. Where applicant sustained a disability entitling him to compensation for a period of 53 weeks, and had received from his employer compensation for 29 weeks, such payments extended the time of operation of the statute of limitations, and the 6 months did not begin to run until compensation was discontinued, although the filing of the claim was more than 6 months after the date of the accident. *Higley v. Belcher*, 2 Cal. I. A. C. Dec. 839.

Where an insurance carrier has not been substituted for the employer, a proceeding against the employer is not barred if the last payment on account of compensation was made by the insurance carrier within 6 months before commencing the proceeding. *Frandsen v. J. Llewellyn Co.*, 3 Cal. I. A. C. Dec. 23.

⁹ Where more than 6 months have elapsed from date of accident to filing of claim, but a sum of money has been paid by the employer to the injured employé for medical expense incurred, the payment of medical expense is not payment of disability indemnity within the meaning of section 16 (c) of the Act, and does not extend the running of the statute. *Johnson v. Engstrum Co.*, 2 Cal. I. A. C. Dec. 788.

¹⁰ Where an injured employé was paid compensation from August 6th, the day of the accident, to December 1st, no payment being made thereafter, and on June 11th of the next year a claim was filed with the Commission, it was held that, as 6 months had elapsed since the last day of payment, the claim was barred by section 16 of the Act. *Baumgartner v. New Method Laundry Co.*, 2 Cal. I. A. C. Dec. 639. Where 3 months after the accident the sum of \$540 was paid to the employé, and accepted by him as a full settlement, and 10 months after the accident he filed a claim for compensation with the Commission, and the defendant thereupon relied upon the defense of the statute of limitations, since this sum paid as settlement, but unapproved by the Commission, if paid in weekly indemnity, would compensate the employé for disability up to a date within 6 months of the filing of his claim, the claim is therefore not barred by the Act. *Wilson v. Red River Lumber Co.*, 2 Cal. I. A. C. Dec. 807.

itations provided in the Act from claiming the compensation due the deceased during his lifetime, or the cost of medical treatment furnished him,¹¹ but may file a claim for a death benefit, or for the payment of funeral expenses if dependency be not established, within one year from the date of death. The fact that no claim is made by the employé prior to his death does not bar the dependents from claiming a death benefit if claim be made within a year from the death.¹² It was not the intention of the lawmakers, in enacting the provision of this Act which authorizes the Industrial Accident Commission to rescind, alter, or amend any order or award, to open the statute of limitations and to extend it beyond the period of six months to enable a claimant to present an entirely new case based on the alleged result of an injury which had never before been called to the attention of the commissioners.¹³

§ 215. — Federal Act

The federal Act of 1908, continued in force as to injuries prior to the Act of 1916, provides that in case of death the persons entitled to compensation or their legal representatives shall, within ninety days after such death, file an affidavit setting forth their relationship to the deceased and the ground of their claim, which affidavit shall be accompanied by the certificate of the attending physician setting forth the fact and cause of death, or the non-production of the certificate shall be satisfactorily accounted for. The requirement that an affidavit be filed within ninety days after death is directory, and a failure to do so within that time may be waived by the Secretary in cases where the facts appear to justify such waiver.¹⁴ It is the date of the delivery to the official su-

¹¹ *Stephens v. Clark*, 2 Cal. I. A. C. Dec. 135.

¹² *Id.*

¹³ (Wk. Comp. Act, §§ 16, 25 [c], 25 [d], 81, 82) *Ehrhart v. Indus. Acc. Com.* of Cal. (Cal. 1916) 158 Pac. 193.

¹⁴ *In re Gray, Jr.*, Op. Sol. Dept. of L. (1915) 648, overruling *In re Goodley*, Op. Sol. Dept. of L. (1915) 619.

perior, and not the date of the execution of the affidavit of claim, which determines whether the affidavit of claim is filed within ninety days.¹⁵ Delivery to the deceased employé's official superior, in accordance with regulations of the Secretary designating such official superior to receive the affidavit, is a filing with the secretary within the meaning of the Act;¹⁶ but an affidavit deposited in the mail within ninety days, addressed to the deceased's official superior, but not received by him until after the expiration of the ninety-day period, is not a filing.¹⁷ A filing by any one or more of the beneficiaries named in section 2 and referred to in section 4 is sufficient to protect the rights of a minor child.¹⁸ Where an employé leaves no parent or widow, but leaves a child, and the acting Spanish consul files the affidavit of claim on behalf of the child, such acting consul may be regarded as acting in loco parentis, and his affidavit as the affidavit of the child.¹⁹ An affidavit filed with the American consul at Madrid, to whom the proper blanks had been sent, and through whom they were to be returned when filled out and executed, has been held to have been filed with the Secretary of Commerce and Labor.²⁰ Neither a verbal notice of claim by the royal vice consul of Italy to the superior officer of an Italian subject, killed while in the employ of the United States, within ninety days after death, nor a telegraphic notice by such consul sent to the Secretary of Commerce and Labor ninety-two days after the death, is a compliance with the Act.²¹ If a beneficiary in case of death, in person or by agent, files a claim for compensation, or what is equivalent to a claim, within the time

¹⁵ In re Graham, Op. Sol. Dept. of L. (1915) 629.

¹⁶ In re Nurse, Op. Sol. Dept. of L. (1915) 626.

¹⁷ In re Henry, Op. Sol. Dept. of L. (1915) 635.

¹⁸ In re Rodriguez, Op. Sol. Dept. of L. (1915) 551.

¹⁹ In re Redondo, Op. Sol. Dept. of L. (1915) 563.

²⁰ In re Melchor, Op. Sol. Dept. of L. (1915) 646.

²¹ In re Badolato, Op. Sol. Dept. of L. (1915) 630.

prescribed, and an "affidavit" in the technical sense is not filed until ninety days have expired, owing to the delay of government officers in supplying the necessary forms, the right to compensation is not barred.²² Where a claimant cannot act for himself within the time limited, and another, in his name and behalf, but without prior authority, acts for him and files a claim within ninety days, a ratification by the claimant of the act done on his behalf, though made after the expiration of the ninety days, relates back to the time of the act done, so as to make the filing effective as to the prior date.²³

The federal Act of 1908, also provides that in case of incapacity for work lasting more than fifteen days, the injured party shall, within a reasonable period after the expiration of such time, file an affidavit setting forth the grounds of his claim, to be accompanied by a certificate of the attending physician as to the cause and nature of the injury and probable duration of the incapacity, or the nonproduction of the certificate shall be satisfactorily accounted for. The filing of this affidavit is not the only basis of a claim, as the Secretary may find a claim established from other sources. Such filing is therefore not mandatory, but directory.²⁴ Where a verbal claim for compensation was promptly made, but an affidavit of claim was not filed until nearly a year after the injury, owing to the neglect of official superiors to furnish necessary forms, the delay was not unreasonable.²⁵ The fact that no physician is employed satisfactorily accounts for the nonproduction of a physician's certificate.²⁶ Where the evidence shows incapacity for more than fifteen days, the attending physician's

²² *In re Powers*, Op. Sol. Dept. of L. (1915) 622.

²³ *In re Callender*, Op. Sol. Dept. of L. (1915) 637.

²⁴ *In re Filler*, Op. Sol. Dept. of L. (1915) 663.

²⁵ *In re Sturgeon*, Op. Sol. Dept. of L. (1915) 669.

²⁶ *In re Wagner*, Op. Sol. Dept. of L. (1915) 666.

certificate, covering only the thirteen days the employé was under his observation, satisfies the law.²⁷

The affidavit of claim may be executed and filed for the claimant by an attorney in fact duly appointed for the purpose.²⁸ It may be executed before any person authorized to administer oaths generally, and the authority of a person in a foreign country to administer oaths is a question of fact, which should be established by satisfactory evidence.²⁹ Such general authority is not indispensable, if specific authority to administer oaths is not so limited as to exclude the oath in question.³⁰

²⁷ *In re Kuehnle*, Op. Sol. Dept. of L. (1915) 665.

²⁸ *In re Jiminez*, Op. Sol. Dept. of L. (1915) 657.

²⁹ *In re Gilfillen*, Op. Sol. Dept. of L. (1915) 654.

³⁰ *In re Grant*, Op. Sol. Dept. of L. (1915) 660.

ARTICLE V

EVIDENCE

Section

- 216. Admissibility.
- 217. Hearsay.
- 218. Declarations of workman.
- 219. Burden of proof and evidence to sustain it—Presumption.
- 220. Report—Evidentiary effect.
- 221. Medical examination.
- 222. Federal Act.

§ 216. Admissibility

The Legislature cannot delegate to a commission the power to regulate and prescribe the nature and extent of proof.³¹ While administrative commissions or boards are not held to the same strict rule with respect to rulings on the admission of evidence as courts of law,³² evidence admissible in courts is properly received in proceedings before these tribunals,³³ and the ordinary rules as to

³¹ Workmen's Compensation Act, § 75, subd. 6, purporting to give the Commission power to regulate and prescribe the nature and extent of the proofs of evidence, is an attempted delegation of power, violative of Const. art. 22, § 21. *Englebreton v. Indus. Acc. Com.*, 170 Cal. 793, 151 Pac. 421.

³² *First Nat. Bank v. Indus. Com.*, 161 Wis. 526, 154 N. W. 847; *Chicago & N. W. Ry. Co. v. Railroad Commission*, 156 Wis. 47, 145 N. W. 216, 974; *Borgnis et al. v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489. The Commission is not confined to the evidence taken on the hearing in the same degree as courts are in their proceedings. The Compensation Act contemplates that the Commission shall get all the facts and information available and render its award accordingly. *Winters v. Mellen Lumber Co.*, *Bul. Wis. Indus. Com.* vol. I, p. 89.

³³ *In re Fierro's Case*, 223 Mass. 378, 111 N. E. 957.

Documentary evidence.—Printed reports of the United States Bureau of Mines, written by an expert, bearing on the causes and effects of carbon monoxide poisoning, are admissible, though read in evidence by another witness, the expert not being produced. *Markt v. National Brewing Co.*, 2 Cal. I. A. C. Dec. 881. Permission was granted a witness, without objection by the adverse party, to send in a written statement elaborating his oral testimony given on the stand, wherein he set forth the details of certain

order of proof are usually followed. Where a case has been submitted by agreement of a defendant upon the testimony previously taken, he will not be granted the privilege of producing further testimony, which could have been produced before.³⁴ A memorandum relative to the injury, entered by the foreman of the department in which the employé worked, is admissible in evidence as an admission against the employer that the injury occurred in the course of employment, where it was the foreman's duty to make such entries.³⁵ Conversation over the telephone is competent to prove notice.³⁶ Evidence as to the manner in which the injury was received is ordinarily irrelevant, and should be excluded, where it

occurrences similar to the alleged occurrence in dispute. Such statement was admissible as a continuation of the sworn oral testimony, to the extent that the oral testimony was admissible. *Id.* An original certified power of attorney by an alien dependent may be accepted as evidence in proving a claim. (Wk. Comp. Act Wash. § 3) Rulings Wash. Indus. Ins. Com. 1915, p. 6.

Testimony of a deceased witness, taken in some other and different proceeding than the one in which the same is sought to be introduced, is not admissible. *Rediger v. Pekin Wagon Co.*, Bulletin No. 1, Ill., p. 146.

Ex parte affidavits and depositions, not in conformity with the statute or rules of court, are not the best evidence, and are not admissible to establish any fact or question at issue. *Rediger v. Pekin Wagon Co.*, Bulletin No. 1, Ill., p. 146. The Industrial Board has the power to issue a *dedimus potestatem*, and under rule 17 has the right to permit the evidence so taken to be read on the trial of the cause. *Cardinale v. Valencano*, Bulletin No. 1, Ill., p. 114.

Competency of witness.—It is not sufficient to preclude a physician from testifying that he has been appointed by the Board to make an examination and report his findings, unless it is clearly shown he is biased and prejudiced. *Krisan v. American Steel Foundries*, Bulletin No. 1, Ill., p. 156.

Expert testimony.—Where two experts called in by the Commission agreed with the conclusion of the physicians who had treated the applicant, the Commission held that its only safe ground was to get absolutely impartial expert evidence, and then follow it so far as it coincided with reason and judgment. *Derbeck v. Pfister & Vogel Leather Co.*, Bul. Wis. Indus. Com. vol. I, p. 92.

³⁴ *Witt v. Pacific Lumber Co.*, 2 Cal. I. A. C. Dec. 861.

³⁵ *Fitzgerald v. Lozier Motor Co.*, 187 Mich. 660, 154 N. W. 67.

³⁶ *Cutaria v. Swieberg*, Bulletin No. 1, Ill., 153.

will tend to arouse prejudice against the employer, as where it shows ill treatment of the employé by the employer's foreman.³⁷ Unsworn opinion evidence, given without notice to the employer or insurer, or opportunity to interrogate the witness or make additional proof, should not be considered.³⁸ While, on review by the courts of many states, the finding of a coroner or his jury is inadmissible in evidence on the trial of an issue as to the cause of death, the rule is otherwise in Illinois, and in that state the inquest of the coroner and the verdict of the jury are competent evidence.³⁹ An admission by an employer against his interest should be given its full force, the same as in an action at law, and is equally good against his insurance carrier.⁴⁰

§ 217. — Hearsay

A provision authorizing a Commission to disregard "technical rules" does not usually authorize an award made on hearsay evidence; the rule against hearsay evidence being more than a mere artificial technicality of law.⁴¹ Many considerations preclude the

³⁷ *Ruth v. Witherspoon-Englar Co.*, 98 Kan. 179, 157 Pac. 403.

³⁸ *Pacific Coast Casualty Co. v. Pillsbury, Indus. Acc. Com.*, 171 Cal. 319, 153 Pac. 24; *McCay v. Bruce*, 2 Cal. I. A. C. Dec. 975.

³⁹ *Armour & Co. v. Indus. Board of Ill.* (1916) 273 Ill. 590, 113 N. E. 138; *Victor Chemical Works v. Indus. Board of Ill.* (Ill. 1916) 274 Ill. 11, 113 N. E. 173.

The admissibility of such evidence has been declared in the following cases, which include actions on contract of life insurance, a suit to set aside a will, and actions arising from negligence: *United States Life Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Stollery v. Cicero & Proviso Street Ry. Co.*, 243 Ill. 290, 90 N. E. 709; *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; *Foster v. Shepherd*, 258 Ill. 164, 101 N. E. 411, 45 L. R. A. (N. S.) 167, Ann. Cas. 1914B, 572; *Devine v. Brunswick Balke Co.*, 270 Ill. 504, 110 N. E. 780. There is no distinction in principle between these cases and such as arise under the Workmen's Compensation Act. *Armour & Co. v. Indus. Board of Ill.* (1916) *supra*.

⁴⁰ *Moss v. Ames Iron Works*, The Bulletin, vol. 1, No. 8, p. 9.

⁴¹ *Englebretson v. Indus. Acc. Com.*, 170 Cal. 793, 151 Pac. 421; *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771.

An award based on hearsay evidence will be set aside. *Englebretson v.*

admission of hearsay evidence. The unreliability of a relation by one person of statements made to him by another is so well known that it has become customary and is considered necessary for courts, in cases where oral admissions of a party are proved against him, to instruct the jury that they must view such admissions with caution, because of the tendency of witnesses to make perverted or inaccurate reports. There are many decisions of courts of the highest standing declaring the importance and substantial character of the rule against hearsay testimony. It has been said that the fact "that this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that hearsay evidence is totally inadmissible. * * * The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all. If the circumstance that the eyewitnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily

Indus. Acc. Com., supra; Employers' Assur. Corp. v. Indus. Acc. Com., 170 Cal. 800, 151 Pac. 424. The rule against the admission of hearsay evidence as proof of a fact is more than a mere technical rule of admission, and is not to be considered as one of the technical rules of evidence referred to in section 77 of the Compensation Act. *Englebreton v. Indus. Acc. Com., 2 Cal. I. A. C. Dec. 449.* The Industrial Accident Commission has no power to make an award, where the only evidence of accidental injury consists of hearsay testimony, notwithstanding the provision of section 77 of the Compensation Act that hearings before the Commission "shall be governed by this Act and by the rules of practice and procedure adopted by the Commission, and in the conduct thereof neither the Commission nor any member thereof nor any referee appointed thereby shall be bound by the technical rules of evidence," and notwithstanding the provision of subdivision 6 of section 75, which purports to give to the Commission the power "to regulate and prescribe the nature and extent of the proofs and evidence." *Id.*

obtained.”⁴² But, under the provision of the New York Act that the Commission shall not be bound by statutory rules of evidence or technical rules of procedure, the Commission is authorized to receive and consider, not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it.⁴³ In this connection it should be noticed, however, that though the New York Commission in its investigations may receive hearsay

⁴² *Englebreton v. Indus. Acc. Com.*, 170 Cal. 793, 151 Pac. 421, quoting Chief Justice Marshall, in *Queen v. Hepburn*, 11 U. S. (7 Cranch) 296, 3 L. Ed. 348, holding that the reasons for excluding hearsay evidence were these: “First, because the averment of fact does not come to the jury sanctioned by the oath of the party on whose knowledge it is supposed to rest; and, secondly, because the party, upon whose interests it is brought to bear, has no opportunity to cross-examine him on whose supposed knowledge and veracity the truth of the fact depends”—citing 1 *Greenleaf on Evidence* (16th Ed.) page 183, § 99a, wherein Mr. Greenleaf says: “To these reasons may be added considerations of public interest and convenience for rejecting hearsay evidence. The greatly increased expense and the vexation which the adverse party must incur in order to rebut or explain it, the vast consumption of public time thereby occasioned, the multiplication of collateral issues for decision by the jury, and the danger of losing sight of the main question and of the justice of the case if this sort of proof were admitted, are considerations of too grave a character to be overlooked by the court or the Legislature in determining the question of changing the rule.” The above case also cites 2 *Wigmore on Evidence*, p. 1697; *Woolsey v. Pethick Bros.*, 1 *Butterworth*, 411; *Gilbey v. Great Western Ry. Co.*, 102 L. T. 202, 3 *Butterworth*, 135; *Amys v. Barton*, 5 *Butterworth*, 117.

⁴³ (Laws 1914, c. 41, § 68) *Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507, reversing 169 App. Div. 450, 155 N. Y. Supp. 1; *Putnam v. Murray*, *The Bulletin*, N. Y., vol. 1, No. 4, p. 9.

Commissioner Lyon said in *Stadtmuller v. Travelers' Insur. Co.*, *The Bulletin*, N. Y., vol. 1, No. 4, p. 9, that “it would be perfectly proper for the Commission, if it thought the weight of the hearsay evidence efficient, to grant compensation on that evidence alone, but if it were the only evidence in the case I should personally hesitate very seriously before doing so. I do not understand that the opinion of the Appellate Division goes any farther than to make it possible for this Commission, in carefully weighing evidence, to make a finding upon hearsay evidence alone. I do not understand that the Appellate Division has in any way intimated that this Commission should make such a finding on such evidence, unless it is convinced by the weight of the evidence of its truth.

testimony, the probative effect of such evidence is unchanged, and an award which is altogether dependent upon such testimony cannot be sustained, where there is substantial evidence to the contrary.⁴⁴ Thus hearsay testimony of the deceased workman's statements as to the cause of the accident, made at a time when he was in a highly nervous state, which resulted in delirium tremens, causing death, is no evidence at all, where there is substantial legal evidence that no such accident happened.⁴⁵

§ 218. — Declarations of workman

Statements made by the injured workman relative to his bodily or mental feelings may be admitted, but his statements relative to the cause of his illness should be excluded.⁴⁶ This is true of statements made by a deceased workman to a fellow servant as to the cause of his injury.⁴⁷ The statement of a workman, made immediately after an accident, that he had received a pin prick while cleaning spittoons, made when he was unconscious of the tragical results which were to follow, was the best evidence of the surroundings and circumstances of the cause of his fatal malady.⁴⁸

⁴⁴ *Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507, reversing 169 App. Div. 450, 155 N. Y. Supp. 1.

⁴⁵ *Id.*

⁴⁶ *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771; *Gilbey v. Great Western Ry. Co.*, 3 B. W. C. C. 135. There was no error in receiving evidence as to declarations of the deceased employé. *Pigeon v. Employers' Liab. Assur. Corp.*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737.

⁴⁷ *Reck v. Whittlesberger*, *supra*. As to probative effect of workman's declarations, see next section.

But in *Allard v. N. Y., N. H. & H. R. R. Co.*, 1 Conn. Comp. Dec. 385, where the claimant's statement that he had received a strain resulting in an injury to his hip, and had called the attention of two fellow employés to the fact was unsupported, and the two workmen denied having any knowledge of the injury, it was held he had not sustained his claim by a preponderance of evidence.

⁴⁸ *Patch v. First National Bank of Milwaukee*, Rep. Wis. Indus. Com. 1914-15, p. 9.

§ 219. Burden of proof and evidence to sustain it—Presumption

The burden of proof is upon an applicant to establish his claim by a preponderance of credible testimony. This burden may in some cases be discharged by the testimony of the applicant alone, but such testimony must convince the mind that he has made his claim in good faith, and is entitled thereto.⁴⁹ It was held in a Michigan case, however, that where there is no evidence as to an accident arising out of and in the course of an employment, other than statements of a deceased employé in the absence of his employer, an award cannot be sustained.⁵⁰ Proof of the workman's death may be made by circumstantial evidence, and the finding of the body is

⁴⁹ *Denker v. Pacific Stevedoring & Ballasting Co.*, 1 Cal. I. A. C. Dec. 14.

The burden of proving facts necessary to make out a case rests on the party petitioning for relief under the Act as much as it does on the plaintiff in any proceeding at law. *Corral v. William H. Hamlyn & Son* (R. I.) 94 Atl. 877. An applicant for disability caused by accidental injury must prove his claim by a preponderance of the testimony. *Rebello v. Marin County Milk Producers*, 1 Cal. I. A. C. Dec. 87; *W. R. Rideout Co. v. Pillsbury* (Cal.) 159 Pac. 435. The burden of proof is on the applicant to establish by competent proof the fact of death. *Western Grain & Sugar Products Co. v. Pillsbury* (Cal.) 159 Pac. 423. In *Stampick v. American Steel & Wire Co.*, 1 Conn. Comp. Dec. 474, Commissioner Beers said the burden of proof resting upon the claimant is "a burden of proof which does not rest on any technical rule, but which is inherent in that principle of justice which determines that one cannot secure from another the payment of money without showing that he is entitled to it." The burden of proof in all claims for compensation rests on the claimant to furnish convincing proof to the Board as to every jurisdictional fact, or to furnish proof of facts from which such jurisdictional facts may be clearly deduced. In *re Gertrude Patterson*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 33. The testimony of a workman that the loss of an eye had impaired his efficiency as a workman, because he could not gauge distances as accurately as before, was a sufficient basis for a finding that there was a substantial permanent impairment of his earning capacity. *Oliver v. Christopher*, 98 Kan. 660, 159 Pac. 397.

⁵⁰ *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771. This rule is emphasized to the extent of even holding admission of such evidence reversible error, because the mind of the trial court might have been "colored by his admitting statements which are inadmissible as evidence." *Id.*; *Smith v. Hardman, Ltd.*, 6 B. W. C. C. 719.

not an indispensable requisite to a conclusion that the employé came to his death by violence.⁵¹

A *prima facie* case is made when it is shown that an employé was at his usual place of employment, at the usual time of day when he was expected and required to be there, and an injury of any character is shown.⁵² Where it is difficult to determine where the weight of testimony lies concerning a given state of facts, or condition or manner in which an accident happened, the legal presumption favors the payment of compensation.⁵³ In other words, if the evidence, though slight, is yet sufficient to make a reasonable man conclude in the claimants' favor on the vital points, then his case is proven. But the rational mind must not be left in such uncertainty that these essential elements are not removed from the realm of fancy.⁵⁴

The burden of proof in respect to particular matters, and the sufficiency and probative effect of evidence relative to such matters, is considered in other sections.⁵⁵

The presumptions created by the New York Act, that the claim comes within the law, that sufficient notice was given, and that the injury was not caused by the employé's willful intention or intoxication, do not arise until an accident arising out of and in the

⁵¹ *Western Grain & Sugar Products Co. v. Pillsbury* (Cal.) 159 Pac. 423.

⁵² *Cerny v. Wood Street Mill Co.*, Bulletin No. 1, Ill., p. 52.

⁵³ *Isidora v. Rockford Gas Light & Coke Co.*, Bulletin No. 1, Ill., p. 42.

⁵⁴ *In re Sponatski*, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333; *Plumb v. Cobden Flour Mills Co., Ltd.*, [1914] A. C. 62; *Barnabas v. Busham Colliery Co.*, 4 B. W. C. C. 119, H. L.; *Flecher v. Owners of the Ship Dutchess*, [1911] A. C. 671. See also *Childs v. American Exp. Co.*, 197 Mass. 337, 84 N. E. 128; *Bigwood v. Boston & N. St. R. Co.*, 209 Mass. 345, 95 N. E. 751, 35 L. R. A. (N. S.) 113.

In *Foley v. A. T. Demarest & Co.*, 1 Conn. Comp. Dec. 661, where the evidence to show that the workman was injured while in the employ of one of the defendant companies was hardly more than a mere guess, it was insufficient to sustain the burden of proof against that defendant.

⁵⁵ For section references, consult index.

course of the employment of the claimant by the defendant has been proven.⁵⁶

§ 220. Report—Evidentiary effect

The report of the accident made by the employer as required by statute is competent *prima facie* evidence of the facts stated therein, subject to be explained or contradicted.⁵⁷ Where the report is made by the employer's agent authorized to make same, the employer is bound thereby.⁵⁸ A report made by a Commission under statutory authority may be considered by it, when it has been laid before the parties.⁵⁹

§ 221. Medical examination

Submission to a medical examination to afford opportunity to procure evidence, is ordinarily required.⁶⁰ A claim that the injured

⁵⁶ (Wk. Comp. Act, § 21) *Collins v. Brooklyn Union Gas Co.*, 171 App. Div. 381, 156 N. Y. Supp. 959.

⁵⁷ *First Nat. Bank v. Indus. Com.*, 161 Wis. 526, 154 N. W. 847.

A report of the employer constituted *prima facie* evidence that the accident occurred as reported, and that the injury arose out of and in the course of employment. (Pub. Acts Ex. Sess. 1912, No. 10) *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771.

⁵⁸ The Supreme Court of Michigan has held that such reports are admissible. *First Nat. Bank v. Indus. Com.*, 161 Wis. 526, 154 N. W. 847; *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, 249, Ann. Cas. 1916C, 771. This conclusion finds support in *Seaboard Air Line Ry. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. Ed. 175; *Chicago & N. W. Ry. Co. v. Railroad Commission*, 156 Wis. 47, 145 N. W. 216, 974.

⁵⁹ A report made by the Industrial Commission under St. 1911, § 2394—52, subd. 10, authorizing the collection and publication of statistical and other information, may be considered by the Commission as evidence when it has been laid before the parties. *International Harvester Co. v. Indus. Com.*, 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330.

⁶⁰ *In re McLean*, 223 Mass. 342, 111 N. E. 783.

The evidence showed that the employé had been requested by the Board to report at the office of an impartial physician for examination, as provided by part III, § 8, of the Act, and that he had failed to do so. Other evi-

employé refused to submit to a medical examination is not substantiated, where before the employer's physician arrived the employé's counsel announced that they would not consent to an examination, but no demand appears to have been made after the physician arrived, and the anticipatory refusal did not lead the prosecutor to countermand him; he afterwards appearing and being sworn as a witness.⁶¹

Where within a few weeks from the decision of the California Commission an operation is performed, and it becomes possible that permanent disability may be lessened considerably, the Commission will allow a further examination at any time upon the request of either party to determine the extent of permanent disability, whether a year has elapsed or not.⁶² Where the opinions of eminent physicians as to whether the applicant had varicose veins, and whether his disability was affected thereby, are conflicting, and the parties agree to rest their decision on the report of a medical referee, who reports that there had never been varicose veins, such report will be accepted as the basis of an award in favor of the applicant.⁶³

§ 222. — Federal Act

The duty of claimants under the original federal Act, continued in force as to injuries prior to the Act of 1916, to submit to medical examination at least once in six months, is mandatory upon them; but the obligation of the Secretary to provide such an examination is directory, so that a right to compensation is not lost by the latter's

dence indicated that his incapacity for work had ceased. The employé filed a request for a hearing about four months after he had been notified to report for an impartial examination, and was held not entitled to compensation. *Diminico v. Fidelity & Casualty Co. of N. Y.*, 2 Mass. Wk. Comp. Cases, 328 (decision of Com. of Arb.).

⁶¹ *Birmingham v. Lehigh & Wilkesbarre Coal Co.* (N. J. Sup.) 95 Atl. 242.

⁶² *Peterson v. Pellasco*, 2 Cal. I. A. C. Dec. 199.

⁶³ *O'Neal v. Palmer & McBryde*, 2 Cal. I. A. C. Dec. 745.

failure to act.⁶⁴ In order to defeat a right to compensation for refusal to submit to an examination, it is necessary that the examination shall have been directed by the Secretary, that it be made without expense to the employé, and that the employé be advised by the Secretary that such examination is required.⁶⁵ If the Secretary so directs, an examination made by a naval surgeon designated by the Secretary of the Navy to examine an employé to determine his right to continued compensation would be a compliance with the Act.⁶⁶ The requirement as to examination shows that the Act contemplates the payment of compensation be not authorized for a longer period than six months at a time, even though the disability is permanent in its nature.⁶⁷ The examinations should be paid for by the government, the contingent appropriation for the department being available for such purpose.⁶⁸

⁶⁴ In re Villafranca, Op. Sol. Dept. of L. (1915) 762.

⁶⁵ In re Mayott, Op. Sol. Dept. of L. (1915) 765.

⁶⁶ In re Villanueva, Op. Sol. Dept. of L. (1915) 765.

⁶⁷ In re Haynes, Op. Sol. Dept. of L. (1915) 761.

⁶⁸ (Dec. Comp. of Treas.) Op. Sol. Dept. of L. (1915) 781.

ARTICLE VI

PROCEEDINGS BEFORE SPECIAL TRIBUNAL

Section

- 223. In general.
- 224. Jurisdiction.
- 225. Service of summons.
- 226. Parties.
- 227. Pleading and issues under California Act.
- 228. Taking and reception of testimony.
- 229. California.
- 230. Hearing, findings, and award.
- 231. California.
- 232. Review by special tribunal.
- 233. Dismissal.
- 234. Reopening of case, rehearing, and supplementary proceedings.
- 235. California.
- 236. Proceedings under original federal Act.

§ 223. In general

The procedure before a Commission should be flexible and adapted to the direct accomplishment of the aim of the Acts, with as little formality or hampering restriction as is consistent with the preservation of the real rights of the parties and the doing of justice according to the terms of the Acts.⁶⁹ While it was evidently the intent of this legislation that, by concise and plain summary proceedings, controversies arising under the Acts should be promptly adjusted, under a simplified procedure unhampered by the more technical forms and intervening steps which sometimes cumber and delay regular litigation, the elementary and fundamental principles of a judiciary inquiry should be observed.⁷⁰ Commissions and Boards are purely creatures of statute, endowed

⁶⁹ *In re Hunnewell*, 220 Mass. 351, 107 N. E. 934.

The hearing before the Commission is of a summary character, and the Commission is not bound by the ordinary rules of evidence and practice. *Gardner v. Horseheads Const. Co.*, 171 App. Div. 66, 156 N. Y. Supp. 899.

⁷⁰ *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771.

with varied and mixed functions. Primarily they are administrative bodies, created to carry provisions of the Acts into effect. Supplemental to this, in order that they may more efficiently administer the law, they are vested with quasi judicial powers, plenary within the limits fixed by the statute. Along the lines marked out by the Acts, they are authorized to pass upon disagreement between employers and claimants in regard to compensation for injuries, and to that end make and adopt rules for a simple and reasonably summary procedure. As a rule, hearings are to be held upon notice to parties in interest; compulsory process for attendance of witnesses and power to administer oaths is given; the parties in interest are entitled to notice, to be heard, and to submit evidence; a review, findings, a decision, and an award of compensation are provided for; though in the final test resort must be had to the courts to enforce the awards.⁷¹ The rule seems to be that Commissions

⁷¹ This legislation is remedial, and should be given a broad interpretation. All controversies arising between the employé and the employer and insurer under the terms of the acts are to be settled in accordance with the procedure there established. This follows from general considerations touching the nature of the legislation and the aim intended to be accomplished by it. In *re Panasuk*, 217 Mass. 589, 105 N. E. 368. The Arbitration Committee and the Industrial Accident Board are given authority to summon witnesses, administer oaths, hold hearings, take testimony, examine evidence, make rulings of law and findings of fact, and render decisions. Their decisions may be enforced by appropriate proceedings in the courts. The power to take testimony and make rulings of law which are subject to review by the judicial department of the government goes far to indicate that in performing those functions they are to be guided and controlled by the same general principles which would govern judicial officers in discharging the same duties. *Pigeon v. Employers' Liab. Assur. Corp.*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737.

The Arbitration Committee and the Industrial Accident Board had jurisdiction to consider whether the amount paid for medical attendance by the injured employé during the first two weeks after his injury could be recovered. (St. 1911, c. 751, pt. 2, §§ 1-5) In *re Panasuk*, *supra*. Where the employé made no claim under the Act, the action of the insurer or her employer in notifying the Industrial Accident Board of the accident and the formation of a Committee of Arbitration which made an award in favor of the employé was

and Boards are not courts,⁷² and that their members are not judicial officers, within the strict meaning of these terms.⁷³ It has been held in Massachusetts, however, that the word "court" is used with a broader significance than including simply judicial officers; that it may be given a signification liberal enough to include the Committee on Arbitration and the Industrial Accident Board as constituted by the Act, and should be given such construction;⁷⁴ and the California Supreme Court has stated that "the Industrial Accident Commission exercises judicial functions; it sits as a court to try matters pertinent to issues within its jurisdiction."⁷⁵ The claimant before the Wisconsin Industrial Accident Board is not a suitor in any court within a provision of the Constitution of that state that a suitor in any court may prosecute or defend either in person or by attorney or agent.⁷⁶ The Wisconsin

warranted. (St. 1911, pt. 3, § 5, as amended by St. 1912, c. 571, § 10) *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Burt v. Brigham*, 117 Mass. 307.

⁷² The Compensation Board provided for by the Act of 1916 is not a "court" within Const. § 135, prohibiting the establishment of courts not provided for by the Constitution. *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648. The Industrial Accident Board is a ministerial and administrative body, with incidental quasi judicial powers, exercised by consent of those electing to be governed by the Act, not vested with powers or duties in violation of constitutional limitations. *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49. The Industrial Commission is merely an administrative body, and not a court. *Menominee Bay Shore Lumber Co. v. Indus. Com.*, 162 Wis. 344, 156 N. W. 151. The Commission is not a court; its hearings are inquiries, not trials. *McDonald v. Globe Laundry Co.*, 2 Cal. I. A. C. Dec. 217.

⁷³ The members of the Industrial Commission are not "judicial officers" within the Constitution. *Pigeon v. Employers' Liab. Assur. Corp.*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737.

⁷⁴ *Id.*

⁷⁵ *Smith v. Indus. Acc. Com.*, 26 Cal. App. 560, 147 Pac. 600. This case is supported by *Corea v. Higuera*, 153 Cal. 451, 95 Pac. 882, 17 L. R. A. (N. S.) 1018; *People v. McCue*, 150 Cal. 195, 88 Pac. 899. The Industrial Accident Commission, in awarding compensation, is a judicial body exercising judicial functions. *Western Metal Supply Co. v. Pillsbury* (Cal.) 156 Pac. 491; *Carstens v. Pillsbury* (Cal. 1916) 158 Pac. 218.

⁷⁶ *International Harvester Co. v. Indus. Com.*, 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330.

Act recognizes the right of a claimant to select and employ his own attorney, subject to the limitation that the fee to be paid must be approved by the Board.⁷⁷ The Industrial Commission of Ohio acts as the state Liability Board of Awards in matters pertaining to its administration of the Workmen's Compensation Fund.⁷⁸

Members of the Compensation Board provided for by the Kentucky Act of 1916 are arbitrators within Constitution, § 250, authorizing submission of controversies to arbitrators selected by the parties, and the acceptance of the Act constitutes a consent that the Board may act as arbitrators in determining differences between employer and employé.⁷⁹

§ 224. Jurisdiction

The California Commission has jurisdiction to determine all questions of liability arising under the Act of that state, including the power to examine and construe an insurance policy protecting the employer against liability for injuries to his employés, should examination be necessary in determining the liability imposed by the Act, either upon the employer or upon the insurance carrier;⁸⁰ but it cannot obtain jurisdiction over a controversy where the employer or insurance carrier applies for the adjustment of a controversy, unless the injured employé consents thereto, since otherwise the employé would be deprived of his right of election to sue for damages in the courts upon the ground of personal gross negligence of the employer.⁸¹ Thus, where the only issue presented arises be-

⁷⁷ *Id.*

⁷⁸ "For convenience the Board in charge of the administration of the fund will be referred to in this opinion as the Board of Awards, rather than as the Industrial Commission of Ohio, for the Commission, in matters pertaining to its administration of the Workmen's Compensation Fund, acts as the State Liability Board of Awards." *State v. Indus. Com.*, 92 Ohio St. 434, 111 N. E. 299.

⁷⁹ *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648.

⁸⁰ *Walker v. Santa Clara Oil & Development Co.*, 2 Cal. I. A. C. Dec. 1.

⁸¹ *State Comp. Insur. Fund v. Lemon*, 2 Cal. I. A. C. Dec. 507.

tween the insurance carrier and the physician secured by the employer to treat an injured employé, as to the proper charge for the services of such physician, the Commission has no jurisdiction to hear the application. To give the Commission over the subject-matter of the controversy, there must be a proceeding between the employer or his insurance carrier on one side, and the injured employé, his dependents, the physician or attorney employed by him, or some person having a claim or lien upon amounts due such injured employé as compensation on the other side. Where the issue is between the insurer and its insured, or the physician employed by the insured alone, no question of compensation is raised, but only a question of private contract or insurance law, which is triable in civil courts. The Commission has power only to adjust questions of compensation due to the injured employé or to persons claiming through him.⁸² It has jurisdiction over charges for medical, sur-

⁸² Maryland Casualty Co. v. Berry, 1 Cal. I. A. C. Dec. 237.

Commission held without jurisdiction: Where in an action properly before this Commission an issue is raised over the contract of insurance, by the insurance carrier setting up as a defense a claim that the employer secured his insurance through false statements as to the wage of the injured employé, the claim of the insurance carrier is not a proper ground of defense under the Act, but a matter to be determined in another court having jurisdiction over private contractual rights between insurers and insured. Souza v. Stangland & Co., 2 Cal. I. A. C. Dec. 765. Where an application was filed by an employer to have determined a dispute arising between him and the insurance carrier founded upon the contract between them, the Commission held that it had no jurisdiction. Mendocino Lumber Co. v. Southwestern Surety Insur. Co., 2 Cal. I. A. C. Dec. 755. The Commission has no power to determine how much an employé or an employer or an insurance carrier shall be charged for medical, surgical, and hospital services, where the party to be charged for the services is the party who has contracted for them. In this event it is a matter for agreement entirely between the contracting parties. Brown v. Davies-Leavitt Co., 2 Cal. I. A. C. Dec. 12.

Commission held to have jurisdiction: The Commission has jurisdiction of a claim by a principal or general contractor against a subcontractor under section 30 (c) of the Act, for reimbursement for compensation paid to the injured employé of the subcontractor, as such a claim is one arising out of, affecting, and concerning compensation, and is analogous to a right of subro-

gical, and hospital services and other expenditures to cure and relieve an injured employé, only where such expense has been necessarily incurred by or on behalf of the employé, because of the employer's neglect or refusal to reasonably furnish them. In this event the Commission, in charging the expense to the employer, will regulate these charges as it deems reasonable.⁸³ Where an undertaker files an application for adjustment of a claim for expense of the burial of the deceased employé, there being no dependents, the Commission will assume jurisdiction.⁸⁴ Where the insurance carrier is responsible for medical services rendered an injured employé, the Commission will assume jurisdiction of an application of the physician for adjudication of a claim against the insurance carrier.⁸⁵ But where it is claimed that the employer has not notified his insurance carrier of an accident in time for the latter to furnish medical and surgical treatment to the injured employé, such claim raises an issue solely between the insurer and insured, based upon the conditions of the contract of insurance, over which the Commission has no jurisdiction.⁸⁶

The California Commission cannot make an award against a property owner in favor of an independent contractor's employé. Such liability can be enforced only in ordinary proceedings in the regularly constituted courts.⁸⁷ Where it clearly appears from the application that there is a want of jurisdiction, and no good purpose can be served by a hearing to take testimony, and no probability of such testimony correcting possible inaccuracies in the

gation to the interest of the injured employé whose claim he had paid. *Hattan v. Hattan*, 1 Cal. I. A. C. Dec. 324.

⁸³ (Wk. Comp. Act, § 15a) *Brown v. Davies-Leavitt Co.*, 2 Cal. I. A. C. Dec. 12.

⁸⁴ *Suhr & Co. v. State Comp. Insur. Fund*, 2 Cal. I. A. C. Dec. 725.

⁸⁵ *Mahan v. Frankfort General Insur. Co.*, 2 Cal. I. A. C. Dec. 530.

⁸⁶ *Conner v. Acme Cement & Plaster Co.*, 1 Cal. I. A. C. Dec. 143.

⁸⁷ (Wk. Comp. Act, § 30) *Carstens v. Pillsbury* (Cal. 1916) 158 Pac. 218; *Sturdivant v. Pillsbury* (Cal. 1916) 158 Pac. 222.

application and showing jurisdiction appears, the Commission will make its findings and award forthwith upon the record before it.⁸⁸ It will dismiss a proceeding prior to hearing when it appears from the application and the statement of applicant's attorneys that he was engaged in agricultural labor and that the defendants have not accepted the provisions of the Act, even though the latter have made no formal appearance.⁸⁹

A nominal award to preserve jurisdiction, authorized under the California Act, will not be made where the evidence shows that the only purpose of a request for such award is to allow the employé to require an operation at a future date, and that his right to such operation can be determined at once.⁹⁰

In a Connecticut case, where the claimant alleged that the medical treatment provided by his employer within the thirty-day period was improper, causing an aggravation of the injury, the Commissioner held that any right to further medical expenses, or damages for such improper treatment, should be enforced at law in the courts, and that he had no jurisdiction.⁹¹ Commissioner Williams refused to pass on whether the Connecticut Act conflicts with existing treaty rights between the United States and Italy, holding that it would not be seemly or becoming for one in his position to determine such an issue;⁹² and Commissioner Donohue has said: "Whether or not there is any conflict between the law of this state on this particular point and the treaties between Italy and the United States I am not particularly concerned. It is a matter for consideration by a tribunal of proper jurisdiction and entirely without my province to pass upon."⁹³ But in another case Commis-

⁸⁸ *Topping v. Ellis*, 2 Cal. I. A. C. Dec. 382.

⁸⁹ *Gomez v. Thomas & Ettinger*, 2 Cal. I. A. C. Dec. 877.

⁹⁰ (Wk. Comp. Act, § 25 [c], [d]) *Taylor v. Spreckels*, 2 Cal. I. A. C. Dec. 62. Temporary awards, see § 188, ante.

⁹¹ *Cushner v. H. C. Rowe & Co.*, 1 Conn. Comp. Dec. 574.

⁹² *Salvatore v. Andreani & Gelormino*, 1 Conn. Comp. Dec. 169.

⁹³ *Viotti v. De Bisschop*, 1 Conn. Comp. Dec. 195.

sioner Beers considered the question, and stated that there was no conflict between the treaty and the Act.⁹⁴

A Commission or Board has no authority to pass upon the constitutionality of a Compensation Act.⁹⁵

§ 225. — Service of summons

By sections 22 and 74 of the California Act, the Industrial Accident Commission is allowed to prescribe the mode of making service of summons upon defendants proceeded against before it. The Commission has, in its rules of procedure, directed that service of summons be made either by personal service or by mail substantially in the same manner as provided by the Code of Civil Procedure for mailing notices in civil actions. Where, therefore, service of summons has been made upon a defendant by mail according to the rules of the Commission, it has jurisdiction over the person of such defendant, in the absence of affirmative proof of failure to receive the notices and inability to make a defense upon the merits of the case caused thereby.⁹⁶

§ 226. Parties

As a rule, applications for death benefits are properly made by the dependents, rather than by the executor or administrator of the deceased workman.⁹⁷ Where the evidence in an application for an

⁹⁴ *Fabbian v. C. W. Blakeslee & Sons*, 1 Conn. Comp. Dec. 305.

⁹⁵ *Cardinale, etc., v. Valenzano*, Bulletin No. 1, Ill., p. 114; *Chicago Savings Bank & Trust Co. v. Chicago Rys. Co.*, Bulletin No. 1, Ill., p. 104.

⁹⁶ *Silva v. Common*, 1 Cal. I. A. C. Dec. 644.

⁹⁷ An employé was killed in the course of his employment, leaving surviving him a widow, a minor child aged 20 months, a widowed mother, and two sisters aged 23 and 9 years. Some months prior to his death he deserted his wife and child, without any fault on the part of his wife, since which time he had contributed nothing toward their support. He had never contributed anything toward the support of his mother or either of his sisters. The Commission held that it was not necessary for the application for compensation to be filed by the administrator or executor of the deceased. In *re Laura Shaffer*, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 7.

award by a person other than the injured employé, the latter being still living, discloses that the employé has not received full compensation, the California Commission will on its own motion order him to be brought in as a coapplicant, and will award him, when brought in, whatever compensation he may be entitled to.⁹⁸ Without any power of attorney or other personal authorization, the Chinese consul has, under treaty rights, the power to institute proceedings in behalf of a nonresident widow of the injured employé.⁹⁹ The Wisconsin Act contemplates that a minor may, the same as an adult, and without being represented by a guardian, apply to the Industrial Commission to determine the compensation to be awarded for an injury.¹

§ 227. Pleading and issues under California Act

The California Commission has expressed a desire that attorneys allege only those claims or defenses upon which they expect to rely, to the end that parties may not be put to the useless expense of subpoenaing witnesses to prove or disprove allegations which will not be in controversy at all. If any applicant or defendant overlooks or fails in application or answer to allege any claim or defense, he will not thereby be barred from so doing at the hearing, where good faith has been exercised.² Where the defendant does not plead the defense that the application was not filed within the time prescribed by law, but raises such defense promptly at the hearing, he is entitled, in view of the informality of proceedings before the Commission, to have such defense considered and determined.³ An answer is not indispensable. In many cases none is filed. The Commission may, upon its own motion, investigate is-

⁹⁸ *Newkirk v. Union Ice Co.*, 1 Cal. I. A. C. Dec. 166.

⁹⁹ *Ching Shee v. Madera Sugar Pine Co.*, 2 Cal. I. A. C. Dec. 1014.

¹ (St. 1915, §§ 2394—3, 2394—8, 2394—31, and 2394—7, subsec. 2). *Menominee Bay Shore Lumber Co. v. Indus. Com.*, 162 Wis. 344, 156 N. W. 151.

² *Shouler v. Greenberg*, 1 Cal. I. A. C. Dec. 146.

³ *Schultz v. Pacific Electric Ry. Co.*, 2 Cal. I. A. C. Dec. 709.

sues not raised by the answer. The Act contains no provision authorizing a default for failure to answer, and defaults are not allowed by the Commission. The only function of the answer is to call the attention of the Commission to defensive matters relied upon.⁴ The Commission is not limited in the trial of causes to the issues raised by the pleadings, but may, on its own motion, investigate issues outside the pleadings, and will require an applicant substantially to prove his case, even though the defendant makes no answer thereto.⁵ The defense of the statute of limitations is not lost by failure to plead it in answer.⁶ The Commission will not give opinions on hypothetical cases, or lay down general statements or rules of law binding upon it, aside from rulings necessary to the making of findings of fact, awards, and opinions upon issues arising in the causes submitted.⁷

§ 228. Taking and reception of testimony

A Commission, in seeking out the truth and attempting to do justice to the parties under the Act, cannot be bound closely by the formal rules of evidence established by courts of law to prevent perversion of justice in jury trials. It must have the more liberal rules and methods of the equity courts.⁸ Some Commissions consider statements not made under oath.⁹ Under the California Act the Commission need not make its award upon the basis only of a stipulation of fact submitted by the parties, but may make further investigations of its own, and take further testimony.¹⁰ It is not

⁴ *Stoll v. Ocean Shore Railroad Co.*, 2 Cal. I. A. C. Dec. 81.

⁵ *Id.*

⁶ *Id.*

⁷ *Salvatore v. New England Casualty Co.*, 2 Cal. I. A. C. Dec. 355.

⁸ *Patch v. First National Bank of Milwaukee*, Rep. Wis. Indus. Com., 1914-15, p. 9.

⁹ *Frankfort General Ins. Co. v. Pillsbury* (Cal.) 159 Pac. 150.

¹⁰ It was held in *Biero v. New Haven Hotel Co.*, 1 Conn. Comp. Dec. 52, that in compensation proceedings before the Commissioner witnesses may be

bound by medical testimony of physicians, although unanimous. If such testimony is weak or contradictory, and unprofessional testimony is more probable, the Commission will be governed by the merits.¹¹ That an effort to procure an adjournment proved futile did not make it incumbent on the Michigan Board to grant further time to take additional testimony.¹²

§ 229. — California

Due process of law requires that the party against whom a claim is presented shall have opportunity to be present when the evidence to sustain the claim is introduced.¹³ There is nothing in the California Act which requires taking of testimony in shorthand, although any party in interest at the hearing may at his own expense have a reporter present to take such testimony, if desired. All that is required is that the substance of the evidence given on material points be taken by the referee and reported to the Commission.¹⁴ The Commission may, without notice to either party, cause testimony to be taken, and where the only matter upon which it desires information is of a scientific or mechanical nature, it feels no reluctance in selecting its own experts and in taking testimony from them without prior notice to either side. In such cases, however, it is the policy of the Commission to send a copy of such report to

examined not under oath, if due regard is had to such fact in weighing the evidence. In *Mahoney v. Seymour Mfg. Co.*, 1 Conn. Comp. Dec. 292, the Commissioner, with the approval of the parties, considered the written statements of surgeons who treated the applicant as evidence, though made out of court and not under oath (Wk. Comp. Act, § 25).

¹¹ *Snyder v. Pacific Tent & Awning Co.*, 3 Cal. I. A. C. Dec. 1.

¹² (Pub. Acts Ex. Sess. 1912, No. 10, pt. 3, § 11) *Redfield v. Mich. Workmen's Compensation Mut. Ins. Co.*, 183 Mich. 633, 150 N. W. 362.

¹³ *Carstens v. Pillsbury* (Cal. 1916) 158 Pac. 218.

¹⁴ *McCay v. Bruce*, 2 Cal. I. A. C. Dec. 54. The Act does not require that testimony taken at hearings be taken down verbatim by shorthand or otherwise. A referee is only required to report to the Commission the substance of the evidence received by him upon the issues. *Id.*

all parties interested, so that they may have an opportunity to reply or controvert the testimony before a decision is reached.¹⁵ While stipulations may bind the parties, the Commission in all proceedings in which evidence is introduced will make the facts, and not the stipulations the determining factor, where it appears that the stipulations were entered into under a misapprehension.¹⁶ Though the parties have stipulated that the conclusions of medical referees appointed by themselves shall fix the extent of disability, the Commission has power, with or without notice or application, to direct an examination by another physician, and to base an award on his report.¹⁷ In certain cases reliance must be placed upon the evidence of physicians as to the existence of disability. Where the opinion of physicians is that the disability is not sufficient to prevent the injured employé from resuming his employment, the Commission will be guided by it.¹⁸ Where simulation or malingering by an applicant is alleged, the Commission will go to great pains and considerable expense to determine the issue fairly, to prevent fraud and imposition. Usually it will cause him to be examined by experts of its own selection, in addition to the medical testimony presented by

¹⁵ *De Long v. Krebs*, 2 Cal. I. A. C. Dec. 256.

The power to take testimony without notice to the parties will be used reluctantly, and almost never where issue has arisen and the evidence may be conflicting. Where, however, the issue is simply one of scientific or mechanical fact, the Commission will select its own experts, without notice to the parties, as it sees fit. Its policy is, however, to submit the reports of such experts to the parties, and allow an opportunity for criticism before decision is reached. *Id.*

The Act (section 24, subd. "b") expressly confers on the Commission the power to take testimony without notice to either party. *Id.*

¹⁶ *Turner v. City of Santa Cruz*, 2 Cal. I. A. C. Dec. 991.

¹⁷ (*Wk. Comp., etc., Act*, § 24) *Leyman v. Amalgamated Oil Co.*, 2 Cal. I. A. C. Dec. 921.

¹⁸ *Batchelder v. Kreis*, 1 Cal. I. A. C. Dec. 63. Certain issues are for medical practitioners to determine, and the Commission must rely on their best judgment and scientific knowledge. *Rollnik v. Lankershim*, 1 Cal. I. A. C. Dec. 45.

each side.¹⁹ The Commission would frequently err if it permitted its decision to be made wholly upon the evidence as it came to it in the form of a verbatim transcript. Honest witnesses are sometimes blundering, and a too liberal interpretation of their transcribed testimony may cause it to appear contradictory, when in fact it was not intended that way. In such cases the written evidence may properly be qualified to some extent by the impression made upon the mind of the person holding the hearing.²⁰ In the interest of expedition and inexpensiveness of procedure the technical rules of evidence are not to be permitted to draw out trials to an unnecessary length or unduly increase the expense thereof.²¹

§ 230. Hearing, findings, and award

The award must be supported by the findings of fact, and every finding of fact must have some substantial evidence in its support, though not necessarily the preponderance of evidence.²² It must

¹⁹ *Gordon v. Evans*, 1 Cal. I. A. C. Dec. 94.

²⁰ *Johnson v. Sudden & Christenson*, 1 Cal. I. A. C. Dec. 422.

²¹ *McDonald v. Globe Laundry Co.*, 2 Cal. I. A. C. Dec. 217.

²² (St. 1911, § 2394—19) *Voelz v. Indus. Com.*, 161 Wis. 240, 152 N. W. 830. *International Harvester Co. v. Indus. Com.*, 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330; *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771.

It is essential that the finding of the arbitrators be sustained by competent and legal evidence. *Victor Chemical Works v. Indus. Board of Ill.* (1916) 274 Ill. 11, 113 N. E. 173. The New York Commission's determination as to the facts, being a quasi judicial determination, must rest on the facts presented to it. The Commission cannot arbitrarily act on the information it receives, or in direct violation of the conceded facts, but must base its determination on the undisputed facts and the reasonable inferences to be drawn from the general situation. *Gardner v. Horseheads Const. Co.*, 171 App. Div. 66, 156 N. Y. Supp. 899. The Commission cannot make an award, in the absence of at least some evidence that the employé met with an injury while he was at work for the specified employer, and as a consequence of something that had a relation to the work of the employer, something done by him or by others while he was so employed. *Collins v. Brooklyn Union Gas Co.*, 171 App. Div. 381, 156 N. Y. Supp. 957.

result from this that a finding of fact made by a Commission cannot be based on mere conjecture any more than a finding of fact made by a court. It does not require so much evidence in its support, but it cannot be upheld without evidence.²³

The finding and award must give all facts essential to the case in hand, and such questions of law as were presented and ruled on. No other or further detailed finding is required.²⁴ The finding of a Commissioner under the Connecticut Act should not contain excerpts from evidence and purely evidential facts, but should merely

²³ Voelz v. Indus. Com., 161 Wis. 240, 152 N. W. 830.

The statute contemplates and provides for a full and fair hearing, and that the decision of the Commission shall be based on evidence, and not arbitrarily made. It would seem to be clearly outside of its powers to find essential facts that had no support in the evidence. *International Harvester Co. v. Indus. Com.*, 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330. Inferences from the evidence such as a reasonable man might draw may be made by the Industrial Accident Board, but such inferences must not amount to mere conjecture or speculation. *In re Sanderson's Case (Mass.)* 113 N. E. 355.

²⁴ Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245.

In the opinion of the California Commission, it is not required by the Act to make its findings upon all issues raised by the application and denied in the answer. It is required merely to make its findings upon all facts necessary to entitle the injured employé to compensation. This requirement is satisfied by a bare finding that such facts are or are not established, without going into detail thereon. Nevertheless, without conceding any duty to do so, the Commission will, upon special request, make a detailed finding upon any material fact. *Rudder v. Ocean Shore Railroad Co.*, 1 Cal. I. A. C. Dec. 209. The Commission is not required by law to make detailed or special findings. The consideration of the convenience of the Commission is certainly against its being required to prepare detailed findings in every uncontested case or upon every uncontested issue, where a finding directly of the fact to be established will fill every requirement for disposal of the case. Where there are serious issues involved, the practice of the Commission to incorporate in its opinion a review of the evidence and the principles of law involved is all that is necessary to indicate the basis upon which the decision is reached. *Mason v. Western Metal Supply Co.*, 1 Cal. I. A. C. Dec. 284. Although the Commission is not required to make special or extended findings of fact, it will do so upon reasonable request, to avoid embarrassing counsel in their endeavor to place questions of law, or mixed questions of law and fact, before the courts of the state for review. *Id.*

state the facts found, the claims of law made, and the rulings on evidence excepted to; in short, it should conform to the finding required of the superior court by the rules of court and the practice prevailing in that court.²⁵ An award is sometimes made expressly subject to revision,²⁶ or in graduated payments, when it appears that justice may thereby be promoted.²⁷ The provision of the Connecticut Act requiring that the award be filed with the clerk of the superior court of the county where the accident occurred is directory only.²⁸

A general finding that the applicant sustained a total disability from the accident cannot be construed as a finding that a later injury contributing to the disability was due to natural causes.²⁹

If it be conceded that an examiner had no authority to make findings, the parties, after submitting the case to him for his findings, are not in a position to object to his power to make such findings.³⁰

It is a condition precedent to the power of the Michigan Board to make an award that it shall have decided on the facts found by it that the injured person was an employé, that the injury was the result of an accident, and that the accident arose in the course of employment.³¹

²⁵ *Hartz v. Hartford Faience Co.* (1916) 90 Conn. 539, 97 Atl. 1020.

²⁶ In *Hurlowski v. American Brass Co.*, 1 Conn. Comp. Dec. 6, where, according to the opinion of an expert, the workman's disability would probably disappear in two months, an award was made for that period, subject to revision at that time, with due regard to the workman's care in obtaining proper medical treatment in the meantime.

²⁷ In *Flannery v. O'Brien*, 1 Conn. Comp. Dec. 264, where the Commissioner found, upon the testimony of an expert surgeon, that the partial incapacity would exist for about a year after the injury, but with a gradual lessening in extent, an award was made of graduated payments, decreasing in amount at intervals, until incapacity ceased.

²⁸ (Wk. Comp. Act, pt. B, § 26) *Welton v. Waterbury Rolling Mill*, 1 Conn. Comp. Dec. 78.

²⁹ *Pacific Coast Casualty Co. v. Pillsbury Indus. Acc. Com.*, 171 Cal. 319, 153 Pac. 24.

³⁰ *Winters v. Mellen Lumber Co.*, Bul. Wis. Indus. Com., vol. 1, p. 89.

³¹ *Bell v. Hayes-Ionia Co.* (Mich.) 158 N. W. 179.

After a decision is once rendered and filed, the Illinois Industrial Board is vested with no power to set aside, disturb, or change its own findings upon the record.³²

§ 231. — California

While hearings may be held by a Commissioner or referee, for the purpose of taking testimony, the final hearing referred to by section 25 (a) of the California Act must be held by a majority of the Commission, and takes place when the briefs are all in and the case submitted for decision. Such final hearing is held by the Commission sitting in session for the purpose of considering the evidence and determining the issues. The thirty days within which a decision must be made after date of final hearing, therefore, commences to run at the day of such session of the Commission, after the case has been submitted.³³ Where the submission of a case is held open for the filing of a reply brief, and the decision is rendered within thirty days after such brief is filed, the provisions of the Act are complied with; but in any event the requirement that the proceeding be determined within thirty days is directory, and not mandatory, nor a cause of forfeiture of jurisdiction.³⁴ Where there has been unreasonable delay of attorneys for the applicant in prosecuting the claim, by failing to present evidence or arguments for more than six months, the Commission will render a decision on the record before it.³⁵ Where it is impossible at the time of the hearing to determine the percentage of permanent disability, by reason

³² *Mustaccio v. Simpson Construction Co.*, Bulletin No. 1, Ill., p. 60.

³³ *Phillips v. Chanslor-Canfield Midway Oil Co.*, 1 Cal. I. A. C. Dec. 580.

³⁴ (Wk. Comp. Act, § 25 [a]) *Rives v. Smith*, 2 Cal. I. A. C. Dec. 972. Section 25 of the Act is directory, and not mandatory. Failure to render a decision after the 30-day period does not make void such decision, or deprive the Commission of any power to make a decision. *Phillips v. Chanslor-Canfield Midway Oil Co.*, 1 Cal. I. A. C. Dec. 580.

³⁵ (Roseberry Act). *Jackson v. Mammoth Copper Mining Co. of Maine*, 2 Cal. I. A. C. Dec. 915.

of applicant's physical condition not yet indicating the final outcome of the injury, an award will be made covering the temporary total disability to the date of the hearing or thereafter, and the case continued until a final determination can safely be made.³⁶ Where compensation is denied because no permanent disability is shown, but there is a possibility that present unhealed injuries may result in permanent disability later, the award against the applicant will be made subject to the right of the Commission to reopen the proceeding at any time within two hundred and forty-five weeks, upon a showing that permanent disability has resulted.³⁷ An optional award, allowing the employer to provide an operation to relieve the workman's disability, and providing that if he refuses the operation indemnity may be terminated, is not invalid on the ground that if the employer provides the operation he will be required to pay for surgical treatment beyond the ninety-day limit fixed by the statute, since the award leaves it optional with him to provide or not provide the operation.³⁸

Where an application is made by a defendant employer, subse-

³⁶ *Blass v. Studebaker Corp. of America*, 1 Cal. I. A. C. Dec. 162.

Where by the testimony of the physicians who have attended or examined the injured man, it appears that he has probably suffered a permanent partial disability entitling him to 65 per cent. of his average weekly earnings for a period of 104 weeks, an award will be made at this amount, reviewable at the end of one year, if a medical examination at that time should disclose that the injury was more or less serious than testified to at the time of the hearing. *Petersen v. Pellasco*, 2 Cal. I. A. C. Dec. 199. Where an employé has been seriously injured, and at the date of the hearing of his case it is impossible to determine whether his injuries will result in permanent disability or not, or the extent of such permanent disability, a temporary partial disability indemnity representing the loss of earning power of the applicant will be awarded until such time as his permanent disability, if any, can be definitely determined. Upon the determination of such percentage of permanent disability, the payments previously made may be credited upon the amount due. *Snyder v. Goodwin*, 1 Cal. I. A. C. Dec. 433.

³⁷ *Ely v. Maryland Casualty Co.*, 1 Cal. I. A. C. Dec. 335.

³⁸ *Southwestern Surety Ins. Co. v. Pillsbury* (Cal.) 158 Pac. 762.

quent to the entering of the findings and award against him, requesting that his insurance carrier be joined as party defendant in the proceeding and be made solely liable for the payment of the award, and he dismissed from all liability, and notice is also given to the insurance carrier and the applicant employé, as required by law, the Commission will give notice of its intention to amend the findings and award to this effect, and set a date for hearing upon the advisability of making the amendment joining the insurance carrier and making it solely liable. Unless good cause be shown at the hearing, at which hearing the insurance carrier is privileged to defend upon the merits of the case, the findings and award will be amended.³⁹

Where the Commission finds the ultimate facts in controversy, it is not required to make specific findings upon probative matters.⁴⁰ An award providing for the termination of indemnity only upon the ceasing of disability or on the further order of the Commission is not open to the objection that it does not limit the time of payment to the number of weeks prescribed by the statute as the maximum, and that it is invalid for failure to do so. Since the statute makes the limitation, the order ceases to be effective at the end of that period.⁴¹

§ 232. Review by special tribunal

A board vested with power to review the decision of a committee of arbitration may pass on all questions relative to the payment of compensation,⁴² and may re-establish, increase, diminish, or end compensation.⁴³ A majority of the members of the Board may

³⁹ *Stockwell v. Waymire*, 1 Cal. I. A. C. Dec. 225.

⁴⁰ *Frankfort General Ins. Co. v. Pillsbury* (Cal.) 159 Pac. 150.

⁴¹ *Southwestern Surety Ins. Co. v. Pillsbury* (Cal.) 158 Pac. 762.

⁴² The Industrial Accident Board is expressly given jurisdiction to review and pass upon questions arising relative to the payment of compensation. (Wk. Comp. Act, part III, §§ 13, 14) *Bacik v. Solvay Process Co.*, Mich. Wk. Comp. Cases (1916) 48.

⁴³ *Smith v. Israel Bros.*, Bulletin No. 1, Ill., p. 164.

hear the case.⁴⁴ Where it is impossible to determine where the weight of the testimony is, or reconcile the various phases of a record upon a question of facts, the Board will generally follow the conclusions and findings of the Committee of Arbitration.⁴⁵

Other methods or means than those specifically indicated in the terms of the statute or a specific rule of a board are permissible to bring the record properly before the Board.⁴⁶ A report which is as definite as the circumstances permit will not be held insufficient.⁴⁷ The chairman of the Arbitration Committee has power to authenticate a statement of facts upon failure of the parties to file a correct stenographic report or agreed statement of facts.⁴⁸ Failure to object to the filing of the stenographic report of agreed statement of facts within the time provided by statute, and going to trial, is a waiver of all question concerning the regularity of proceedings before the Board.⁴⁹ Where the parties fail to file a stenographic report or agreed statement of facts within the time prescribed by law, but an authenticated statement is filed in apt time by the Chair-

⁴⁴ Two members of the Board have a right to hear a case on review, of an award of the Committee of Arbitration as the Workmen's Compensation Act gives any member of the Board power to swear witnesses and take testimony. *Moeller v. Bereda Mfg. Co.*, Bulletin No. 1, Ill., p. 66. The mere fact that evidence is heard by but two members of the Board is no ground for striking the agreed statement of facts from the files and dismissing the cause, even though a limited appearance is filed for that purpose. *Anderson v. National Fireproofing Co.*, Bulletin No. 1, Ill., p. 41.

⁴⁵ *Lynch v. Baers Express & Storage Co.*, Bulletin No. 1, Ill., p. 79.

⁴⁶ *Rossow v. Denvir*, Bulletin No. 1, Ill., p. 141; *Hollas v. Illinois Steel Co.*, Bulletin No. 1, Ill., p. 158.

⁴⁷ A report of the Committee of Arbitration that "Joe Beam is entitled to receive and recover from said respondent, Thornton Claney Lumber Company, the sum of five and $\frac{63}{100}$ (\$5.63) dollars per week for a period of temporary total disability," was sufficient, where it could not be determined when the disability would terminate. *Beam v. Thornton Claney Lumber Co.*, Bulletin No. 1, Ill., p. 113.

⁴⁸ (Wk. Comp. Act, § 19, par. "b") *Rossow v. Denvir*, Bulletin No. 1, Ill., p. 141; *Bernstein v. Bothman*, Bulletin No. 1, Ill., p. 163.

⁴⁹ *Blake v. Herskovitz*, Bulletin No. 1, Ill., p. 161.

man of the Arbitration Committee, the Board is not estopped from hearing the case on review.⁵⁰ But if the stenographic report is filed without first submitting it to the applicant or his attorney for his authentication, or the stenographic report was not authenticated by any one representing either the applicant or his attorney, nor by the Chairman of the Arbitration Committee, the petition for review will be dismissed.⁵¹ A motion to dismiss for want of a stenographic report will be denied, where it is shown that a letter was addressed to the Secretary of the Board, requesting that it be submitted for authentication.⁵²

An insurer's requested rulings that a claimant was not entitled to compensation, on the report of the Massachusetts Board of Arbitration finding that she was not next of kin or a member of decedent's family, became immaterial where her claim was disallowed by the Industrial Accident Board.⁵³ An employé was not precluded by a finding of the Massachusetts Committee of Arbitration that he agreed to a settlement on a basis of partial disability, which would cease at the end of a certain number of weeks, where such agreement had been made after the Committee had found that total disability would cease on a certain date, to which finding the employé did not assent, and as to which he did not waive his right of appeal, but he had a right to contend before the Industrial Accident Board that his disability was total.⁵⁴

§ 233. Dismissal

Where a cause is called and applicant does not appear, a motion to dismiss will be allowed.⁵⁵ Where after a delay of a year from

⁵⁰ *Bernstein v. Bothman*, Bulletin No. 1, Ill., p. 163.

⁵¹ *Petrock v. Keystone Steel & Wire Co.*, Bulletin No. 1, Ill., p. 89.

⁵² *Hollas v. Illinois Steel Co.*, Bulletin No. 1, Ill., p. 158.

⁵³ *In re Kelley's Case*, 222 Mass. 538, 111 N. E. 395.

⁵⁴ *Duprey v. Maryland Casualty Co.*, 219 Mass. 189, 106 N. E. 686.

⁵⁵ *Motely v. McDonald*, Bulletin No. 1, Ill., p. 25.

the filing of the claim for compensation the parties had taken no steps to bring the matter to a hearing, and upon notice of the California Commission that the proceeding would be dismissed for want of prosecution, unless good cause be shown to the contrary, the parties fail to answer or show cause, the proceeding will be dismissed.⁵⁶ Where the pleadings show that the application is filed more than six months after the occurrence of the accident complained of, and that no payment or agreement to pay the claim has been made, the action will be dismissed without any hearing.⁵⁷ The case was dismissed without prejudice where after making claim a workman was not represented at the hearing on the date set, and his wife stated that he had disappeared and that she did not know where he was;⁵⁸ also where a workman claimed compensation for the loss of a finger due to blood poisoning, and died before the hearing of the case, and no one appeared to represent him.⁵⁹ Where the attorney of record for the applicant, after the taking of testimony, but before a decision, files with the Commission a notice in writing that the applicant has waived all claims against the defendant and requests a dismissal of the action, the Commission is not bound to dismiss the action, but may proceed with the case and render an award of disability compensation to the applicant, where the evidence has shown him entitled to an award.⁶⁰

§ 234. Reopening of case, rehearing, and supplementary proceedings

A case will be reopened and a rehearing granted when it appears from the showing made that justice requires it, but not otherwise.⁶¹

⁵⁶ *Hunter v. Mitchell*, 2 Cal. I. A. C. Dec. 817.

⁵⁷ *Petch v. Lamont & Richardson*, 2 Cal. I. A. C. Dec. 982; as to limitations, see § 214, ante.

⁵⁸ *Berthold v. McCormick Steamship Co.*, 2 Cal. I. A. C. Dec. 993.

⁵⁹ *Rokos v. Glaros & Papas*, 2 Cal. I. A. C. Dec. 993.

⁶⁰ *Gerber v. Central Council of Stockton*, 2 Cal. I. A. C. Dec. 580.

⁶¹ In *Fiorio v. Ferrie*, 1 Conn. Comp. Dec. 459 (on motion to open up award), where claimant authorized her counsel to agree to facts stated and

Where compensation has been awarded subject to modification at a later hearing, if justified by further evidence to be produced at that hearing, and the wages of the workman are then found to have been more than the amount upon which compensation was based at the first hearing, the modification of the award can be made retroactive to cover all the payments awarded.⁶² Except where the parties otherwise agree or waive their rights in respect thereto, where a matter is recommitted under the Connecticut Act to the Commissioner by the superior court for further hearing, finding, and award, it becomes the duty of the commissioner to limit the scope of the inquiry at such hearing to the particular point on which the court found error.⁶³

A settlement receipt in full, when not approved by the Michigan Board, will not prevent the Board from reopening the proceed-

request an award, which was done, it was held not to be ground for opening up the award that she understood she would receive \$150 more than was in fact allowed her by the award. In *Iacovazzi v. Coppolo*, 1 Conn. Comp. Dec. 476, where the respondent at the time of the hearing was ill, though not seriously, and an hour before the hearing telephoned his business adviser, who then telephoned to the Commissioner to ask for a continuance, but, finding the Commissioner engaged, took no further action until after he had been notified of an award against him and execution taken thereon, it was held there was not sufficient ground to warrant a rehearing. In *Becker v. Blake*, on petition for rehearing, 1 Conn. Comp. Dec. 516, where no new witnesses were offered, and the new evidence offered amounted to no more than "threshing over old straw," the Commissioner denied the rehearing. In *Braithwaite v. Rowley*, 1 Conn. Comp. Dec. 355, where, after stating at the original hearing that she wanted only an allowance for medical expense, and no other compensation, claimant applied to reopen the award, and on evidence it appeared that claimant was also entitled to disability indemnity, and that at the prior hearing she had been without counsel or adviser, the Commissioner held that the case on its merits called for a revision of the award, and so ordered.

The Commission's right to rehear a case is not cut off by an appeal being taken to a higher court on the original decision, the Commission having continuing jurisdiction. *McNally v. Diamond Mills Paper Co.* (on rehearing) *The Bulletin*, N. Y., vol. 1, No. 11, p. 12.

⁶² *Ryan v. Griswold & Davis*, 1 Conn. Comp. Dec. 510.

⁶³ *Schmidt v. O. K. Baking Co.*, 1 Conn. Comp. Dec. 683.

ing, though the workman and his employer have agreed that the workman shall receive one-half his weekly wages, without specifying how long such payments shall continue, and this agreement has been approved by the Board.⁶⁴ A finding by the Committee of Arbitration under the Massachusetts Act that compensation should be denied after a fixed date was conclusive, and a bar to further payments where no review was requested within the time limited.⁶⁵ The provision of this Act that "no party shall as a matter of right be entitled to a second hearing upon any question of fact" means that the introduction of new evidence is a matter of discretion ordinarily. Commonly there should not be a rehearing. Where there has been a full trial, a final decree should be entered.⁶⁶ An award under the New Jersey Act is subject to review after one year.⁶⁷

The Industrial Commission of New York held that it would not reverse a decision rendered by the Workmen's Compensation Commission, which it succeeded, unless the case is very clear at the rehearing, and shows that a grave injustice has been done.⁶⁸ Where the facts show that applicant has not been guilty of injurious practices, or has done nothing to retard his recovery, the Illinois Board on review will not interfere with its former finding.⁶⁹ Nor will it disturb its finding where it is not known how long a disability will continue, and recovery is problematical.⁷⁰

Where a minor, appearing without a guardian, agrees to a stip-

⁶⁴ *Foley v. Detroit United Ry.* (Mich.) 157 N. W. 45.

⁶⁵ *In re Hunnewell*, 220 Mass. 351, 107 N. E. 934.

⁶⁶ *In re Doherty*, 222 Mass. 98, 109 N. E. 887; *In re Fierro's Case*, 223 Mass. 378, 111 N. E. 957.

⁶⁷ *Banister Co. v. Kriger* (N. J. Sup.) 89 Atl. 923, denying rehearing in case reported in 84 N. J. Law, 30, 85 Atl. 1027. ("Within" was inadvertently used for "after" in the former opinion.)

⁶⁸ *Adler v. Thomas Hefsky Theater Co., Inc.*, *The Bulletin*, N. Y., vol. 1, No. 11, p. 13.

⁶⁹ *Smith v. Israel Bros.*, *Bulletin* No. 1, Ill., p. 164.

⁷⁰ *Id.*

ulation of facts, upon which compensation is awarded by the Wisconsin Commission, and paid, and then later, when he appears by his guardian, it appears that there is error in the stipulation and that the employé has not received as much as he was entitled to, the Commission may award such further compensation as the Act provides.⁷¹

§ 235. — California

The California Act provides that any person aggrieved by any final order, decision, award, rule, or regulation of the Commission may apply to the Commission for a rehearing in respect to any matters determined or covered by such final order, decision, award, rule, or regulation and specified in the application for rehearing within the time and in the manner provided for in the Act, and not otherwise.⁷² Where it appears to the Commission that any party has made a bona fide offer of material evidence, which could not reasonably be discovered and presented at a prior hearing, or which the parties did not produce because of lack of opportunity, by failure to receive notice, a rehearing will be granted in the furtherance of justice.⁷³ A rehearing will be denied where the application is not properly verified,⁷⁴ or contains a mere general statement that a particular finding is not sustained by the evidence,⁷⁵ or

⁷¹ *Schmidt v. Menominee Bay Shore Lumber Co.*, Rep. Wis. Indus. Com. 1914-15, p. 22.

⁷² Wk. Comp. Act, Laws 1913, p. 315, § 81.

⁷³ *DeLong v. Krebs*, 1 Cal. I. A. C. Dec. 592.

⁷⁴ Where an application for a rehearing is filed, but is not verified upon oath as required by section 81 (c) of the Act, the request for a rehearing must be denied. *Porter v. Anderson*, 2 Cal. I. A. C. Dec. 67.

⁷⁵ The requirement that an application for rehearing "shall set forth specifically and in full detail the grounds upon which the applicant considers said final order, decision, award," etc., unjust or unlawful, means that he must do something more than make the general statement that a certain finding is not sustained by the evidence. *Pacific Coast Casualty Co. v. Pillsbury*, 2 Cal. I. A. C. Dec. 538, 171 Cal. 52, 151 Pac. 658.

does not show the nature and purport of the newly discovered evidence on which it is based, and why with reasonable diligence it could not have been presented at the prior hearing,⁷⁶ where supplementary proceedings offer adequate relief,⁷⁷ where notices prerequisite to the relief sought have not been given,⁷⁸ and where defective service complained of is not alleged to have been prejudicial.⁷⁹ It is not ground for a rehearing that the decision was not

⁷⁶ A petition for a rehearing upon the ground of newly discovered evidence must show the nature and purport of such evidence, so that the Commission may ascertain its materiality, weight, and why it could not, with reasonable diligence, have been produced at the prior hearing; otherwise the petition will be denied. *Hewitt v. Red River Lumber Co.*, 2 Cal. I. A. C. Dec. 286. It is not sufficient to allege the possession of new evidence as to disability; the evidence itself must be stated or outlined, if the petitioner desires the Commission to consider it as a ground for rehearing. The continuing jurisdiction of the Commission over awards enables it to alter or amend them for good cause shown, and further hearings will be allowed upon proper showing. (Wk. Comp., etc., Act, § 25 [d]) *Daly v. Mahoney Bros.*, 1 Cal. I. A. C. Dec. 625.

⁷⁷ Where the award of the Commission has been entered ordering the defendant to pay the reasonable value of medical and surgical treatment furnished the applicant within 90 days from the accident, without specifying the amount thereof, and an application for a rehearing is requested upon the ground that medical bills have not been approved by the Commission, or the reasonable value of the medical services determined, such application for a rehearing should be denied, for the reason that the claims for treatment can be approved at any time upon request, and it is not necessary to reopen the case to do so. Supplementary proceedings are sufficient for this purpose. *Billingsley v. United Tuna Packing Co.*, 2 Cal. I. A. C. Dec. 133.

⁷⁸ Where an employer in a petition for rehearing alleges that the Commission erred in not dismissing the proceeding as to the employer and making the insurance carrier solely liable for compensation awarded to an employé, and it appears from the record that the notices required by section 34 (e) of the Compensation Act as a prerequisite to the substitution of the insurance carrier and relief of the employer from liability had not been given, such petition for rehearing will be denied, and the employer not relieved from liability. *Sutton v. Wurster Construction Co.*, 2 Cal. I. A. C. Dec. 705.

⁷⁹ Where a defendant claims, in an application for a rehearing, that the Commission had never secured jurisdiction over his person, and where the record shows that service of summons was made upon the defendant by mailing a copy of the application to him, with a notice of its having been

tendered by a full Commission,⁸⁰ that the award is unreasonable,⁸¹ that incompetent evidence was admitted, where there was ample competent evidence,⁸² that individual stockholders of the defendant corporation had no opportunity to defend previously,⁸³ that one

filed, and of the time and place set for hearing, in accordance with the rules of the Commission, and the defendant nowhere urges in his request that he has been prejudiced or prevented from defending upon the merits of the proceeding by any defect in the service of summons or failure to receive notification of the pendency of the proceeding, the request for rehearing will be denied. *Silva v. Common*, 1 Cal. I. A. C. Dec. 644.

⁸⁰ The fact that a decision is not rendered by a full Commission is no ground for the granting of a rehearing, section 4 of the Act specifically providing that a majority of the Commission is sufficient for the exercise of any power. *Mann v. Locke*, 2 Cal. I. A. C. Dec. 415.

⁸¹ *Stevens v. Tittle*, 2 Cal. I. A. C. Dec. 146.

Where, following an award by the Commission against the employer for the reasonable value of medical treatment furnished, it appears that the medical treatment received by the applicant was in fact furnished him under a hospital agreement free from expense to him at that time, this fact does not entitle the employer to a rehearing, for the reason that the award was only for the reasonable value of such services, the amount thereafter to be approved by the Commission, and the Commission would thereafter decline to prove any claim against the employer, unless he failed to establish the facts above mentioned. *Petersen v. Pellasco*, 2 Cal. I. A. C. Dec. 199. The grounds for application for a rehearing on an award for compensation are stated in the Act (section 82), and do not include the ground that the award was unreasonable. Section 83 does allow an application for a rehearing upon this ground, but this section applies only to safety rules and regulations, and does not apply to awards granting or denying compensation. *Saunders v. Oxnard Home Telephone*, 1 Cal. I. A. C. Dec. 636.

⁸² Where a written statement elaborating previous oral testimony, without objection, is permitted to be filed, even though such statement may be irrelevant and hearsay, and not admitting of cross-examination, and therefore inadmissible in a court, the Commission will not grant a rehearing on the ground that it acted in excess of its powers, especially when there is ample evidence otherwise. *Markt v. National Brewing Co.*, 2 Cal. I. A. C. Dec. 881.

⁸³ Where a suit is against a corporation, and the corporation has defended by its duly appointed officers, the Commission cannot permit individual stockholders to be heard on petition for rehearing in determining controversies, and it is no ground for rehearing for them to set up the claim that

party is dissatisfied with the findings of a referee which have been accepted by the Commission,⁸⁴ that labor unions provided counsel for the applicant,⁸⁵ or that labor controversies existed at the place where the applicant was injured and resided.⁸⁶ In default of some very serious mistake as to the facts, a rehearing will not be granted to correct a finding based upon a stipulation mutually entered into at a prior regular hearing.⁸⁷

Where, on certiorari to review an award of the Industrial Accident Commission, it does not appear from the record what part of the award was given for disability which would have existed after a certain date on account of the original injury, or how much was allowed for an additional injury, it is essential that the Commis-

they had no opportunity to defend previously. *English v. Cain*, 2 Cal. I. A. C. Dec. 399.

⁸⁴ When a question of fact is submitted to be determined by an expert with the consent of the parties, then, unless circumstances of extraordinary character arise, the Commission will accept the findings made by such referee as conclusive upon the issue referred to him, and will not grant a rehearing because of dissatisfaction of either party with the finding made. *Estell v. Los Angeles Ice & Cold Storage Co.*, 1 Cal. I. A. C. Dec. 501.

⁸⁵ It is not ground for a rehearing that the injured employé was furnished an attorney by a labor union to aid him in presenting his case. The fact that the labor union of Stockton provided counsel for the applicant is not only not worthy of condemnation, but it is a system which the Commission should be glad to have the labor unions of California follow in all proper cases. *Schebrosky v. Morrison & O'Neil*, 1 Cal. I. A. C. Dec. 401.

⁸⁶ A rehearing will not be granted for the purpose of having the witnesses all brought down to San Francisco and there re-examined, because of unfortunate labor controversies at the place where the applicant was injured and resides. Taking witnesses from Stockton to San Francisco would not make their testimony any more impartial than if they were examined at Stockton. *Schebrosky v. Morrison & O'Neil*, supra.

⁸⁷ *Daly v. Mahoney Bros.*, 2 Cal. I. A. C. Dec. 34.

The objection that the evidence does not justify the findings as to the extent of the disability or the rating thereof, if permanent, cannot be raised where both facts are determined by the report of the medical referee to whom the parties have stipulated, and by whose report they had previously agreed to abide, and to which report they had not objected for 30 days subsequent to its admission and prior to the award. *Id.*

sion rehear the case and allow only for such disability as would have existed if the additional injury, the slipping of a broken bone, had not occurred, unless they should find that it naturally resulted from the original injury.⁸⁸ Where the evidence warrants it, compensation for increased disability resulting from the accident may be awarded by supplementary order after notice, without the necessity of the filing of a verified application for a rehearing. The request for such relief is not in the nature of a petition for a rehearing, as it does not call into question the correctness of any prior decision by the Commission. It calls instead for supplemental relief, which can be given without any other formality than notice and an opportunity to be heard.⁸⁹

The Commission will reopen a case if a disablement clearly traceable to the accident shall, within two hundred and forty-five weeks from the accident, become apparent and compensable, and application made to modify the findings and award to conform to the new condition.⁹⁰ Where compensation is requested upon the ground that applicant's disability has increased since the former award of compensation, such request is not a new proceeding within the period of limitations of the Compensation Act, but is the exercise of the power conferred upon the Commission to reopen a case.⁹¹

Where an insurer's application for a rehearing does not complain of the Commission's failure to credit the employer with a sum paid by him to the employé, an objection to the award based on such failure is waived.⁹² A specification in such an application that the evidence did not authorize a finding that the employé was

⁸⁸ *Pacific Coast Casualty Co. v. Pillsbury, Indus. Acc. Com.*, 171 Cal. 319, 153 Pac. 24.

⁸⁹ *Salvatore v. New England Casualty Co.*, 2 Cal. I. A. C. Dec. 355.

⁹⁰ (Wk. Comp. Act, § 82 [b]) *Estell v. Los Angeles Ice & Cold Storage Co.*, 1 Cal. I. A. C. Dec. 501.

⁹¹ *Salvatore v. New England Casualty Co.*, 2 Cal. I. A. C. Dec. 355.

⁹² *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 52, 151 Pac. 658.

disabled in whole or in part from the time of his injury to a date subsequent to the hearing before the referee does not present the objection that compensation was allowed for a longer period than that of actual disability as shown by the evidence.⁹³

When a rehearing is granted to receive further evidence, the issue must be clear and the evidence confined strictly thereto.⁹⁴

§ 236. Proceedings under original federal Act

Questions of fact, or mixed questions of law and fact, under this Act, are not to be determined by the Attorney General, but are committed to the determination of the Secretary.⁹⁵ The question whether an employé is an artisan or laborer is one coming fairly within the discretion of the Secretary of [Commerce and] Labor to decide. In absence of any showing that the duties performed were not those of a laborer, it is presumed that the finding of the Secretary is correct.⁹⁶ In the absence of new and controlling evidence that the settlement was made upon an erroneous or incomplete showing of facts, the head of a department cannot reopen a case that has been disallowed by a predecessor.⁹⁷ The duty of determining whether a claim for compensation has been established involves a discretion on the part of the Secretary, which cannot be delegated to another.⁹⁸ It is otherwise where such evidence is offered.⁹⁹

⁹³ (Wk. Comp. Act. § 81, subd. c) *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398.

⁹⁴ *De Long v. Krebs*, 1 Cal. I. A. C. Dec. 592.

⁹⁵ *In re Hutton* (Op. Atty. Gen.) Op. Sol. Dept. of L. (1915) 409.

⁹⁶ *In re Adler* (Dec. Comp. of Treas.) Op. Sol. Dept. of L. (1915) 67 (15 Comp. Dec. 845).

⁹⁷ *In re Erickson*, Op. Sol. Dept. of L. (1915) 774.

⁹⁸ *In re Villafranca*, Op. Sol. Dept. of L. (1915) 676.

⁹⁹ Claim had been disapproved by the former head of the Department of Commerce and Labor, which action was subsequently sustained by the head of the Department of Labor. Upon the furnishing of new evidence the claim was reopened and allowed. *In re Kinney*, Op. Sol. Dept. of L. (1915) 768.

ARTICLE VII

PROCEEDINGS IN COURT

DIVISION I.—ORIGINAL PROCEEDINGS

Section

- 237. Jurisdiction and practice.
- 238. Verdict, judgment, and findings.

DIVISION II.—REVIEW OF DECISION OF SPECIAL TRIBUNAL

- 239. Jurisdiction.
- 240. Jury trial.
- 241. Appeal and review.
- 242. Review of findings and decision.
- 243. Connecticut.
- 244. Washington.
- 245. California.

DIVISION III.—REVIEW BY HIGHER COURT

- 246. Remedies.
 - 247. Right of appeal.
 - 248. Presentation below and for review.
 - 249. Questions reviewable.
 - 250. Decision.
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DIVISION I.—ORIGINAL PROCEEDINGS

§ 237. Jurisdiction and practice

The employer must plead matters of defense as to which he has the burden of proof.¹ The petition for compensation under the Nebraska Act should set out the injury "in its extent and character," and the judgment should conform thereto, determining plainly the extent and character of the injury, whether the disability is total or partial, and whether temporary or permanent; it should state definitely the time for which periodical payments must be made.²

¹ Hunter v. Colfax Consol. Coal Co. (Iowa) 157 N. W. 145.

² Hanley v. Union Stockyards Co. (Neb.) 158 N. W. 939.

An action under the provision of the New Jersey Act that in case of a dispute over or failure to agree upon a claim for compensation either party may submit the claim to the judge of the common pleas of such county as would have jurisdiction in a civil action cannot be brought in the Supreme Court of New York, though personal service cannot be had on the defendant company in New Jersey by reason of removal of its place of business to New York, the state of its incorporation.³ A proceeding before the court of common pleas for the computation of compensation is properly set on foot by the person to whom payment is to be made.⁴ The small cause court has no jurisdiction to determine the liability of a corporation on an agreement executed by one of its injured employés, under an agreement of settlement, based on this Act.⁵

The administration of the Rhode Island Act is given to the superior court. Regardless of the amount involved, original jurisdiction of petitions brought under the Act is conferred upon the superior court. There are several provisions in the Act giving to petitions brought under it precedence over other causes in respect to assignment and hearing; and it is provided that, without the intervention of a jury or a Board of Arbitration, the evidence shall be presented directly to a justice of the superior court for his decision, the justices of which court have special training and wide experience as triers of fact. Further, the decision of said justice on questions of fact is conclusive. In these provisions appears the intention of the General Assembly to avoid the delays of a jury trial, and the delays of appellate proceedings with reference to the weight and sufficiency of evidence, and to speed the cause in the superior court to a final determination of the facts involved,

³ (Wk. Comp. Law N. J., P. L. 1911, p. 141, § 2, par. 18) *Lehmann v. Ramo Films, Inc.*, 92 Misc. Rep. 418, 155 N. Y. Supp. 1032.

⁴ (P. L. 1911, p. 139, § 2, pars. 12, 19) *McFarland v. Central R. Co.*, 84 N. J. Law, 435, 87 Atl. 144.

⁵ (P. L. 1911, p. 134, § 2, par. 18) *Parro v. New York, S. & W. R. Co.*, 85 N. J. Law, 155, 88 Atl. 825.

leaving only questions of law and equity to be brought up on appeal.⁶

Hearings under the Minnesota Act are to be held at the time and place fixed by the judge, regardless of the time and place of holding the regular terms of court.⁷ The proceedings being summary in nature, when all the real parties in interest are present and have been heard, the court must decide the merits of the controversy in a summary manner.⁸ This Act provides that "if the employer shall insure to his employes the payment of the compensations provided by part 2 of this Act, in a corporation or association authorized to do business in the state of Minnesota and approved by the insurance commissioner of the state of Minnesota, and if the employer shall post a notice or notices in conspicuous places about his place of employment, stating that he is so insured and stating by whom insured, and if the employer shall further file copy of such notice with the labor commissioner of the state of Minnesota, then, and in such case, any suits or actions brought by an injured employe or his dependents shall be brought directly against the insurer, and the employer or insured shall be released from any further liability."⁹ The notice herein provided for need not be filed at the time of the accident, but is effective if filed any time before the beginning of the compensation suit.¹⁰

It is not error to instruct that the case is within a Compensation Act, where the evidence conclusively shows this to be the fact.¹¹

⁶ *Jillson v. Ross* (R. I.) 94 Atl. 717.

⁷ (Gen. St. 1913, §§ 8195-8230) *State ex rel. Diamond Drilling Co. v. District Court*, 129 Minn. 423, 152 N. W. 888.

⁸ *State ex rel. London & Lancashire Guarantee & Accident Co. of Canada v. District Court* (Minn.) 158 N. W. 615.

⁹ Gen. St. 1913, § 8227.

¹⁰ *State ex rel. London & Lancashire Guarantee & Accident Co. of Canada v. District Court* (Minn.) 158 N. W. 615.

¹¹ (Laws 1911, c. 163) *Wheeler v. Contoocook Mills Corp.*, 77 N. H. 551, 94 Atl. 265.

§ 238. Verdict, judgment, and findings

Error in the amount of a general verdict is not material, where the jury also make necessary findings on which the court can enter a judgment for the proper amount.¹²

The provision of the New Jersey Act that "within thirty days after the final hearing the judge of the court of common pleas shall file his determination" is directory only.¹³ Before the trial judge can properly find that the accident arose out of the employment, it is essential that there be some fact or circumstance established to support such finding.¹⁴ Error in making an award for a total of four hundred and fifty weeks for a temporary injury, in violation of a provision of this Act that in no case shall the total number of weekly payments be more than four hundred, was not rendered harmless by the reservation of right to a modification in case of an earlier termination of temporary disability.¹⁵ The judgment in an action brought by an infant, by his next friend, to recover compensation as an employé for injuries suffered in the course of his employment, binds the plaintiff, to the extent of the questions involved, as effectively as would the judgment in a suit for damages.¹⁶

The findings of fact which under the Rhode Island Act should be contained in the final decree are the conclusions of the justice as to the issuable or ultimate facts of the controversy. It is not intended that the decree shall contain a statement of the evidence or the findings of probative facts from which conclusions are to be drawn as to the issuable facts.¹⁷

¹² *Girten v. National Zinc Co.*, 98 Kan. 405, 158 Pac. 33.

¹³ *Diskon v. Bubb*, 88 N. J. Law, 513, 96 Atl. 660.

¹⁴ *Schmoll v. Weisbrod & Hess Brewing Co.* (N. J.) 97 Atl. 723.

¹⁵ *Birmingham v. Lehigh & Wilkesbarre Coal Co.* (N. J.) 95 Atl. 242.

¹⁶ (P. L. 1911, p. 134) *Hoey v. Superior Laundry Co.*, 85 N. J. Law, 119, 88 Atl. 823.

¹⁷ (Wk. Comp. Act, art. 3, § 6) *Jillson v. Ross* (R. I.) 94 Atl. 717; *Weber v. American Silk Spinning Co.* (R. I.) 95 Atl. 603.

In Minnesota, the court has power to open its judgments and correct or modify them upon the presentation of newly discovered evidence, when manifest wrong has been done, upon substantially the principle upon which rests its inherent power to grant a new trial. The statute allowing relief within a year applies.¹⁸ Where the workman sues for damages, and it appears at the trial, after the defendant's liability has been determined, that the case is one coming properly under the Compensation Act, the trial court should make the verdict correspond with the amount allowable under that Act. No new trial is necessary if the liability of the defendant has been determined.¹⁹ If the time fixed by the Nebraska court during which periodical payments are to be made does not exceed six months, the order is final; so far as that court is concerned there is no power to modify the order. But if the time for the continuance of payments exceeds six months, then, after that time has elapsed, either party may show to the court that conditions have so changed that a change in the order is necessary. No application of any nature can be made to the district court until after six months have elapsed.²⁰ Compensation is for disability, and ends when disability ends; but the court must find whether the disability is total or partial, temporary or permanent. A judgment that compensation shall continue "during the period of compensation covered by the statute" is too indefinite and unsatisfactory.²¹

¹⁸ Where evidence discovered after the rendition of judgment, if true, showed that the injuries, which resulted in the fracture of a limb, were misapprehended and not correctly described at the first trial, and that they were more serious than disclosed, it was sufficient to warrant a reopening of the case. (Gen. St. 1913, § 7786, Rev. Laws 1905, § 4160) *State ex rel. Klemer v. District Court (Minn.)* 158 N. W. 825.

¹⁹ *Mahowald v. Thompson-Starrett Co. (Minn.)* 158 N. W. 913.

²⁰ *Hanley v. Union Stockyard Co. (Neb.)* 158 N. W. 939.

²¹ *Id.*

DIVISION II.—REVIEW OF DECISION OF SPECIAL TRIBUNAL

§ 239. Jurisdiction

The manner of beginning a proceeding for compensation in the circuit court of Illinois is not substantially different from an appeal from a judgment of the county court on a probated claim, or an appeal from a justice of the peace, and it is almost exactly the procedure provided for the review of the judgments of justices of the peace by writ of certiorari. The character of the right, the method of procedure, and the judgment rendered are all of the kind recognized by the common law, and bring the case within the terms of the statute providing for appeals to the Appellate Court.²²

That the Industrial Accident Commission of Maryland sits in Baltimore does not authorize the superior court of that city to entertain jurisdiction of an appeal by which it is sought to review the Commission's findings.²³ Since the insurance carrier is merely a surety for the employer, and the employer and employé are the real parties in interest, the court which has jurisdiction over the place where the accident occurs has jurisdiction of appeals; there is no concurrent jurisdiction of the court where the insurance carrier has its office.²⁴

The provision of the Wisconsin Act that service on the secretary of the Commission, or any member of the Commission, shall be a completed service, does not dispense with the necessity of service being made on the defendant. The defendant must be served as in ordinary cases.²⁵

²² (Appellate Court Act, § 8 [Hurd's Rev. St. 1913, c. 37, § 25]; Practice Act [Hurd's Rev. St. 1911, c. 110] § 91; Wk. Comp. Act, Laws 1911, p. 314) Christensen v. R. W. Bartelmann Co., 273 Ill. 346, 112 N. E. 686.

²³ (Wk. Comp. Act, § 7) Brenner v. Brenner, 127 Md. 189, 96 Atl. 287.

²⁴ Id.

²⁵ (St. § 2394—19) Hammond-Chandler Lumber Co. v. Indus. Com. of Wis. (1916, Wis.) 158 N. W. 292.

Where the Compensation Commission of New York is in error in its decision adverse to plaintiff, plaintiff's remedy is by appeal to the Appellate Division of the Supreme Court.²⁶

§ 240. Jury trial

Where the employer pleads that the injury was due to the employé's willful negligence or intoxication, a jury trial may be demanded thereon in Iowa.²⁷ An interlocutory order, made at the first hearing, awarding a jury trial on appeal from an award of the Industrial Insurance Department of Washington, being subject to change and correction, may be rescinded at the final hearing.²⁸ The provision of the Connecticut Act that the acceptance of its compensation provisions shall constitute a "mutual renunciation and waiver * * * of the right of jury trial on all questions affecting compensation" does not refer to the hearing on appeal in the superior court, but includes only the original proceeding before the Commission. It was inserted to guard against a possible constitutional objection to the Act, and was otherwise unnecessary.²⁹

§ 241. Appeal and review

Since a party appealing from a ruling of the Maryland Industrial Accident Commission has the burden of showing error in the decision of the Commission, which must be taken as *prima facie* correct, he has a right to open and close.³⁰ A party claiming to be

²⁶ (Wk. Comp. Act, § 23) *Naud v. King Sewing Mach. Co.* (1916) 95 Misc. Rep. 676, 159 N. Y. Supp. 910.

²⁷ *Hunter v. Colfax Consol. Coal Co.* (Iowa) 157 N. W. 145.

²⁸ *Sinnes v. Daggett*, 80 Wash. 673, 142 Pac. 5.

²⁹ (Wk. Comp. Act, pt. B, § 1) *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245.

³⁰ (Wk. Comp. Act, § 55) *American Ice Co. v. Fitzhugh* (1916) 128 Md. 382, 97 Atl. 999.

aggrieved by the action of the Committee of Arbitration of Michigan must first seek a review of the committee's action by the Industrial Accident Board before resorting to the court in certiorari proceedings to review the Committee's award.³¹ On a petition to review an order of the Board denying an application to stop compensation, the essentials leading up to the award, or its equivalent, are generally to be taken as *res judicata*, except the physical condition of the injured employé, which naturally and legally remains open to inquiry.³²

Where the employer had given notice of acceptance of the Wisconsin Act, and acted throughout as though it were subject to the Act, it could not be heard to contend on appeal that there had been no acceptance of the Act, and that the Commission had no jurisdiction.³³

One method of review of an award of the Industrial Board provided for by the Illinois Act is to sue out of the circuit court a writ of certiorari to the Board.³⁴

The New York Act gives a right of appeal only to an employer privately insured.³⁵ Since an employer insured in the state fund has absolute immunity from liability, its interest is too remote to authorize an appeal from an award of the Commission for death of an employé.³⁶ Where the defendant in a hearing before the Commission relies on the defense that the action must be brought by the deceased's personal representative, instead of by his dependent, and the Supreme Court, in affirming the decision of the Commis-

³¹ *Schrewe v. New York Cent. R. R. Co.* (1916, Mich.) 158 N. W. 337.

³² *Spooner v. Estate of P. D. Beckwith*, 183 Mich. 323, 149 N. W. 971. There was a similar holding in *Mead v. Lockhart*, 2 B. W. C. C. 398.

³³ *Milwaukee Western Fuel Co. v. Indus. Com.*, 159 Wis. 635, 150 N. W. 998.

³⁴ *Munn v. Indus. Board* (1916) 274 Ill. 70, 113 N. E. 110.

³⁵ *Crockett v. State Insur. Fund*, 170 App. Div. 122, 155 N. Y. Supp. 692.

³⁶ (Wk. Comp. Act, Consol. Laws, c. 67, §§ 53, 23) *Id.*

sion, holds that the dependent was a proper claimant, it may nevertheless refer the matter back to the Commission for a further hearing upon the status of the employé and the nature of his employment.³⁷

A petition, setting forth briefly the nature of the questions to be decided, may, without impropriety, be filed in the superior court in Massachusetts, though the Act requires only a bare presentation of certified copies of the Industrial Accident Board's order or decision.³⁸ On appeal by the insurer, the Board may set out the evidence, or the substance thereof; but it is not essential that it do so.³⁹ In such case, the Board cannot make a new finding, but can merely complete the record according to the facts and return it, where the cause is remitted to the Board on account of diminution of the record.⁴⁰

An original proceeding in review of an award of the California Commission should be against the Commission by its name, "Industrial Accident Commission," and not against the members of the Commission individually. The person or persons interested in maintaining the award also should be joined.⁴¹

Where, on an application for a writ of review directed to the California Commission to review an award made on account of injuries, the petition fails to sufficiently show that there was not in the evidence sufficient support for the finding of the Commission that the accident arose out of and happened in the course of the employment of the injured person by the petitioner, the writ will not issue on the ground that the evidence shows that the injuries

³⁷ *Dearborn v. Peugeot*, 170 App. Div. 93, 155 N. Y. Supp. 769.

³⁸ (Wk. Comp. Act, pt. 3, § 11, as amended by St. 1912, c. 571, § 14) *In re American Mut. Liab. Ins. Co.*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372.

³⁹ *In re Doherty*, 222 Mass. 98, 109 N. E. 887.

⁴⁰ *Id.*

⁴¹ *Carstens v. Pillsbury* (1916, Cal.) 158 Pac. 218.

were received while such person was employed as an independent contractor.⁴²

An appeal by the Wisconsin Industrial Commission will be dismissed, where it appears that it is not prejudiced by the judgment, and that the judgment is one sought by but denied to it, and granted on motion of its codefendant.⁴³

§ 242. — Review of findings and decision

Where a Workmen's Compensation Act does not expressly give a retrial, it will be construed to intend to the contrary.⁴⁴ An award made by consent of appellants will not be disturbed on appeal.⁴⁵ As a rule the findings of fact⁴⁶ made by a Board or Commission are

⁴² *Garratt-Callahan Co. v. Indus. Acc. Com. of the State of Cal.*, 2 Cal. I. A. C. Dec. 953, 171 Cal. 334, 153 Pac. 239.

⁴³ *Hammond-Chandler Lumber Co. v. Indus. Com. of Wis.* (1916, Wis.) 158 N. W. 292.

⁴⁴ *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245; *Pigeon's Case*, 216 Mass. 51, 52, 102 N. E. 932, Ann. Cas. 1915A, 737; *Donovan's Case*, 217 Mass. 76, 79, 104 N. E. 431, Ann. Cas. 1915C, 778; *Herrick's Case*, 217 Mass. 111, 112, 104 N. E. 432; *Bentley's Case*, 217 Mass. 79, 80, 104 N. E. 432; *Main Colliery Co. v. Davies*, 16 T. L. R. 460, 2 B. W. C. C. 108.

On appeal from a Compensation Commissioner, the superior court cannot retry the facts, but can merely inquire into the facts to determine whether or not the finding and award were authorized, or so unreasonable as to justify interference by the court. *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436; *Hotel Bond Co. Appeal*, *supra*.

⁴⁵ *Cunningham v. Buffalo, C. & B. Rolling Mills*, 155 N. Y. Supp. 797.

⁴⁶ "Findings of fact" mean findings of ultimate, rather than evidentiary, facts. *Northwestern Iron Co. v. Indus. Com. of Wis.*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877; *Briere v. Taylor*, 126 Wis. 347, 105 N. W. 817; *Chippewa B. Co. v. Durand*, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931; *McDougald v. New Richmond R. M. Co.*, 125 Wis. 121, 103 N. W. 244; *Travelers' Ins. Co. v. Hallauer*, 131 Wis. 371, 111 N. W. 527; *Cole v. Cole*, 27 Wis. 531.

An award made to an employé after an examination and the hearing of expert testimony was a "decision of a question of fact," which is not reviewable. (*Wk. Comp. Act, Consol. Laws*, c. 67, § 2, gr. 21, § 20) *Goldstein v. Centre Iron Works*, 167 App. Div. 526, 153 N. Y. Supp. 224.

conclusive,⁴⁷ where they are supported by any evidence,⁴⁸ only

⁴⁷ "We are of the opinion that the word 'conclusive,' contained in the provision of the Act now under consideration, should have the construction usually given it when the word is used with reference to appellate proceedings. It is undoubtedly so used in this provision, and has reference to the possibility of a claim of appeal to this court. By its use the General Assembly intended to shut off any further proceedings with regard to the facts of the case, and to give to the superior court the exclusive final jurisdiction to determine all such questions." *Jillson v. Ross* (R. I.) 94 Atl. 717; *Blanding v. Sayles*, 21 R. I. 211, 42 Atl. 872, 23 R. I. 226, 49 Atl. 992.

Findings of the Committee of Arbitration as to the amount of compensation will not be considered on appeal, where they have been overruled by the Industrial Accident Board. *In re Septimo*, 219 Mass. 430, 107 N. E. 63.

⁴⁸ *Smith v. Indus. Acc. Com. of Cal.*, 2 Cal. I. A. C. Dec. 439, 26 Cal. App. 560, 147 Pac. 600; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398; *Cardoza v. Pacific Gas & Electric Co.*, 1 Cal. I. A. C. Dec. 435; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; (a determination drawn from conflicting testimony that the employé's condition at time of hearing resulted from the accident) *Southwestern Surety Ins. Co. v. Pillsbury (Cal.)* 158 Pac. 762; *Larke v. John Hancock Mut. Life Insur. Co.* (1916), 90 Conn. 303, 97 Atl. 320; *Searles v. Connecticut Co.*, 1 Conn. Comp. Dec. 97 (affirmed by superior court on appeal); (Wk. Comp. Act 1913, § 19, par. "f") *Victor Chemical Works v. Indus. Board of Ill.* (1916) 274 Ill. 11, 113 N. E. 173; (determination as to the duration of incapacity) *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244; *In re Fierro's Case*, 223 Mass. 378, 111 N. E. 957; *In re Doherty*, 222 Mass. 98, 109 N. E. 887; *In re Von Ette*, 223 Mass. 56, 111 N. E. 696; *Lemieux v. Contractors' Mut. Liab. Ins. Co.*, 223 Mass. 346, 111 N. E. 782; *In re Herrick*, 217 Mass. 111, 104 N. E. 432; *In re Sponaski*, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333; *In re Diaz*, 217 Mass. 36, 104 N. E. 384; *In re McPhee*, 222 Mass. 1, 109 N. E. 633; *Pigeon's Case*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737; *Lannigan v. Lannigan*, 222 Mass. 198, 110 N. E. 285; (finding on whether a wife left her husband for justifiable cause, St. 1914, c. 708, § 3, cl. "a") *In re Newman's Case*, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C, 1145; (findings of fact of the Industrial Accident Board on its review of the Arbitration Committee's report) *In re Donovan*, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778; *In re Septimo*, 219 Mass. 430, 107 N. E. 63; *In re Meley*, 219 Mass. 133, 106 N. E. 559; (finding of the Board that the employé received lead poisoning as a personal injury arising out of and in the course of his employment) *In re Doherty* (1915) 222 Mass. 98, 109 N. E. 887; (finding that incapacity for work is total) *Bruce v. Taylor & Maliskey* (1916, Mich.) 158 N. W. 153; *Bell v. Hayes-Ionia Co.* (Mich.) 158 N. W. 179; *Kennelly v. Stearns Salt & Lumber Co.* (Mich.) 157 N. W. 378; *Redfield v. Insur. Co.*, 183 Mich. 633, 150 N. W. 362; *Bayne v.*

Riverside Storage & Cartage Co., 181 Mich. 378, 148 N. W. 412; La Veck v. Parke, Davis & Co. (Mich.) 157 N. W. 72; Linsteadt v. Louis Sands Salt & Lumber Co. (Mich.) 157 N. W. 64; Bischoff v. American Car & Foundry Co. (Mich.) 157 N. W. 34; (finding on conflicting evidence that employe's injury was received while in the employment, Pub. Acts Extra Sess. 1912, No. 10, pt. 3, § 12) Grove v. Michigan Paper Co., 184 Mich. 449, 151 N. W. 554; (finding as to whether the injury arose by reason of intentional and willful misconduct of the workman) Rayner v. Sligh Furniture Co., 180 Mich. 168, 145 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386; Remlow v. Moon Lake Ice Co. (Mich.) 158 N. W. 1027; Rumboll v. Nunnery Colliery Co., 80 L. T. 42, 1 W. C. C. 28; (Wk. Comp. Act, § 20) Rhyner v. Hueber Bldg. Co., 171 App. Div. 56, 156 N. Y. Supp. 903; Kingsley v. Donovan, 169 App. Div. 828, 155 N. Y. Supp. 801; Collins v. Brooklyn Union Gas Co., 171 App. Div. 381, 156 N. Y. Supp. 957; Plass v. New England Ry. Co., 169 App. Div. 826, 155 N. Y. Supp. 854; In re Board of Water Supply, 170 App. Div. 107, 155 N. Y. Supp. 753; (finding that the attorney for the employer and insurer had not exceeded his authority in consenting that a certain award should be made) Cunningham v. Buffalo C. & B. Rolling Mills, 155 N. Y. Supp. 797; (finding of dependency, Wk. Comp. Act, § 20) Hendricks v. Seeman Bros., 155 N. Y. Supp. 638; (findings that the employe's injuries were accidental and received in the course of his employment, Wk. Comp. Law, §§ 20, 21) In re Powely, 169 App. Div. 170, 154 N. Y. Supp. 426; (Wk. Comp. Law, § 20) In re State Workmen's Compensation Com'n, 218 N. Y. 59, 112 N. E. 571; Tirre v. Bush Terminal Co., 172 App. Div. 386, 158 N. Y. Supp. 883; (finding that the employer was not prejudiced by the claimant's failure to give the statutory notice within 10 days after disability, the notice having been given 2½ months after the accident) Marinaccio v. Flinn-O'Rourke Co., Inc., 172 App. Div. 378, 158 N. Y. Supp. 715; (findings supported by any reasonable view of the evidence or by any fair inferences deducible therefrom, Wk. Comp. Law, Laws 1913, c. 599) First Nat. Bank v. Indus. Com., 161 Wis. 526, 154 N. W. 847; Milwaukee W. F. Co. v. Indus. Com., 159 Wis. 635, 150 N. W. 998; Eagle Chemical Co. v. Nowak, 161 Wis. 446, 154 N. W. 636; Oldenberg v. Indus. Com., 159 Wis. 333, 150 N. W. 444; Milwaukee Coke & Gas Co. v. Indus. Com., 160 Wis. 247, 151 N. W. 245; Nekoosa-Edwards Paper Co. v. Indus. Com., 154 Wis. 105, 141 N. W. 1013, L. R. A. 1916A, 348, Ann. Cas. 1915B, 995; Northwestern Iron Co. v. Indus. Com. of Wis., 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877; Heileman Brewing Co. v. Schultz, 161 Wis. 46, 152 N. W. 446; (finding that death of the workman was not due to any hazard peculiar to his employment and different from the hazard incident to any other outdoor work during a thunderstorm, the workman having been struck by lighting, while working on a dam) Hoenig v. Indus. Com. of Wis., 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339; City of Milwaukee v. Indus. Com., 160 Wis. 238, 151 N. W. 247.

A finding on conflicting evidence as to willful misconduct will not be reversed by the court on writ of error. Great Western Power Co. v. Pillsbury

(1915) 170 Cal. 180, 149 Pac. 35. Where the employer insisted that deck hands who had no duty to perform during the trip were required by a well-known rule to remain in the cabin during the voyage, but it was not shown that the deceased had ever been told of any such prohibition, and it appeared that on the day of the accident several of the hands were playing cards on the deck, and that the officer in command joined in the game, the finding that the employé was not violating any specific rule of his employer could not be disturbed. *W. R. Rideout Co. v. Pillsbury* (Cal.) 159 Pac. 435. The determination of the percentage of disability is a conclusion of fact, not subject to review by the courts unless palpably contrary to the undisputed evidence. *Frankfort General Ins. Co. v. Pillsbury* (Cal.) 159 Pac. 150. The award is final unless some substantial error of law is found on appeal. (Wk. Comp. Act, § 26) *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245; *Gray's Appeal*, 80 Conn. 248, 251, 67 Atl. 891; *Brown v. Clark*, 80 Conn. 419, 423, 68 Atl. 1001. The determination of the truth from conflicting evidence and of the credibility of witnesses was for the Commissioner as the trier of the facts. *Larke v. John Hancock Mut. Life Ins. Co.* (1916) 90 Conn. 303, 97 Atl. 320.

The decision of the Industrial Board, where it has acted within its jurisdiction, is conclusive on the circuit court. *Munn v. Indus. Board* (1916) 274 Ill. 70, 113 N. E. 110. A finding of the Board that an employer, through its foreman and timekeeper, knew of the injury, was conclusive, unless it could be said that neither the foreman nor the timekeeper was an "agent." (Wk. Comp. Act, pt. 2, § 18) *In re Bloom*, 222 Mass. 434, 111 N. E. 45. The Board's finding that the employé's death was proximately caused by his injury must stand, when supported by any evidence, unless wrong as a matter of law. *In re Burns*, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787. A finding of the Board against the claimant's contention that the injury was due to serious and willful misconduct of the employer, requiring that the compensation be doubled, is final when supported by any evidence. *Id.* Findings of fact made by the Industrial Accident Board, after a hearing of the parties, on the statements of counsel and the evidence before the full Board, are not open to revision on appeal. *In re Bentley*, 217 Mass. 79, 104 N. E. 432. A finding in accordance with the report of the Arbitration Committee that the employé's act was not "serious and willful misconduct" could not be disturbed on appeal, when supported by any evidence. *In re Nickerson*, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790. Findings of fact in an award made by the Board are conclusive, if there is any evidence to support them, and are just as conclusive as the findings of a judge or the verdict of a jury. *In re Sander-son's Case* (Mass.) 113 N. E. 355. The case will not be sent back after death of the dependent in order that a motion may be made to the Board for an award to be made to some other than the dependent, where it does not appear that there was any one to whom an award should have been made at the time the award was made to the dependent. (St. 1911, c. 751, pt. 3, § 12, as amended by St. 1914, c. 708, § 11) *In re Murphy* (Mass.) 113 N. E. 283.

The Industrial Board's findings are conclusive, in the absence of fraud,

when they are supported by evidence or inferences deducible therefrom. *Papinaw v. Grand Trunk Ry. Co.* (Mich.) 155 N. W. 545. A finding of the Industrial Accident Board that an employé's injured condition resulted from injury, and not from senile cataract, could not be disturbed, where the court could not say from the entire record that the finding was erroneous. *Spooner v. Estate of P. D. Beckwith*, 183 Mich. 323, 149 N. W. 971. Where a workman was killed from falling a few days after returning to work following his recovery from a prior fall, medical testimony that his fatal fall was due to a concussion of the brain received on the first fall was evidence competent in support of a finding of the Industrial Board for claimant, and hence such finding was conclusive. *Deem v. Kalamazoo Paper Co.* (Mich.) 155 N. W. 584. A finding of the Board, based on opinion evidence, that the direct cause of the pneumonia causing the workman's death was the hurt or strain of his back, could not be disturbed, where the evidence favorable to the claimant was not wholly improbable. *Bayne v. Riverside Storage & Cartage Co.*, *supra*. The question presented on certiorari to review a finding of the Industrial Accident Board is whether there is any evidence in the record to support the Board's findings. *Kennelly v. Stearns Salt & Lumber Co.*, *supra*.

A computation by the Commission of the amount of an award is conclusive, where there is evidence as to the amount of decedent's earnings. (Wk. Comp. Act, Consol. Laws, c. 67, § 20) *Fairchild v. Pennsylvania R. R. Co.*, 170 App. Div. 135, 155 N. Y. Supp. 751. A decision of the Commission that the deceased workman's mother was dependent on him could not be disturbed, where it was supported by evidence. (Wk. Comp. Laws, & 20) *Rhyner v. Hueber Bldg. Co.*, *supra*. A finding of the Commission that the workman's loss of his fingers in the chain guard of his motorcycle, which was used occasionally in the employer's business and without objection was cared for during working hours, came within the provision of the Act, could not be disturbed, where it was supported by substantial evidence. (Wk. Comp. Act, § 21) *Kingsley v. Donovan*, *supra*. A finding that the workman received a personal injury by an accident arising out of his employment could not be disturbed, in the absence of fraud, where it was supported by evidence. *Carroll v. What Cheer Stables Co.* (R. I.) 96 Atl. 208.

It is only when the facts are undisputed, and no conflicting inference respecting the ultimate fact can be drawn therefrom, that the question becomes one of law. *Northwestern Iron Co. v. Indus. Com. of Wis.*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877; *Ennis v. Hanna D. Co.*, 148 Wis. 655, 134 N. W. 1051. In the absence of fraud, the findings of fact made by the Industrial Commission are conclusive, and its order or award can be set aside only upon the ground (1) that it acted without or in excess of its powers; (2) that it was procured by fraud; or (3) that its findings of fact do not support the order or award. *City of Milwaukee v. Indus. Com.*, 160 Wis. 238, 151 N. W. 247. It was not the scheme of the Act to make the court a reviewer of facts. Its office is to relieve against fraud, to keep the

questions of law being reviewable;⁴⁹ but findings on any jurisdictional fact will be reviewed and annulled, when without the support of substantial evidence.⁵⁰ A decision or finding will be reversed,

Commission within its jurisdictional bounds, and to correct an award not supported by the facts found. *Id.*

⁴⁹ (Finding whether the workman was guilty of willful misconduct when he was killed) *Fidelity & Deposit Co. of Md. v. Indus. Acc. Com.*, 171 Cal. 728, 154 Pac. 834; *Head v. Head Drilling Co.*, *Fidelity & Deposit Co. of Md. v. Indus. Acc. Com.*, 2 Cal. I. A. C. Dec. 973, 171 Cal. 728, 154 Pac. 834; (*Laws* 1913, p. 335) *Courter v. Simpson Construction Co.*, 264 Ill. 488, 106 N. E. 350; *Munn v. Indus. Board* (1916) 274 Ill. 70, 113 N. E. 110; *Victor Chemical Works v. Indus. Board of Ill.* (1916) 274 Ill. 11, 113 N. E. 173; *Bell v. Hayes-Ionia Co.* (Mich.) 158 N. W. 179; (*Wk. Comp. Act*, § 20) *Howard v. Ludwig*, 171 N. Y. 507, 64 N. E. 172; *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, *Ann. Cas.* 1913A, 883; *In re State Workmen's Compensation Comm'n*; *Dale v. Saunders Bros.*, 218 N. Y. 59, 112 N. E. 571, affirming 171 App. Div. 528, 157 N. Y. Supp. 1062.

A finding of the Commission, upon an application for compensation, that the applicant was at the specific time of his injury employed in interstate commerce, and that the particular service being rendered by him at the time of his injury was a service in such interstate commerce, is more in the nature of a conclusion of law, and is reviewable on certiorari. *Smith v. Indus. Acc. Com. of Cal.*, 2 Cal. I. A. C. Dec. 439, 26 Cal. App. 560, 147 Pac. 600.

"Under its supervisory power over the Public Service Commission, respecting its administration of the Workmen's Compensation Act, this court takes cognizance of questions of law only." (*Code* 1913, c. 15p, §§ 1-55 [secs. 657-711]) *Poccardi v. Public Service Commission*, 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299.

⁵⁰ *Employers' Assur. Corp., Ltd., v. Cal. Indus. Acc. Com.*, 2 Cal. I. A. C. Dec. 452, 170 Cal. 800, 151 Pac. 424; (finding whether there is any evidence that the injury occurred in the course of the employment) *Western Indemnity Co v. Pillsbury*, 170 Cal. 686, 151 Pac. 398. This case follows *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35, as to the extent to which the court may, on certiorari, inquire into the sufficiency of the evidence to sustain findings of jurisdictional facts underlying the power of the Commission to award compensation, and holding that there is no substantial difference between the *Roseberry Act*, then in force, and the present *Boyn-ton Act*, as to this phase of the case.

An award which is void, because made without proof that the injury resulted from accident, must be annulled on certiorari as an act in excess of the jurisdiction of the Commission. *Englebreton v. Indus. Acc. Com.*, 170 Cal. 793, 151 Pac. 421. Where the jurisdiction of the Commission depends

where it is on a matter not within the tribunal's jurisdiction,⁵¹ or is based solely on hearsay, or other improper or wholly insuffi-

upon an ultimate fact found, such as that of death by violence, the Supreme Court on review may determine whether the evidence is sufficient to justify the finding of death, and may nullify the award where it is not sustained. *Western Grain & Sugar Products Co. v. Pillsbury* (Cal.) 159 Pac. 423.

When the finding and award of the Commissioner appealed from are unauthorized in law, irregular, or informal, or based upon a misconception of the law, or of the powers or duties of the administrative tribunal, or are so unreasonable as to justify judicial interference, the award may be set aside. *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245; *Norton v. Shore Line Electric R. Co.*, 84 Conn. 24, 35, 78 Atl. 587. In *Benoit v. Bushnell*, 1 Conn. Comp. Dec. 172 (superior court reversing the Commissioner), it was held that, where the evidence showed that the claimant did not see a doctor for a week after the injury, and the defendant, though knowing of the injury, did not know that it was claimed to have been received in his employment, and no claim for compensation was made for three months, a finding that he had actual knowledge, and was not prejudiced by lack of notice, is not sustained by the evidence, and will be set aside on appeal.

Where there are no facts and the decision of the Commission is arbitrarily unfair and unreasonable, a question of law arises, and the court may right the wrong. *Rhyner v. Hueber Bldg. Co.*, 171 App. Div. 56, 156 N. Y. Supp. 903. Where the Commission's findings are without evidence, and in direct conflict with the undisputed facts and all reasonable inferences which may be drawn from them, its determination may be reversed as an error of law. *Gardner v. Horseheads Const. Co.*, 171 App. Div. 66, 156 N. Y. Supp. 899.

The rule in certiorari cases is that, if in any reasonable view of the evidence it will support the conclusion arrived at, such conclusion will not be disturbed for want of support in the evidence. If, however, the findings have no support in the testimony, there was no jurisdiction to make them. *International Harvester Co. v. Indus. Com.*, 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330; *State ex rel. v. Willeuts*, 143 Wis. 449, 453, 128 N. W. 97; *State ex rel. v. Losby*, 115 Wis. 57, 90 N. W. 188; *State ex rel. v. Fisher*, 129 Wis. 57, 108 N. W. 206; *Milwaukee Western Fuel Co. v. Indus. Com.*, 159 Wis. 635, 150 N. W. 998.

The action of the Commission is final and irreviewable, except as to matter "going to the basis of the claimant's right." (Code, c. 15p, § 43 [ser. sec.

⁵¹ A decision is conclusive only when it is within the Board's jurisdiction. *Uphoff v. Indus. Board of Ill.*, 271 Ill. 312, 111 N. E. 128. In the absence of proof that the Accident Board had jurisdiction to make the award, an order of such Board confirming an award of the Arbitration Committee will be set aside. *Shevchenko v. Detroit United Ry. (Mich.)* 155 N. W. 423.

cient evidence;⁵² but an admission of incompetent evidence will not operate to reverse an award, if there is any basis in the com-

699.) As to such matters, its function is administrative, only quasi judicial, and the supervisory power of this court over its action, respecting the right of the claimant, is under its original jurisdiction by mandamus. *Poccardi v. Public Service Com.*, 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299; *De Constantin v. Pub. Ser. Com.*, 75 W. Va. 32, 83 S. E. 88, L. R. A. 1916A, 329. In this respect, the West Virginia statute accords with the British Compensation Act, and those of several states limiting the power of review to questions of law. *Gane v. Colliery Co.*, 2 B. W. C. C. 42; *Turner v. Bell & Sons*, 4 B. W. C. C. 63; *Moss & Co. v. Akers*, 4 B. W. C. C. 294; Ill. Act (Hurd's Rev. St. 1913, c. 48) § 19; Iowa Act (Acts 35th Gen. Assem. c. 147) § 34; Mass. Act (St. 1911, c. 751) pt. 3, §§ 10, 11; Mich. Act (Pub. Acts Extra Sess. 1912, No. 10) pt. 3, §§ 11, 12, 13; Minn. Act (Gen. St. 1913, §§ 8216, 8225) §§ 22, 30.

"In a number of states of the Union, under the provisions of statutes somewhat similar to our own, the determination of questions of fact is referred to certain Boards or Commissions, created by said statutes. These boards have different titles in different states, viz., a Board of Award, Industrial Accident Board, Board of Arbitration, Committee of Arbitration, and other names. The provisions are also somewhat common in these statutes that findings of fact by such a Board shall be final, and that, upon appeal, a review of the proceedings of such Boards shall be limited to questions of law. In the construction of these statutory provisions, courts of last resort in the various states have generally held that a finding of fact, although declared conclusive by the statute, will not be upheld, if there is no evidence to support it. Under the Rhode Island Act it is contemplated that the decision of the justice of the superior court and the decree of that court shall be based upon evidence, and not arbitrarily made. If the record discloses that a finding of fact is entirely without legal evidence tending to support it, such finding amounts to an error of law, and will be reviewed by this court upon appeal and set aside." *Jillson v. Ross* (R. I.) 94 Atl. 717.

⁵² An award cannot stand, if a finding of a jurisdictional fact is without any support, except that of hearsay testimony. *Employers' Assur. Corp., Ltd., v. Cal. Indus. Acc. Com.*, 2 Cal. I. A. C. Dec. 452, 170 Cal. 800, 151 Pac. 424. The decision of the arbitrators and of the Industrial Board must be sustained by some competent evidence. Where it is founded on hearsay, or other improper or insufficient evidence, the circuit court should, on certiorari, remand the proceeding to the Industrial Board for proper proceeding. *Victor Chemical Works v. Indus. Board of Ill.* (1916) 274 Ill. 11, 113 N. E. 173. Where the order of the Industrial Accident Board is not authorized by the evidence, it will be reversed, and the case remanded for further hearing before the Board. *Carpenter v. Detroit Forging Co.* (1916, Mich.) 157 N. W.

petent evidence to support it.⁵³ The court may usually examine and take into account the evidence adduced before a Commission as supplementing, illuminating, or explaining, though not as varying or contradicting, the findings of fact made by the Commission.⁵⁴ A probative fact found cannot prevail over the findings of ultimate facts, unless necessarily in conflict with such findings.⁵⁵ But it is proper to consider whether the subordinate facts found by a Com-

374. An award made by the deputy commissioner on hearsay and insufficient testimony of a flimsy character on the question of dependency will be set aside by the court. *Tirre v. Bush Terminal Co.*, 172 App. Div. 386, 158 N. Y. Supp. 883.

⁵³ *First Nat. Bank v. Indus. Com.*, 161 Wis. 526, 154 N. W. 847; *Andrzejewski v. Northwestern Fuel Co.*, 158 Wis. 170, 148 N. W. 37; *Chicago & N. W. Ry. Co. v. Railroad Com.*, 156 Wis. 47, 145 N. W. 216, 974; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 38 L. R. A. (N. S.) 489; *Milwaukee Coke & Gas Co. v. Indus. Com.*, 160 Wis. 247, 151 N. W. 245; *Milwaukee Western Fuel Co. v. Indus. Com.*, 159 Wis. 635, 150 N. W. 998.

"We do not think, however, that under the language used in our Workmen's Compensation Act the decision of its administrative board must be in all cases reversed under the rule of presumptive prejudice, because of error in the admission of incompetent testimony, when, in the absence of fraud, there appears in the record a legal basis for its findings, which are made 'conclusive' by statute when said board acts within the scope of its authority." *Fitzgerald v. Lozier Motor Co.*, 187 Mich. 660, 154 N. W. 67; *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771.

In *McGarva v. Hills*, 1 Conn. Comp. Dec. 533, the superior court held, in affirming the award of the Commissioner, that an error in the admission of testimony cannot be a ground for setting aside an award; that it would not be set aside unless it was illegal or very unreasonable.

⁵⁴ *Gleisner v. Gross & Herbener*, 170 App. Div. 37, 155 N. Y. Supp. 946.

Though the Commission has certified the evidence taken before it, as well as its findings of fact therefrom, such evidence will be considered by the Supreme Court merely to supplement, explain, and illuminate, but not to contradict or vary, the Commission's findings of fact. The question of the correctness of the Commission's determination as to the applicability of the statute to the injury on which the claim is based remains in all cases a question for judicial scrutiny, in the light of the facts as found by the Commission. In *re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598.

⁵⁵ *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398; *People v. McCue*, 150 Cal. 195, 88 Pac. 899.

missioner support the ultimate fact, as well as whether the ultimate fact supports the conclusion of law.⁵⁶ Unless the facts in evidence are practically undisputed, an appellate tribunal cannot with fairness to the rights of the parties assume a finding of facts as made by the tribunal under review, when there is no finding of record of the tribunal of these facts.⁵⁷ Where the evidence is not reported, it cannot be successfully contended that as a matter of law findings of fact were not warranted.⁵⁸ A decision that the injuries were not due to accident makes that question *res judicata*.⁵⁹

Evidence that a workman returned to work, regained his health, and gave a release, authorizes an order that he had been fully compensated.⁶⁰ The unexplained absence of the testimony of the physician who attended the deceased employé is not substantial evidence overcoming the statutory presumption favorable to the award.⁶¹

The positive duty resting on the Committee of Arbitration in Massachusetts to report all material testimony supplies the absence of an express statement in the bill of exceptions. And hence it was open to the insurer to argue that findings were not supported by the evidence, though the bill of exceptions contained no such statement.⁶²

Where a city, as employer, stipulated that arbitration should be waived and the claim of a dependent be submitted to the Michigan

⁵⁶ *McGarva v. Hills*, 1 Conn. Comp. Dec. 533.

⁵⁷ *Ilartz v. Hartford Faience Co.* (1916) 90 Conn. 539, 97 Atl. 1020.

⁵⁸ *In re Bentley*, 217 Mass. 79, 104 N. E. 432; *In re Septimo*, 219 Mass. 430, 107 N. E. 63; *In re Fisher*, 220 Mass. 581, 108 N. E. 361.

⁵⁹ (Wk. Comp. Act, § 20) *Naud v. King Sewing Mach. Co.* (1916) 95 Misc. Rep. 676, 159 N. Y. Supp. 910.

⁶⁰ (Laws 1913, c. 599, § 2394—19) *Oldenberg v. Indus. Com.*, 159 Wis. 333, 150 N. W. 444.

⁶¹ *Sullivan v. Indus. Engineering Co.*, 158 N. Y. Supp. 970.

⁶² (St. 1911, pt. 3, § 7, as amended by St. 1912, c. 571, § 12) *In re Brightman*, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321.

Industrial Accident Board, and the claimant's divorced husband appeared and denied her right to an award, the claimant proceeded on the theory that a hearing should be had before the Board questioning whether the parties were bound by the stipulation, claimant could not urge, on certiorari to review the Board's award, that the hearing before the Board was violative of the stipulation.⁶³

Under the express provisions of the Illinois Act, the circuit court at any time has power on application to make its judgment conform to any modification required by any subsequent proceedings for review, and hence an order of the circuit court that it "retained jurisdiction for the purpose of enforcing this judgment and in accordance with the statute" was unnecessary, but harmless.⁶⁴ Where an application is made for judgment on the Industrial Board's award, and no attempt has been made to review the Board's findings, the circuit court has no jurisdiction to inquire into the legality of the Board's action, but is authorized only to enter judgment on the award.⁶⁵

§ 243. — Connecticut

As said in a recent Connecticut case, the power of the superior court in the correction of the finding of the compensation commissioner is analogous to, and its method of correcting the finding similar to, the power and method of the Supreme Court of Errors in correcting the finding of the superior court. The finding of the superior court on an appeal from an award of the Commissioner, unless it corrects the finding of the Commissioner, should merely, in its finding, make that finding a part of its record, without refinding the facts, or making them the findings of fact for the purpose of appeal. If the trial court corrects the finding, it should indicate in

⁶³ (Pub. Acts Extra Sess. 1912, No. 10) *Vereeke v. City of Grand Rapids*, 184 Mich. 474, 151 N. W. 723.

⁶⁴ *Armour & Co. v. Indus. Board of Ill.* (1916) 273 Ill. 590, 113 N. E. 138.

⁶⁵ *Pitt v. Central Illinois Public Service Co.* (1916) 273 Ill. 617, 113 N. E. 155.

its findings on appeal the corrections so made in the finding of the Commissioner.⁶⁶ If the trial court finds no harmful error in the appeal from the Commissioner, it should dismiss the appeal; but if it finds harmful error, either in the conclusion of law reached, or in a conclusion of fact reached, or in the finding of a material fact, or the refusal to find a material fact, it should, if the award may be changed or modified, without requiring a further hearing, sustain the appeal to this extent and direct the Commissioner to make the award in accordance with its direction. Where the award cannot be changed or modified according to the trial court's conclusion without a further hearing on the facts, it should sustain the appeal and indicate in the judgment or its memorandum the ground of its action.⁶⁷

In a case wherein the award was made against both the employer and insurer, it was held but just that the insurer should be allowed to contest the correctness of the award on appeal, though it neglected to take its appeal in the name of its insured, instead of its own name, as provided by the terms of the policy.⁶⁸

An exception to a finding, on the ground that "the court erred in finding the facts set forth in part first of the finding," is too general, and should specifically point out the paragraphs of the finding of the Commissioner and the part of the finding of the superior court which it was desired to have corrected.⁶⁹

§ 244. — Washington

Under the Washington Act the findings and award of the Insurance Department are reversible only on three grounds: (1) That it acted without or in excess of its powers; (2) that the award was procured by fraud; and (3) that the findings of fact by the De-

⁶⁶ *Thompson v. Twiss* (1916) 90 Conn. 444, 97 Atl. 328.

⁶⁷ *Id.*

⁶⁸ *Wright v. Barnes*, 1 Conn. Comp. Dec. 248.

⁶⁹ *Thompson v. Twiss*, *supra*.

partment do not support the award.⁷⁰ The finding of the Department of the nonexistence of any one of the four facts essential to establish a right to compensation would result in the denial of an award, and in such case an appeal is allowed.⁷¹

§ 245. — California

Under the provision of the California Act that "the findings and conclusions of the Commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the Commission," the correctness of the findings of fact cannot be questioned where there has been presented to the Commission any evidence to support them. The phrase "such questions of fact shall include ultimate facts and the findings and conclusions of the Commission" must relate wholly to conclusions of fact, for the clause expressly so declares. Ultimate facts are nothing more than conclusions of fact drawn from the probative or evidentiary facts; hence matters of fact stated in their ultimate form cannot differ from conclusions of fact, however characterized.⁷² This Act is not effective to prevent application to the superior court to exercise its original jurisdiction by way of certiorari.⁷³ The question whether a finding on whether a workman was guilty of "willful misconduct" is supported by the evidence, being one going to the jurisdiction, is reviewable on certiorari, where there is no substantial conflict in the testimony.⁷⁴ Proceedings of the Industrial Accident Commission will not be reviewed on the ground that the Commission's findings are not sustained by the evidence and that the applicant had discovered no evidence material to him; these being grounds on which the Commission may grant a rehearing under Workmen's

⁷⁰ (Wk. Comp. Act Wash. § 20) Rulings of Wash. Indus. Ins. Com. 1915, p. 24.

⁷¹ (Wk. Comp. Act Wash. § 5) *Id.* p. 14.

⁷² *Smith v. Industrial Accident Commission*, 26 Cal. App. 560, 147 Pac. 600.

⁷³ *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35.

⁷⁴ *Id.*

Compensation Act, § 82, but the court being restricted to grounds stated in section 84.⁷⁵ Section 84 does not include the word "award," and therefore applies only to regulations made by the Commission for the safeguarding of employes against safety orders, decisions, rules, or regulations unreasonable in character. The unreasonableness of an award is not a ground of review.⁷⁶ The refusal of a referee in taking testimony to allow cross-examination of a witness upon certain matters is mere error in taking testimony, which cannot be reached by a writ of certiorari, under the California Act.⁷⁷ A judgment of the Commission, ordering the employer to pay "to the persons entitled to receive the same the reasonable value of medical and surgical services rendered to the applicant," cannot be enforced until the amounts are designated and the persons named, and until that time no application can be made for the review of such award.⁷⁸ A decision on certiorari that an award of the Commission is not sufficiently supported by evidence should merely annul the order, leaving the Commission to proceed with a further hearing if it has power to do so.⁷⁹ Where the Commission ordered an employer to pay the reasonable value of medical services received by the injured employé, but stipulated that the claims were to be approved by it before they were paid, the award was not enforceable as a final judgment because of the reservation, and hence was not reviewable on appeal.⁸⁰

The findings of the Commission that an employé has been allowed compensation for a longer period than that of actual disability, and that in making the award the Commission failed to credit the em-

⁷⁵ *Cardoza v. Pillsbury*, 169 Cal. 106, 145 Pac. 1015.

⁷⁶ *Stevens v. Tittle*, 2 Cal. I. A. C. Dec. 146.

⁷⁷ (*Wk. Comp. Act*, §§ 77, 84) *Frankfort General Ins. Co. v. Pillsbury* (Cal.) 159 Pac. 150.

⁷⁸ *Garratt-Callahan Co. v. Indus. Acc. Com. of St. of Cal.*, 2 Cal. I. A. C. Dec. 953, 171 Cal. 334, 153 Pac. 239.

⁷⁹ *Englebreton v. Indus. Acc. Com.*, 170 Cal. 793, 151 Pac. 421.

⁸⁰ *Rains v. Diamond Match Co.*, 171 Cal. 326, 153 Pac. 239.

ployer with a certain sum paid by him to the employé, will not be reviewed (assuming that such findings are reviewable), where the application for rehearing with the Commission does not sufficiently set forth the only claim as to which there might be some ground for contending that there was an entire absence of evidence to support the finding of the Commission of compensation for a longer period than that of actual disability, and where the failure to credit the employer with the sum named is not presented in the application for rehearing.⁸¹

DIVISION III.—REVIEW BY HIGHER COURT

§ 246. Remedies

In Minnesota the right of review by certiorari is open to both parties, by which all rights may be fully protected.⁸² Claimant cannot, however, have the record reviewed on certiorari issued on the relation of one against whom a judgment for compensation has been rendered. The writ serves the purpose of an appeal. Only the party on whose relation it has issued can complain.⁸³

In New York there is no provision of statute or rule of court requiring the filing of exceptions, or, as in England and some of the states, that the grounds of appeal be stated in the notice of appeal; but it was intended that the procedure, both before the Commission and in the court, should be simple and without unnecessary delay or useless formality, and that until otherwise provided the appeal to the Supreme Court should bring up the whole case, to be heard on the record of the Commission and the briefs and argument submitted by the respective parties.⁸⁴ In a recent case it was

⁸¹ *Pacific Coast Casualty Co. v. Pillsbury*, 2 Cal. I. A. C. Dec. 538, 171 Cal. 319, 153 Pac. 24.

⁸² (Wk. Comp. Act, § 30; Gen. St. 1913, § 8225) *State ex rel. Nelson-Spelliscy Co. v. District Court of Meeker County*, 128 Minn. 221, 150 N. W. 623.

⁸³ *State ex rel. Globe Indemnity Co. v. District Court (Minn.)* 156 N. W. 120.

⁸⁴ *Kenny v. Union Ry. Co.*, 166 App. Div. 497, 152 N. Y. Supp. 117.

held that the questions considered were not affected by the fact that after the appeal was taken the New York Workmen's Compensation Commission was superseded by the Industrial Commission.⁸⁵

Though proceedings under the Massachusetts Act are analogous to the chancery practice, yet, since the Act does not provide for exceptions, the only way by which questions of law may be reviewed in the Supreme Judicial Court is by appeal.⁸⁶

§ 247. Right of appeal

Under the Illinois Act, an order of a superior court awarding weekly payments of death benefits may be appealed to the Appellate Court.⁸⁷ The provision of the Massachusetts Act "that there shall be no appeal from a decree upon an order or decision of the Board which has not been presented to the court within ten days after the notice of the filing thereof by the Board" does not mean that the case must be actually brought to the attention of a justice of the superior court within that time. It is a compliance with the statute if the required papers are presented in the court in the sense of being filed as a part of its record within the time prescribed.⁸⁸ The Massachusetts Act does not contemplate, either in its letter or its spirit, that the insurer may litigate by appeal to the Supreme Judicial Court the proportions of the divisions of a payment among

⁸⁵ *Carroll v. Knickerbocker Ice Co.* (N. Y.) 113 N. E. 507, reversing 169 App. Div. 450, 155 N. Y. S. 1.

⁸⁶ *Pigeon v. Employers' Liab. Assur. Corp.*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737. The requirement of the Act that the superior court enter a decree precludes the possibility of exceptions, and thereby requires that the suit be brought up by appeal from the superior court's decree, and not by exceptions. *In re American Mut. Liab. Ins. Co.*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372; (St. 1911, c. 751) *In re McNichol*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306. Appeal is the only method by which questions of law arising under the Act can be brought to the Supreme Judicial Court. *In re Cripp*, 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828.

⁸⁷ *Lavin v. Wells Bros. Co.*, 272 Ill. 609, 112 N. E. 271.

⁸⁸ (Wk. Comp. Act, as amended by St. 1912, c. 571, § 14) *In re McPhee*, 222 Mass. 1, 109 N. E. 633.

those claiming to be dependents upon the deceased employé, when the dependents are satisfied and do not appeal, and when the insurer cannot by any possibility be affected in its pecuniary responsibility by any modification permitted by law of the order for payment. In such case the insurer is not entitled to be heard on the question of the division of the payments.⁸⁹

§ 248. Presentation below and for review

Questions presented for the first time on appeal cannot ordinarily be considered.⁹⁰ The court will not assume, in the absence of a statement in the record to that effect, that all the evidence on which a special tribunal made its findings and decision was before the court.⁹¹

In cases arising under the elective compensation section of the New Jersey Act, the statement of facts as determined by the trial judge should be specific as to the nature and extent of the injury, so that the reviewing court may be enabled to judge of the propriety of the award as supported by the facts found.⁹²

⁸⁹ In re Janes, 217 Mass. 192, 104 N. E. 556.

⁹⁰ The Supreme Court will not try and determine an issue not considered or decided below. A ruling upon the exclusion of testimony is not available as error, where no proof is made at the hearing of the motion for a new trial as to what the witnesses would have sworn to, had they been permitted to testify. *Oliver v. Christopher*, 98 Kan. 660, 159 Pac. 397. *McRoberts v. National Zinc Co.*, 93 Kan. 364, 144 Pac. 247. A contention that the employé was but a casual employé cannot be considered, when presented for the first time on appeal. *Victor Chemical Works v. Indus. Board of Ill.* (1916) 274 Ill. 11, 113 N. E. 173. Objections to the consideration of certain evidence by the Massachusetts Board will not be considered by the Supreme Court on appeal, when not made before the Board. *Duprey v. Maryland Casualty Co.*, 219 Mass. 189, 106 N. E. 686.

But it was not necessary for the relator to ask the trial court to amend its decision in the respects in which it was in error, in order to raise the questions in the Supreme Court. *State ex rel. Anseth v. District Court (Minn.)* 158 N. W. 713.

⁹¹ In re Stickley, 219 Mass. 513, 107 N. E. 350.

⁹² *Long v. Bergen County Court of Common Pleas*, 84 N. J. Law, 117, 86 Atl. 529, supported by *James A. Banister Co. v. Kriger*, 84 N. J. Law, 30, 85 Atl. 1027.

The Illinois Supreme Court's powers to review are limited to a determination, from the facts recited in the decision of the Industrial Board, whether that body acted within its power in making an award.⁹³ In New York, where the undisputed facts in connection with the testimony of the claimant, supported by every reasonable inference that can be drawn therefrom, do not warrant an award, an award made will be reversed on appeal from a non-unanimous affirmance.⁹⁴

If the time during which periodical payments of compensation are to be paid under the Nebraska Act is not more than six months, the trial court has no continuing jurisdiction over the case, and upon appeal from such an order the bill of exceptions must be settled with reference to the term at which such order is made.⁹⁵ Where the compensation awarded does not extend over a period of more than six months, if the bill of exceptions is not settled with reference to the term at which the order is made, and motion is made to quash it for that reason, the Supreme Court on appeal cannot consider the bill of exceptions for the purpose of reviewing the original order.⁹⁶

§ 249. Questions reviewable

Findings of fact are ordinarily conclusive when supported by any evidence,⁹⁷ though the evidence is weak and unsatisfactory;⁹⁸

⁹³ *Munn v. Indus. Board* (1916) 274 Ill. 70, 113 N. E. 110.

⁹⁴ (Wk. Comp. Law, §§ 20, 21) *Jerome v. Queen City Cycle Co.*, 163 N. Y. 351, 57 N. E. 485, affirming 24 App. Div. 632, 48 N. Y. Supp. 1107; *In re Heitz*, 218 N. Y. 148, 112 N. E. 750, affirming 155 N. Y. Supp. 1112.

⁹⁵ *Hanley v. Union Stockyards Co.* (Neb.) 158 N. W. 939.

⁹⁶ *Id.*

⁹⁷ *Munn v. Industrial Board* (1916) 274 Ill. 70, 113 N. E. 110; *Redfield v. Mich. Workmen's Compensation Mut. Ins. Co.*, 183 Mich. 633, 150 N. W. 362;

⁹⁸ A finding that claimant was partially dependent on her deceased brother could not be disturbed, where it was supported by evidence, though the evidence was weak and unsatisfactory. *State ex rel. Globe Indemnity Co. v. District Court* (Minn.) 156 N. W. 120.

the review being limited to questions of law.⁹⁹ The findings of the ultimate facts of the controversy, in many instances, will involve

(finding that there was a casual connection between the injury and the pneumonia causing the workman's death) *Bayne v. Riverside Storage & Cartage Co.*, 181 Mich. 378, 148 N. W. 412; *Zabriskie v. Erie R. Co.*, 86 N. J. Law, 266, 92 Atl. 385, L. R. A. 1916A, 315; *Sexton v. Newark Dist. Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 451, affirmed 86 N. J. Law, 701, 91 Atl. 1070; *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *Hulley v. Moosbrugger*, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203; *Jackson v. Erie R. Co.*, 86 N. J. Law, 550, 91 Atl. 1035; *Delaware, L. & W. R. R. Co. v. Hardy*, 59 N. J. Law, 35, 34 Atl. 986; (finding as to the duration of disability, *Wk. Comp. Act*, § 2, par. 18) *Scott v. Payne Bros.*, 85 N. J. Law, 446, 89 Atl. 927; (finding that employé's death resulted from an accident arising out of and in the course of his employment) *Winter v. Atkinson-Frizelle Co.*, 88 N. J. Law, 401, 96 Atl. 360; (*Wk. Comp. Act*, Pub. Laws 1911-12, c. 831) *Weber v. American Silk Spinning Co. (R. I.)* 95 Atl. 603; *Corral v. William H. Hamlyn & Son (R. I.)* 94 Atl. 877; *Jillson v. Ross (R. I.)* 94 Atl. 717.

A finding that, where the hands of a longshoreman employed in unloading a vessel on an exposed pier in an open harbor were frozen, the accident arose out of his employment, could not be disturbed by the Supreme Judicial Court, where the finding was reasonably supported by the evidence. *McManaman's Case (Mass.)* 113 N. E. 287.

The inquiry was limited to the question whether the evidence, if satisfactory to the trial court, reasonably tended to support the plaintiff's contentions. *State ex rel. Nelson-Spelliscy Co. v. District Court of Meeker County*, 128 Minn. 221, 150 N. W. 623.

The trial judge's finding of fact that deceased was not in the usual passageway between the tracks, but was on the track, and that, if he were killed without voluntary action on his part, he must have been a trespasser, and therefore, if an accident happened, it did not arise out of the decedent's employment, was conclusive on certiorari. *Siemientkowski v. Berwind White Coal Mining Co. (N. J.)* 92 Atl. 909.

⁹⁹ The Supreme Court is bound by the findings of fact made by the Industrial Board, and can only review its decision for errors of law. *Munn v. Indus. Board* (1916) 274 Ill. 70, 113 N. E. 110. Findings of the Industrial Accident Board will not be disturbed by the Supreme Court on certiorari, where they are sustained by some evidence. *Spooner v. Detroit Saturday Night Co.*, 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A, 17; *Rayner v. Sligh Furniture Co.*, 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386. By section 2, par. 20, of the Act, the right of the Supreme Court to review on certiorari is limited to questions of law. *James A. Banister Co. v. Kriger*, 84 N. J. Law, 30, 85 Atl. 1027.

Whether the court could allow more for an injury to an ankle than the

and be based upon conclusions of law. In a broad sense such findings are findings of fact, and, although the acts provide that they shall be conclusive, nevertheless they may be reviewed in so far as they involve the determination of such questions of law.¹

The Constitution of Rhode Island does not require the Supreme Court to review the findings of fact of the justice of a superior court.² Where the presiding justice dismisses the petition for compensation, on the ground that there can be no recovery for an accident occurring outside such state, without making any findings of fact upon the evidence adduced before him, the Supreme Court on appeal has no jurisdiction to try and determine the facts of the case, but is limited to a consideration of the point of law upon which the petition was dismissed.³ Whether circumstances constituting such "accident, mistake, or unforeseen cause" as will excuse failure to give notice of injury exist in a particular case is a question of fact not reviewable by the Supreme Court.⁴

On appeal in New York from a decision of the Appellate Division,

stipulated compensation for loss of a foot was a question involving the construction of the statute, and therefore a question of law to be decided on certiorari. *Rakiec v. Delaware, L. & W. R. R. Co.* (N. J.) 88 Atl. 953.

On writ of error to review a judgment affirming an award of the Industrial Board, the Supreme Court was authorized to examine the record for errors of law only, and where there was evidence fairly tending to show that decedent's injuries arose out of and in the course of his employment by defendant, the Supreme Court could not do otherwise than affirm the judgment of the circuit court. *Armour & Co. v. Indus. Board of Ill.* (1916) 273 Ill. 590, 113 N. E. 138.

¹ *Jillson v. Ross* (R. I.) 94 Atl. 717. Although the findings of the court of common pleas as to facts in workmen's compensation cases are conclusive on appeal, nevertheless the law arising upon the ascertained facts is a question for the court reviewing the decision. *Hulley v. Moosbrugger*, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203.

² (Wk. Comp. Act, Laws 1912, c. 831, art. 3, §§ 6, 7) *Jillson v. Ross* (R. I.) 94 Atl. 717.

³ *Grinnell v. Wilkinson* (R. I.) 98 Atl. 103.

⁴ *Donahue v. R. A. Sherman's Sons Co.* (R. I.) 98 Atl. 109.

which, though affirming the finding of the Commission, is not unanimous, the Court of Appeals may consider whether there was any evidence to sustain the finding of the Commission.⁵

Where the amount of the judgment was arrived at by applying the law to special findings upon the duration of disability and the existence of permanent partial disability, which were uninfluenced by any error available on review, no defect in the general verdict, which was excessive and unsupported by the evidence, or in the other findings, can justify a reversal.⁶ Nor is the refusal to strike out of the petition for compensation allegations negating all the anticipated defenses prejudicial error, where it appears that they could not have affected the judgment.⁷

The court is not bound by any rule adopted by the Washington Commission, where the construction of the Act is involved as a matter of law.⁸ A provision that in all court proceedings the decision of the Department shall be *prima facie* correct does not apply to the Department's decision as to what constitutes a "fortuitous fund," where there is no conflict in the evidence.⁹

§ 250. Decision

Where a defendant appeals from a judgment rendered against him under the Kansas Act, the plaintiff may by a motion to dismiss

⁵ *Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507, reversing 169 App. Div. 450, 155 N. Y. Supp. 1.

⁶ *Oliver v. Christopher*, 98 Kan. 660, 159 Pac. 397.

⁷ *Id.*

The refusal to strike out from a petition for compensation the allegation that the injury was the result of the employer's negligence in furnishing defective machinery, as tending to create prejudice in the minds of the jury, was not material error, since it appeared that there was little likelihood of its having influenced the jury, and where its excessive verdict could be disregarded, and the amount of compensation determined from special findings upon the existence and extent of incapacity. *Id.*

⁸ (Laws 1911, p. 345) *Zappala v. Indus. Ins. Com.*, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295.

⁹ (Laws 1911, p. 349, § 3) *Id.*

raise the question whether the questions of law involved are so doubtful as to require the filing of briefs; and if, upon the resulting hearing, the court is fully satisfied that no grounds for a reversal exist, an affirmance will be ordered.¹⁰ An injured employé brought an action asking in the first count for compensation for his injury under the Workmen's Compensation Law, and in the second count for damages for pain and suffering and for disfigurement of his hand proceeding from the same injury, and which resulted from the negligence of the defendant. The court overruled a demurrer to each count of the petition, and refused to require the plaintiff to elect on which count he would rely, and directed the parties to proceed to trial on the count for damages, reserving the count for compensation for future consideration. The jury were instructed to consider the case as one based upon a common-law liability for a negligent injury, and a verdict was rendered awarding damages for pain and suffering and disfigurement. The Supreme Court held that while there was some evidence tending to show partial disability, and some testimony as to the recent earnings of the plaintiff, the verdict rendered could not be treated as an award of compensation, and that no judgment could be entered in the Supreme Court for any sum as compensation.¹¹

A showing that a requirement of a judgment that compensation be paid under the New Jersey Act on a particular day of the week will result in inconvenience or trouble to the defendant will not require a reversal or modification of the judgment; the defendant's remedy being by an application to the trial court.¹²

¹⁰ *Cain v. National Zinc Co.*, 94 Kan. 679, 146 Pac. 1165, 148 Pac. 251.

¹¹ *McRoberts v. National Zinc.*, 93 Kan. 364, 144 Pac. 247.

¹² *Connors v. Public Service Electric Co.* (1916, N. J.) 97 Atl. 792.

ARTICLE VIII

COSTS AND ATTORNEY'S FEES

Section

251. Taxation of costs.

252. Contract for fee.

§ 251. Taxation of costs

The allowance of attorney's fees is not authorized by the Minnesota Act, but the court may allow statutory costs, although designated in the order as attorney's fees.¹³ Where it cannot be said that an appeal prosecuted by the insurer was prosecuted without any reasonable ground, "the whole cost of the proceedings" should not be charged upon the insurer, under the Massachusetts Act.¹⁴ The provision of the New Jersey statute that "the judge of the court of common pleas shall * * * determine the amount of compensation to be paid by the employé or his dependents * * * to his legal adviser," and that "the judge shall determine the amount to be paid per week from the compensation payment on account of the legal fee thus awarded," it is contemplated that the attorney's fee be paid from the award.¹⁵ On an appeal, under the Washington Act, from an allowance for an employé's death, the Supreme Court cannot increase the attorney's fee allowed in the superior court.¹⁶ No costs can be recovered in an action against a city of the second class for compensation under the Kansas Act, where no claim has been presented as required by the General Statutes of that state.¹⁷

In a recent case the Court of Appeals of New York states that it

¹³ State ex rel. Diamond Drilling Co. v. District Court, 129 Minn. 423, 152 N. W. 838.

¹⁴ In re Meley, 219 Mass. 136, 106 N. E. 559.

¹⁵ Diskon v. Bubb, 88 N. J. Law, 513, 96 Atl. 660.

¹⁶ (Sess. Laws 1911, c. 54, § 20) Boyd v. Pratt, 72 Wash. 306, 130 Pac. 371.

¹⁷ Knoll v. City of Salina, 98 Kan. 428, 157 Pac. 1167.

regards section 24 of the Act of that state as mandatory, and that costs will be awarded "against a party to an appeal under the act whenever we determine that the proceeding has not been brought upon reasonable ground. Such cases, however, are exceptional. In cases involving no element of unreasonableness, the award of costs is left by section 23 of the statute to the discretion of the court; and ordinarily in the exercise of that discretion costs will not be awarded against an unsuccessful claimant personally, but will be charged against the State Industrial Commission, which virtually represents such claimant through the Attorney General."¹⁸ On an unsuccessful appeal by the employer or insurer from an order of the Appellate Division affirming an award of the Commission, the affirming order made by the Court of Appeals should, under ordinary circumstances, be made with costs, the same as is usually done on an affirmance of a final order in a special proceeding.¹⁹

In California, where no meritorious defense is offered at the hearing, and the payment of compensation has been unreasonably delayed, costs will be allowed to the applicant in the discretion of the Commission.²⁰ The Commission has stated that, when the Act becomes better known to employers and their attorneys, it will be the policy of the Commission to tax the costs of hearings against the defendant in cases where practically no evidence is introduced by him in substantiation of the defenses raised.²¹

¹⁸ (Consol. Laws, c. 67, §§ 23, 24) *Wilson v. C. Dorflinger & Sons* (N. Y. 113 N. E. 454, amending remittitur on appeal from an order (170 App. Div. 119, 155 N. Y. Supp. 857) affirming an award of the Commission, which was reversed (218 N. Y. 84, 112 N. E. 567).

¹⁹ (Consol. Laws, c. 67, § 23) *In re Petrie*, *In re Oneida Steel Pulley Co.* (N. Y.) 113 N. E. 455.

²⁰ *Yamasaki v. Commonwealth Bonding & Casualty Insur. Co.*, 1 Cal. I. A. C. Dec. 658.

But in *Farmer v. Barber*, 3 Cal. I. A. C. Dec. 21, where the application was without merit and was known by the applicant to be so, costs incurred by the defendant, amounting to \$21.50, were assessed to the applicant.

²¹ *Oaks v. Berkeley Steel Co.*, 1 Cal. I. A. C. Dec. 218.

§ 252. Contract for fee

Unless a contract for an attorney's fee is reasonable, it will not be approved or enforced. A contract providing that an attorney shall receive 50 per cent. of the compensation has been held unreasonable.²² The California Commission refused to approve an agreement between the injured employé and the attorney employed by him that the latter should receive as compensation for his services 20 per cent. of any compensation awarded, subject to the approval of the Industrial Accident Commission, stating that the compensation allowed by the Act was not in excess of the needs of the injured persons or their dependents, and that it would be the policy of the Commission to save to such persons, as nearly as possible, the entire compensation payable. A fee of \$20 was determined to be reasonable, and a lien given upon the amount awarded applicant to that extent.²³

²² *Oleskie v. Dodge Bros.*, Mich. Wk. Comp. Cases (1916) 45.

²³ *Keatley v. Shields & Son*, 1 Cal. I. A. C. Dec. 191.

CHAPTER IX

ILLUSTRATIVE SELECTED FORMS

Section

- 253. Forms for illustration and reference.
- 254. Notices—Acceptance, rejection, and withdrawal.
- 255. Notices to be posted, and certificate.
- 256. Notice of injury or claim.
- 257. First report of accident.
- 258. Employer's reports.
- 259. Agreements.
- 260. Application for adjustment of claim—Settlement and petition.
- 261. Answer to application.
- 262. Notice of hearing.
- 263. Arbitration.
- 264. Attending physician's certificate.
- 265. Proof of death, and certificate authorizing burial.
- 266. Subpoena.
- 267. Petition for review.
- 268. Notice of hearing.
- 269. Lump sum settlements.
- 270. Petition to terminate or modify.
- 271. Receipt and release.
- 272. Insurance—Notices.

§ 253. Forms for illustration and reference

The following forms are given by way of illustration and for reference in connection with the propositions hereinbefore discussed and involved in the cases cited. They cover the common essentials of the principal forms prescribed by the officers vested with the power of administering the various Acts, or by the Acts themselves. Though scarcely any two of the forms prescribed and in use under the various Acts are identical in the language used, they differ, as a rule, only in minor details. Publication of all these forms would require several hundred pages and serve no useful purpose, in view of the fact that those forms needed in each state may be readily procured, generally free of charge, on application to the proper administrative officers.

§ 254. Notices—Acceptance, rejection, and withdrawal

EMPLOYER'S NOTICE OF ACCEPTANCE

To the Employés of the Undersigned, and the ——— (*Administrative Officers*):

You and each of you are hereby notified that the undersigned elects to accept the terms, conditions and provisions to provide, secure and pay compensation to employés of the undersigned for injuries received as provided in the Workmen's Compensation Act, and that the undersigned elects to pay damages for personal injuries received by such employé under the terms, conditions and provisions of said Act.

By _____.

STATE OF _____, } ss:
County of _____.

The undersigned being duly sworn deposes and says that a true, correct and verbatim copy of the foregoing notice was on the _____ day of _____, 19—, posted at _____ (*state where posted*).

Subscribed and sworn to before me by _____ this _____ day of _____, 19—. (Seal.) _____, Notary Public.

EMPLOYÉ'S NOTICE OF ACCEPTANCE

To the Employer of the Undersigned, and the ——— (*Administrative Officers*):

You and each of you are hereby notified that the undersigned makes voluntary election to accept the terms, conditions and provisions to provide, secure and pay compensation to employés for injuries received as provided in Workmen's Compensation Act and that the undersigned elects to liquidate claims for personal injuries received by the undersigned as an employé of _____, under the terms, conditions and provisions of said Act.

STATE OF _____, } ss:
County of _____.

The undersigned being duly sworn deposes and says that a true, correct and verbatim copy of the foregoing notice was on the _____ day of _____, 19—, served upon _____ (*employer's name*).

Subscribed and sworn to before me by _____ this _____ day of _____, 19—. (Seal.) _____, Notary Public.

EMPLOYER'S ELECTION NOT TO BECOME SUBJECT TO WORKMEN'S COMPENSATION ACT

Industrial Commission,

Take notice that the undersigned employer of labor in the state of _____

hereby elects not to accept the provisions of the Workmen's Compensation Act.

Dated at _____ this _____ day of _____, 19—.

_____,
By _____.

(P. O. Address.)

EMPLOYER'S NOTICE OF WITHDRAWAL FROM OPERATION UNDER WORKMEN'S COMPENSATION ACT

Industrial Commission,
_____:

Take notice that the undersigned employer of labor in the state of _____ hereby withdraws his (*her*) (*its*) election to become subject to the provisions of the Workmen's Compensation Act of the state of _____.

Dated at _____ this _____ day of _____, 19—.

By _____.

(P. O. Address.)

NOTICE OF EMPLOYÉ UPON ENTERING EMPLOYMENT THAT HE ELECTS NOT TO BE SUBJECT TO THE WORKMEN'S COMPENSATION ACT

To _____
(Write name of employer plainly on above line.)

(Write address of employer plainly on above line.)

You will take notice that, being about to enter your employ, I elect not to be subject to the provisions of the Workmen's Compensation Act of the state of _____.

(Employé) _____
(Address) _____.

Dated at _____ this _____ day of _____, 19—.

§ 255. Notices to be posted, and certificate

In accordance with the provisions of section 6, part I, of the Michigan Act, the Industrial Accident Board prepared the following, printed on cardboard, 12x20 inches:

NOTICE TO EMPLOYÉS

All workmen or operatives employed by the undersigned in or about this establishment are hereby notified that the employer or employers owning or operating the same have filed with the Industrial Accident Board, at Lansing, notice of election to become subject to the provisions of Act No. 10 of Public Acts, Extra Sessions 1912.

(This Act is commonly known as the Workmen's Compensation Law.)

You are further notified that unless you serve written notice on your employer of your election not to come under the law, the act will immediately apply to you.

If you do notify your employer that you elect not to come under said act, you may afterwards waive such claim by a notice in writing, which shall take effect five days after it is delivered to the employer, at the expiration of which period the law will apply to you.

Injury Not Resulting in Death—Notice of

An employé who has been injured in the course of his employment and whose incapacity extends over a period of two weeks (sec. 3, part 2) shall serve written notice of such injury on his employer (from whom blank forms may be obtained), which notice shall be signed by the person injured and shall state in ordinary language the time, place and cause of the injury (sec. 16, part 2).

Injury Resulting in Death—Notice of

When death results from an injury received by an employé in the course of his employment, notice shall be served by his dependents, or by a person in their behalf (sec. 16, part. 2).

Limit of Period of Notification.

Notice of the injury shall be given to the employer within three months after the happening thereof, and claim for compensation shall be made within six months, or in case of death or in the event of physical or mental incapacity, notice shall be given within six months after the death or removal of such mental or physical incapacity. No proceeding for compensation under this Act shall be maintained unless these rules are observed (sec. 15, part 2).
Date _____.

_____, Employer.

The Industrial Accident Board has prepared the following certificate, to be executed by the employer and filed with the Board, showing that such notices were actually posted as required by the section of the law above quoted. This certificate should be promptly filed with the Board, and the signature to the same is required to be that of the employer himself or if made by an officer or agent of a corporation, the appropriate designation of the official character of the person signing must accompany signature.

CERTIFICATE

Industrial Accident Board, Lansing, Mich.:

We do hereby certify that on the _____ day of _____, we posted in the most prominent places in and around our place of business, viz.: _____ (*insert workrooms, mines, stations, etc.*) _____ (*give number*) printed notices of our acceptance of the provisions of Act No. 10 of Public Acts Extra Session 1912, the same being notices furnished by the Industrial Accident Board; and we further certify that said notices were conspicuously posted and securely fastened.

Dated at _____, _____ day of _____, 19—.

_____.

§ 256. Notice of injury or claim

To _____ (*Name of Employer*):

You will take notice that according to the Workmen's Compensation Act of _____ (*state*), _____ (*claimant*) hereby makes claim for compensation for injury (*or gives notice of injury for which compensation will be claimed*), received by _____ (*workman*), _____ (*post office address*), while in your employ at _____ (*place*). The accident occurred _____ (*date*), at _____ (*place*). The cause of the injury is as follows: _____. The nature and degree of the injury is as follows: _____ (and said injury resulted in death _____ [*date*]).

(*Name of claimant.*)

(*Address of claimant.*)

Dated at _____ this _____ day of _____, 19—.

§ 257. First report of accident

Name of person furnishing information _____.

Position _____. Date of report _____ (*month and day*) 19__.

(1) Employer's name _____ (*individual or firm name*).

(2) Address _____ (*St. No., city or town*).

(3) Under the Compensation Act _____ (*yes or no*). (4) Nature of business or industry _____.

(5) Location of plant or place where accident occurred _____ (*city or town*).

(6) Name _____.

(7) Address _____ (*St. No., city or town*).

(8) Age _____. (9) Sex _____. (10) Married or single _____.

(11) Nationality _____. (12) Speak English _____ (*yes or no*).

(13) If not, what language _____. (14) Did injured person make use of guards or safety devices _____ (*yes or no*). (15) Was injury due to willful misconduct on part of employé _____ (*yes or no*). (16) What was the occupation of the person injured _____ (*have in mind work done*).

(17) Length of experience here in this occupation _____. Elsewhere in this occupation _____. (18) Piece or day worker _____.

(19) Working days per week _____. Wages per day _____. Per week _____.

(20) Date of accident _____, _____. M. (21) Day of week _____. (22) Hour of day when injured began work _____.

(23) What was it _____ (*give the maker's name as well*).

(24) Could injured person start and stop the machine _____ (*yes or no*).

(25) How _____. (26) Part causing the accident _____. (27) Was machine provided with safeguards _____ (*yes or no*). (28) Were safeguards properly attached at the time of the accident _____. (29) If not, who removed them _____.

(30) Describe the guard or safety device _____

(31) How did the accident occur _____

(32) What would you suggest to prevent similar accidents _____

Check the one or ones applicable.

(33) At hospital _____. (35) At home _____.

(34) At factory _____. (36) At whose expense _____.

(37) Was accident fatal _____ (*yes or no; state exactly the part of person injured and nature of injury*).

(38) Has the accident resulted in any permanent physical injury _____ (*yes or no*).

(39) Disability: Total _____ (*yes or no*). Partial _____ (*yes or no*). Probable duration in days _____.

(40) Attending physicians:

(Name)	(Address)
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(41) Dependents (give name of dependents in fatal cases only):

(Name)	(Age)	(Relationship)	(Address)
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

(42) Remarks _____

§ 258. Employer's reports

EMPLOYER'S FIRST REPORT OF INJURY

Commission of the State of _____

Employer's name _____. Business _____.

Main office: Street and No. _____. City or town _____.

City or town in which injury was sustained _____. County _____.

Employé's name _____. Street and No. _____. City or town _____.

Age _____. Sex _____. Married or single _____. American or foreign born _____.

Occupation when injured (*machinist, carpenter, laborer, etc.*) _____. Average weekly wage \$_____.

Date of injury _____. Day of week _____.

Date injured had to leave work on account of injury _____.

Describe in full how injury was sustained. _____

State exactly part of person injured and extent of injury _____

IF INJURED HAS RECOVERED, FILL IN BELOW

Give exact date injured employé was physically able to return to work _____.

Give the actual number of working days injured was absent from work. No. of days _____.

Any permanent injury, describe fully _____.

Payments of compensation \$_____. No. of weeks _____.

Payments for physicians \$_____. Hospital \$_____. Other medical aid \$_____.

Did your insurance carrier make any payments in this case? _____.

Give the name of your insurance company _____.

IF INJURY WAS FATAL, FILL IN BELOW

Date of death _____. Payments for burial expenses \$_____.

If deceased left dependents, state relationship of each _____.

Date of report _____. Made out by _____.

(Another Form)

EMPLOYER'S FIRST REPORT OF INJURY

— Commission of the State of —

*Employer,
Place and
Time*

Employer's name —.

Office address — (street and number, city or town and county).

Business, goods produced, work done or kind of trade or transportation —.

Location of plant or place of work where accident occurred — (street and number).

In what city or town? —. County —.

Date of accident — 19—; hour of day — { A. M.
P. M.

Did accident happen on premises? —. If away from the plant, state where —. Was employé injured in course of employment? —.

If employé did not leave work on day of injury, on what day did incapacity begin? —.

*The
Injured
Employé*

Give full name of injured employé —.

Address — (street and number, city or town and county).

Sex —. Age —. Speak English? —. If not, what language? —.

Occupation when injured? —. Married or single? —.

Was injured employé doing his regular work? —. If not, what work? —.

*The
Injury*

Describe in full how the accident occurred —

State nature and extent of injury —
(If amputation was necessary, state what part was amputated).

Name of machine, tool, appliance, etc., in connection with which accident occurred? —

*Cause of
Injury*

Hand feed or mechanical? —.

Part of machine on which accident occurred? —.

What guard, safety appliance or regulation in connection with this machine is it possible to provide that might have prevented this accident? —.

*Medical
Attendance*

Was medical attendance provided by you? —.

How soon after accident? —.

Name and address of physician —.

To what hospital was employé sent? —.

Address of hospital —.

If not sent to hospital, where is he? —.

Are you still providing medical attendance? —.

What will be the probable length of disability? — (give your best estimate).

how many working days per week? _____. hours per day? _____.
 Wages per day at time of accident? _____.
Wages How long has employé received above rate of wages? _____.
 Was the injured employé per diem or piece worker? (*Check which.*) _____

Were you notified by the injured employé of his injury? _____.
 If so, when? _____.
Notice of Did you or your managing superintendent in charge of the work
Injury of injured employé at time of injury have actual knowledge
 of such accident and injury? _____.

Signed, this _____ day of _____, 19____, at _____.
 Employer's Name _____.
 Signed by _____.
 Official Title _____.

Received this _____ day of _____, 19____.

EMPLOYER'S SUPPLEMENTAL OR FINAL REPORT OF INJURY

_____ *Commission of the State of* _____

Employer's name _____.
 Main Office: Street and No. _____. City or town _____.
 Employé's name _____. Date of injury _____.
 When was injured employé physically able to return to work? _____.
 The actual number of working days injured was absent from work _____.
 Number of days employed per week _____. Can injured do the same work
 as before the injury? _____.
 Any permanent injury, describe fully _____.
 Amounts paid for physician's services \$_____. Hospital or other medical
 aid \$_____.
 Amounts of compensation paid \$_____. No. of compensation weeks _____.
 Remarks concerning your method of computing rate of compensation

IF INJURY WAS FATAL FILL IN BELOW

Date of death _____. Payments for burial expenses \$_____.
 If deceased left dependents, give relationship of each.

Name	Age	Relationship
_____	_____	_____
_____	_____	_____
_____	_____	_____

Amounts paid in death benefits \$_____.
 Date of report _____. Made out by _____ (*official position*).

§ 259. Agreements

AGREEMENT IN REGARD TO COMPENSATION

We, ——— (*name of injured employé*), residing at city (*or town*) of ———, and ——— (*employer or insurer*), have reached an agreement in regard to compensation for the injury sustained by said employé while in the employ of ——— on the ——— day of ———, 19—, ——— A. M. (*or* ——— P. M.) at ———.

Cause of injury _____

Nature and extent of injury _____

This agreement conforms to the provisions of the Workmen's Compensation Act, and is a claim for compensation.

It is agreed that the average weekly wages of the said employé, computed according to the terms of the Workmen's Compensation Act are \$—— and that the said ——— will pay said employé 50 per cent. of said sum within the minimum and maximum of the statute or \$—— per week, beginning ———, 19—.*

Witnesses

(*Name of injured employé*)

By _____

Dated at ——— this ——— day of ———, 19—.

(Another Form)

AGREEMENT BETWEEN EMPLOYER AND EMPLOYÉ AS TO PAYMENT OF
COMPENSATION

v.

Insurance Carrier. }
Claimant, }
Respondent, }

We, ——— (*name of injured employé*), residing at ——— (*street and number*), ——— (*P. O.*), and ——— (*name of employer*), have reached an agreement in regard to compensation for the injury sustained by said employé, and submit the following statement of facts relative thereto:

*NOTE.—Here add appropriate words to indicate length of disability, if permanent partial, permanent total, temporary partial, or temporary total, if known; if not, add "During Disability." If death claim, add words to indicate nature of dependency and length of time during which payments are to be made. If amputations or within schedule of injury, add words to indicate statutory period.

1. Said injury was sustained on ———, 19—, at ——— M.
2. Nature of injury ———.
3. Period of disability: From ——— to ———, 19—, at ——— M.
4. Employé's average weekly wage at time of injury: \$——.
5. Permanent total or partial disability (*If injury has caused a permanent disability, give accurate description of same.*)

6. Terms of agreement as to compensation: \$—— per week for ———
(*No. of weeks*) beginning ———, 19—.
7. (*If disability has not ended at time this agreement is filed, give estimate as to probable date employé will be able to resume work.*)

8. The compensation agreed upon herein, as above set forth, is in an amount equal to or greater than is provided for by the Workmen's Compensation Act.
9. Said employer has furnished for said employé all medical services, etc., required by law that is reasonably necessary in the treatment of said injury, and in the amount or value as shown below:

Nature of Expense	Amount	Nature of Expense	Amount
Medical Services		Nursing Services	
Hospital Services		Medicines	

The foregoing agreement is herewith submitted for confirmation and approval by said Commission.
Signed in the presence of:

(Employer)
By _____

(Employé)

MEMORANDUM OF SETTLEMENT

_____ Employer. _____ Employé.
Liability insured at time of injury in _____ Company.
Date of injury _____.

The injury arose out of and in course of the employment, the employé at the time being engaged as follows _____

Employer and employé were both under the _____ Compensation Act at the time of injury.

If either party filed a rejection state when withdrawn _____.

Nature of injury and results:

If death, date of _____.

Dismemberment _____ (*If so state what member or what part of member.*)

Disability _____ (*State whether temporary or permanent and whether total or partial.*)

Days absent from work ———.

Employé's average annual earnings were \$——.

Average weekly wages \$——; daily \$——.

How many days employed during week ———.

State how averages of either annual, weekly or daily wages were made.

Amount of medical, surgical, hospital relief supplied.

Amount of compensation agreed upon \$——.

Amount paid and receipt acknowledged \$——.

Address of employer ———.

Address of employé ———.

Dated at ——— this ——— day of ———, 19——.

_____,
Employer.

_____,
Employé.

_____,
Commission.

Filed ———.

Returned on review ———.

Approved ———.

APPROVAL OF COMPENSATION AGREEMENT

Employé, Dependent—, Personal Representative.

and

Employer.

} Compensation Agreement No. ———.

_____, 19——.

The Workmen's Compensation Board has examined compensation agreement No. ——— between ——— and ——— and hereby declares it to be in accordance with the provisions of the Workmen's Compensation Act, and to be valid.

Workmen's Compensation Board.

(Seal.)

Attest: ———, Secretary.

_____, Chairman.

DISAPPROVAL OF COMPENSATION AGREEMENT

Employé, Dependent—, Personal Representative, Claimant.

and

Employer.

} Compensation Agreement
No. ———.

_____, 19——.

The Workmen's Compensation Board has examined compensation agreement No. ——— between ——— and ——— and hereby declares it to be in-

valid as not being in accordance with the provisions of the Workmen's Compensation Act in the following particulars: _____

Workmen's Compensation Board,
_____, Chairman.

(Seal.)
Attest: _____, Secretary.

§ 260. Application for adjustment of claim—Settlement and petition

_____ Commission of the State of _____

Applicant— v. Defendant—	}	Claim No. _____. Application for Adjustment of Claim.
---	---	---

The petition of the above-named applicant— respectfully shows to your Honorable Commission as follows:

I.

That on the _____ day of _____, 19—, _____ (*name of person injured*) was killed (*or injured*) by reason of an accident arising out of and in the course of h— employment by the above-named _____ (*name of employer*).

That your petitioner is the person injured (*if applicant is a dependent, state relationship*).

II.

That a question has arisen with respect to the compensation to be paid therefor and the general nature of the claim in controversy is as follows, to wit: (Give the date that employer refused to pay the compensation demanded, and state briefly the exact matter in dispute, as for example: (A) Employer denies liability for compensation; *or*, (B) A dispute has arisen concerning the amount or duration of the compensation payable.)

III.

That the following is a statement of particulars relative to this application:

1. Name of injured employé. Address. Occupation. Age.		
---	--	---

2. Name of employer. Address. Place of business. Business address.	
3. Name and address of all other parties to this application and reason why each party is joined. Name and address of employer's insurance carrier, if known.	
4. Place of accident.	
5. Nature of work on which injured per- son was engaged at time of accident.	
6. How did accident oc- cur? (Describe in detail.)	
7. Nature of injury. (De- scribe in detail.)	
8. Has injured person fully recovered? If so, when? When did injured per- son return to work?	
9. Particulars of disabil- ity, whether total or partial, and estimat- ed duration thereof. If death resulted, so state, giving date of death.	
10. Was medical and sur- gical treatment re- quired? Was it furnished by employer? If not, did employer have opportunity to furnish it?	

11. Names and addresses of attending physicians.	_____
12. Wages of employé at time of accident. (State whether paid by day, week, month, or year.)	_____ dollars per _____
How long did injured person work for this employer at this wage prior to the accident?	_____
State whether employment was for 5½, 6, or 7 days per week.	_____
13. Amount injured person is earning, or is able to earn in some suitable employment or business after the accident.	\$_____ per week; \$_____ per month.
14. Payment, allowance or benefit received from employer.	\$_____ for _____ weeks' medical care and attendance. \$_____ per week for _____ weeks' disability compensation.
15. Additional amount claimed as compensation.	\$_____ for _____ weeks' medical care and attendance. <i>(Itemize expenditures made by you for this purpose)</i> \$_____ per week for _____ weeks' disability.
16. When was the employer notified of the accident?	_____
17. If employer was not notified within thirty days after date of accident, give reason for failure to notify him.	_____

18. If application is filed to adjust claim for death, state name, address and relationship of all dependents. If to adjust claim for medical attendance or funeral expenses, state name and address of all other such creditors and amount of claims, if known.	<i>(In case of death of employé this paragraph must be filled out completely)</i> Name _____ Address _____ Name _____ Address _____ Name _____ Address _____ Name _____ Address _____
--	---

IV.

(Here state any further facts that may be desired) _____

Wherefore your petitioner prays, that the above-named defendant— be required to answer this petition, that a time and place be fixed for hearing hereof and due notice thereof given, and that upon such hearing, an order or award be made by your Honorable Commission granting such relief as the said applicant— may be entitled to in the premises.

Dated at _____ this _____ day of _____, 19—.

(Signed) _____
 Address _____.

APPLICATION OF DEPENDENTS OF DECEASED EMPLOYÉ TO THE INDUSTRIAL BOARD FOR THE ADJUSTMENT OF CLAIM FOR COMPENSATION

Before the Industrial Board of _____ :

	}	Application No. _____
v.		
Plaintiff—		
Defendant—		

The plaintiff— respectfully represent— to your Honorable Board as follows:

1. That on the _____ day of _____ 19—, _____ died as a proximate result of personal injuries received by him by reason of an accident arising out

of and in the course of h— employment by the above named defendant in ——— (designate the employment in which the deceased was engaged at the time of the injury).

2. That said ——— left surviving him as all and his only dependents the following named persons:

Names.	Age.	Relationship.	Wholly or Partially Dependent.	Address.
.....				
.....				
.....				

3. That a controversy has arisen with respect to the compensation to be paid therefor.

That the general nature of the question in dispute is as follows:

- (A) The defendant— denies liability for compensation, *or*
- (B) The plaintiff— and defendant— disagree as to the rate of compensation payable, *or*
- (C) The plaintiff— and defendant— disagree as to the amount of compensation payable, *or*
- (D) The plaintiff— and defendant— disagree as to the duration of the time for which compensation is payable.

4. That the following is a statement of the facts relative to this application:

- 1. Name of deceased employé ———.
Address at time of death ———.
Occupation ———.
- 2. Name of the defendant employer ———.
Address ———.
Place of business ———.
Business address ———.
- 3. Names and addresses of all other parties, if any, to this application, and the reason why such parties are joined:

-
- 4. Place of accident ———.
 - 5. Nature of work on which the deceased was engaged at the time of the accident ———.
 - 6. Description of accident and cause of injury ———.
-
- 7. State whether medical or surgical treatment was required ———.
 - 8. Was it furnished by the employer? ———.
 - 9. Were hospital services or supplies required? ———.

10. Were they furnished by the employer? ———.
11. Name of attending physician ———.
Address ———.
12. Nature of injury (*describe fully*) —————
—————
—————
13. That death resulted as a direct and proximate result of said injury on the ——— day of ———, 19—, at ——— o'clock ——— m.
14. Particulars of disability during the period intervening between injury and death, whether total or partial and duration thereof —————
—————
15. Average earnings of the deceased prior to injury, \$—— per week.
16. Did the defendant pay the burial expenses of the deceased? ———. If so, state the amount paid. \$——.
17. Payment, allowance or benefit received from employer by the deceased during period of disability between injury and death.
 - a. \$—— on account of medical care and attention, hospital services and supplies.
 - b. \$—— per week for ——— weeks total disability.
 - c. \$—— per week for ——— weeks partial disability.
18. Additional amount claimed as compensation:
 - a. \$—— on account of medical care and attention, hospital services and supplies.
 - b. \$—— per week for ——— weeks total disability.
 - c. \$—— per week for ——— weeks partial disability.
 - d. \$—— for burial expenses.
19. Notice of injury was served on the employer on the ——— day of ———, 19—.
20. If notice was not served within thirty days after the injury, state fully the reasons for the failure to do so.
—————
—————
—————

Wherefore the plaintiff— pray— that an award be made by your Honorable Board granting to ——— such relief as —h— may be entitled in the premises.
Dated at ——— this ——— day of ———, 19—.

Plaintiff—.
Address _____

STATE OF _____, }
County of _____ } ss:

The undersigned plaintiff, being duly sworn, upon his oath says that the matters set out in the foregoing application are true.

Subscribed and sworn to before me, this ——— day of ———, 19—. _____,
Notary Public.

My commission expires on the ——— day of ———, 19—.

SETTLEMENT AND PETITION—MINNESOTA FORM

STATE OF MINNESOTA, } ss.
County of _____.District Court
_____ Judicial DistrictIn the Matter of Compensation for Injury }
To _____, Employé }
Against _____, Employer }
and _____, Insurer }

The undersigned, being the only parties interested in the above entitled matter, hereby petition the Court for approval of the following agreement and settlement, and agree and represent to the Court as follows:

That they are subject to the provisions of Part II of Chapter 467 of the Laws of Minnesota of 1913 and Amendatory Acts; that the employé can (cannot) read and understand the English language.

Employé address _____.

Employer's address _____.

Employé's age _____. Weekly wage at time of injury _____.

Date of injury _____. Hour of injury _____.

Accident occurred at _____.

Injuries consisted of _____

Nature of disability _____.

Therefore, it is hereby agreed that the employé is entitled to and shall receive compensation for said injury from the employer, beginning _____, 19—, at the rate of \$_____ per week during disability (or) for _____ weeks, payable as follows: _____

all subject to the limitations of said Act; and the employé agrees to give proper receipts for each payment made hereunder.

The employé hereby acknowledges that he has received to date medical and surgical treatment and benefits given by section 18, Part II, of said Act, and the employer agrees to continue to furnish the same, if any be necessary, to the extent and in the manner required by said section. The employé agrees to present himself for examination, or if physically unable to do so, to submit himself to examination by the physician or physicians designated by the employer, when requested.

This settlement is substantially in accordance with sections 13 and 14 of said Act. When all payments hereunder have been made the employer shall be, and hereby is, released from all claims on account of said injury, under said Act or otherwise. This settlement contains the whole agreement between the parties hereto.

Dated this _____ day of _____, 19—.

Witnessed by }

_____ }

_____, Employé.

_____, Employer,

By _____,

_____, Insurer of Employer,

By _____.

§ 262. Notice of hearing

NOTICE OF HEARING

Industrial Accident Commission, Claim Department

_____, Claimant.

_____, Employer.

_____, Insurer.

_____, 19—.

To the parties above named and to each of them:

Notice is hereby given that in the matter of _____, injured _____, 19—, while in the employ of _____ a hearing has been requested by parties interested, on the following grounds: _____

This hearing will be conducted by _____ under the authority of the Commission on _____, A. D. 19—, at _____ o'clock, _____ M., at _____, County of _____, State of _____.

Please accept this notice to be present or represented if you so desire, and notify the Commission if you have any witnesses whom you desire to have summoned; also sign, detach and mail to this Commission the attached form of acknowledgment.

Industrial Accident Commission
of the state of _____.

Secretary

ACKNOWLEDGMENT OF NOTICE

Plan No. _____

Notice of hearing in the case of _____, Claim No. _____, to be conducted under authority of the Industrial Accident Commission at _____ (*city, street and number*) County of _____, State of _____, on the _____ day of _____, A. D. 19—, at the hour of _____ M., is hereby acknowledged this _____ day of _____, A. D. 19—.

§ 263. Arbitration

ORDER FOR ARBITRATION

_____	} Applicant,
v. _____	

_____	} Respondent(s).

The notice and application of _____ the above named applicant, for an adjustment of claim in the above named matter having been presented to the Industrial Accident Board, and due consideration thereof having been had, and it appearing to the Board that the arbitration prayed for by said applicant should be had; it is ordered that the matters in difference between said applicant and said respondent mentioned in the notice and application filed herein be adjusted and determined by arbitration under the provisions of the Workmen's Compensation Act and that said arbitration be held at _____ in the town of _____, County of _____, State of _____, on the _____ day of _____, 19—, commencing at _____ o'clock in the _____noon, and that _____ of the Industrial Accident Board be and he is hereby appointed and designated as chairman of the committee to be formed for such arbitration. It is further ordered that due notice be given to said applicant of the time and place of such arbitration, together with request and notice for said applicant to select one member of said arbitration committee; and that like notice be given to said respondent together with like notice and request that said respondent choose one member of said arbitration committee.

(Seal.)

_____, Chairman.

Dated and entered this _____ day of _____, A. D. 19—.

NOTICE OF APPOINTMENT OF MEMBER OF COMMITTEE OF ARBITRATION

_____	} Applicant,
v. _____	

_____	} Respondent(s).

To the Industrial Accident Board—Gentlemen:

You are hereby notified that _____, whose postoffice address is _____, has been chosen as a member of the committee of arbitration in the above entitled matter by the undersigned.

(Applicant.)_____
(Respondents.)

Dated at _____ this _____ day of _____, 19—.

AWARD OF ARBITRATION

_____	} Applicant,
v. _____	

_____	} Respondent(s).

Notice and application for adjustment of claim for compensation having been filed with said Board in the above entitled matter, and thereafter said Board having requested both of the parties to appoint their respective representatives on the committee of arbitration, and said committee of arbitration having been duly formed, consisting of _____, representing said applicant, and _____, representing said respondent(s), and _____, member of the Industrial Accident Board, as chairman thereof; and said matter having come on to be heard before the aforesaid arbitration committee at _____, in the city of _____, county of _____ and State of _____, on the _____ day of _____, 19—, at _____ o'clock in the _____noon, and after hearing the proofs and allegations of the said applicant(s) and said respondent(s), and said committee having made careful inquiry and investigation of said matter and being fully advised in the premises, doth find, determine and adjudge that the said applicant, _____, is _____ entitled to receive and recover from said respondent(s), _____, the sum of _____ dollars per week for a period of _____ weeks, from the _____ day of _____, 19—, and that said applicant is entitled to receive and recover from said respondent(s) on this date _____ dollars, being the amount of such compensation that has already become due under the provisions of law, the remainder of said award to be paid to said _____, applicant, by said respondent(s) in weekly payments, commencing one week from the date of the award.

Committee of Arbitration,

By _____,

Chairman.

_____.

Dated and entered this _____ day of _____, A. D. 19—.

In a considerable number of cases, the facts surrounding the injury are not in dispute, the only matter of uncertainty being the application of the law to such facts and conditions. Frequently in such cases the parties desire to submit to the Board directly the legal questions in dispute, waiving arbitration and obtaining a speedy decision of the full Board thereon. For the purpose of facilitating this practice the Michigan Board has prepared the follow-

ing form for stipulating the facts and submitting the matter directly to the full Board, viz.:

STIPULATION, AND WAIVER OF ARBITRATION

_____	} Applicant,
v. _____	

_____	} Respondent(s).

The facts in this case being undisputed and the only matter in difference between the parties hereto being the construction and application to said facts of the Workmen's Compensation Law, being Act No. 10, Public Acts 1912, extra session, and the parties hereto desiring to obtain a decision of said matter by the full board without resorting to arbitration, do hereby stipulate and agree as follows:

1. That the accident to the employé, upon which the claim for compensation in this cause is based, occurred on the _____ day of _____, 19—, in the town of _____, county of _____, State of Michigan, and that the same arose out of and in the course of his employment. That the character and nature of the injury and the result thereof is as follows (*state in detail the nature of the injury, disability or death resulting, etc.*): _____

2. That the facts relating to the wages of _____, said employé, are as follows: _____

(*If average weekly wage is undisputed, so state; if disputed, state all material facts relating to same.*) _____

3. The other material facts in said cause not included in paragraphs 1 and 2 are as follows: _____

4. That the arbitration of the matters in difference between the parties hereto, provided for in said Workmen's Compensation Law, be and the same is hereby waived, and the decision of said matters is hereby submitted to the Industrial Accident Board, sitting as a full board, the same as if this cause had proceeded to arbitration under said law, and the decision on arbitration therein had been appealed from and said cause thereby brought before the full board on appeal from such decision. It is further stipulated and agreed

that the decision of said board in this cause pursuant to this stipulation, and based upon the facts set forth herein shall be valid and binding, and shall have the same validity, force and effect as if said cause had proceeded to arbitration in due course, and was brought before the full board on appeal duly taken from the decision of an arbitration committee therein.

In witness whereof the parties hereto have signed this stipulation at _____ in the county of _____, State of Michigan, this _____ day of _____, 19—.

(Applicant.)

Signed in presence of _____

(Respondents.)

STATE OF MICHIGAN, }
County of _____ } ss:

On this _____ day of _____, 19—, before me _____, a notary public in and for said county personally appeared _____, known to me to be the persons described in and who signed the foregoing stipulation, and acknowledged that they signed the same as their free act and deed. And I further certify that I read over all of said stipulation to said persons, and fully acquainted them with the contents thereof before the same was acknowledged and signed by him (them).

Notary Public.

My commission expires the _____ day of _____, 19—.

STATE OF MICHIGAN, }
County of _____ } ss.

On this _____ day of _____, 19—, before me _____, a notary public in and for said county personally appeared _____, known to me to be the person who signed the foregoing stipulation on behalf of _____, the employer therein mentioned, and acknowledged that he executed the same on behalf of said _____, being duly authorized so to do, and that the same is his free act and deed as _____ (state position or office) for said employer.

Notary Public.

My commission expires on the _____ day of _____, 19—.

APPEAL FROM DECISION OF ARBITRATION COMMITTEE

The decision of an arbitration committee in Michigan will stand as the decision of the Industrial Accident Board unless a claim for review is filed by either party to the cause within seven days. The

act, however, gives the Board power to grant further time in which to claim such review if sufficient cause be shown. The Board has prepared the following form for making application for review:

STATE OF MICHIGAN
Industrial Accident Board
Lansing

APPLICATION FOR REVIEW OF CLAIM BEFORE FULL BOARD

To the Industrial Accident Board, Lansing, Mich.

Gentlemen: The undersigned, as provided in Part 3, Sec. 8, of Act No. 10, Public Acts 1912, makes application for a review of the findings of the Committee on Arbitration in the claim of ——— v. ———.

This claim for review is based on the following grounds: —————

Dated at ——— this ——— day of ———, 19—.

§ 264. Attending physician's certificate

1. Name of injured person ———. Address ———.
2. Date of accident ———. Hour of day ——— — M.
3. Was first treatment rendered by you? ———. If not, by whom? ———.
Address ———.
4. If an assistant, consultant, or anaesthetist was necessary, give name and address ———.
5. Who furnished necessary medical supplies? ———.
6. Was a nurse ordered by you? ———. Name ———. Address ———.
7. Is —he able to attend to any part of his present or any other occupation? ———.
8. Was hospital treatment necessary? ———. Name ———. Address ———.
9. Give an accurate description of the nature and extent of the injury? ———
—————
—————
10. Describe the treatment ———
—————
—————
11. Are the symptoms from which he is suffering due entirely to this injury? ———.
12. Has the injury resulted in a permanent disability? ———. If so, what? ———.
13. Has previous sickness or injury affected the present disability? ———.

14. Is there evidence of syphilis? —. Tubercular infection? —. Alcoholism? —. Any infectious disease? —. Occupational disease? —. Neuresthenia? —. Hypochondriasis? —. Hysteria? —. Exaggeration —.
15. Is there evidence of malingering? —.
16. For what period, from the date of accident is disability likely to exist?
— weeks — days.
17. State in patient's own words, how accident occurred _____

18. Name of employer —.
19. Remarks. _____

Dated — 19—.

_____,
Attending Physician.
Address _____.

Degree —. Year —. College —.

STATE OF —, }
County of —. } ss.

I, —, a Notary Public (or Justice of the Peace) for the State of —, residing at —, —, do hereby certify that on this — day of —, A. D. 19—, personally appeared before me, the above named —, a physician in regular standing and to me well known, and made oath in due form of law that the foregoing statements, and each and all of them are full and true of his (her) own knowledge, and are made without reservation or concealment.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written

(Seal.)

_____,
Notary Public (or Justice of the Peace).

§ 265. Proof of death and certificate authorizing burial

PROOF OF DEATH FROM UNDERTAKER

STATE OF —, }
County of —. } ss.

— says that he is a duly licensed undertaker of — (city or town) at street No. —; that as such he was required on the — day of —, 19—, to prepare the dead body of — for burial; that he placed said body in a coffin and placed said coffin containing the said body in a — (grave,

vault, or express car) in ——— cemetery (*cemetery, crematory, or mausoleum*); that he shipped said body via ——— to ——— (*relative, friend, etc.*) at ——— (*address*); that he was directed to conduct such burial by ———, who authorized the following:

Moving remains to morgue.....	\$ ———
Washing, shaving and dressing.....	\$ ———
Embalming	\$ ———
Telephone	\$ ———
Underclothes and hose.....	\$ ———
Slippers	\$ ———
Burial robe	\$ ———
Funeral notices	\$ ———
Cemetery lot	\$ ———
Opening and filling grave.....	\$ ———
Lining gr ve	\$ ———
Outside box	\$ ———
Grave vault	\$ ———
Taking box or vault to cemetery.....	\$ ———
Casket, coffin	\$ ———
Hearse	\$ ———
Personal service	\$ ———
Use of gloves.....	\$ ———
Use of double rigs.....	\$ ———
Use of single rigs.....	\$ ———
Funeral service by.....	\$ ———
——— Wagon deliveries.....	\$ ———
Total	\$ ———

That he was informed said bill would be paid by ———. That no part of said bill of expense so authorized for said burial has been paid, except:

\$ ——— by ———

\$ ——— by ———

\$ ——— by ———

(Signed) _____.

(Undertaker sign here.)

Subscribed and sworn to before me this ——— day of ———, A. D. 19—.

County (or City) Clerk (or Notary Public).

CERTIFICATE OF PERSON AUTHORIZING BURIAL

I, ———, hereby certify that I have read the foregoing affidavit of ———, undertaker; that I authorized the items of expense therein amounting to \$ ———, as the ——— of deceased workman.

(Signed) _____.

(Person authorizing burial sign here.)

§ 266. Subpœna

SUBPœNA

Industrial Commission of State of ———

In the Matter of

_____	}

v.	

The People of the State of ———.

To ———, Greeting:

We command you, that all and singular, business and excuses being laid aside, you appear and attend before the Industrial Commission of ——— at ——— on the ——— day of ———, 19—, at the hour of ——— o'clock ——— M., then and there to testify in the above entitled matter, now pending before said Industrial Commission of ———, in which is being investigated ———

and that you bring with you and then and there produce the following described books, papers and records: _____

and for a failure to attend you will be deemed guilty of contempt and punished according to law.

Given under the seal of the Industrial Commission of ——— this ——— day of ———, 19—.

Witness:
(Seal.)

The Industrial Commission of ———.
By ———, Secretary.

§ 267. Petition for review

PETITION FOR REVIEW OF AGREEMENT OR DECREE

_____	}

Applicant(s)	
v.	
_____	}

Respondent(s).	

———, the above named applicant—, hereby gives notice to said Industrial Accident Commission that the above named parties on ——— day of ———, 19—, made an agreement for compensation approved by the Commission (or

that a decree was made by said Commission) that the ——— (employer's full name) should pay to ——— (employee's full name) the sum of ——— dollars per week for and during the term of ——— weeks.

That since said decree (or agreement) was made the injury for which the employé was compensated has ended (or increased, or diminished).

Said applicant further shows that the accident upon which claim for compensation was based in this matter occurred on the ——— day of ———, 19—, at the town (or city) of ———, county of ———, and State of ———, and resulted in (state full result of injury). ———

The postoffice address of the above named applicant is ——— and the post-office address of the respondent(s) is as follows: ———

The above named applicant prays for the following relief in that said compensation as originally given may be ended (or increased, or diminished).

(Signed) _____,

(Applicant.)

Dated at ———, this ——— day of ———, 19—.

§ 268. — Notice of hearing

NOTICE OF HEARING OF PETITION FOR REVIEW OF AGREEMENT OR DECREE

_____	}

Applicant(s)	
v.	
_____	}

Respondent(s).	

To the above named parties and each of them:

Notice is hereby given that on the ——— day of ———, 19—, notice and application for petition for review of agreement (or decree) for compensation in the above entitled matter was filed with the Industrial Accident Commission at its office in ———, and that a true copy of said notice and application is hereto attached.

You will further take notice that a hearing in accordance with the provisions of ——— (section and act) will be held on the ——— day of ———, 19—, at ———, commencing at ——— o'clock in the ———noon of said day.

You are further notified to be present at the time and place fixed for said hearing and be prepared to proceed with the same.

Industrial Accident Commission,

By ———, Secretary.

Dated at ——— this ——— day of ———, 19—.

§ 269. Lump sum settlements

AGREEMENT FOR REDEEMING LIABILITY BY PAYMENT OF LUMP SUM

Received of —— (*name of employer or insurer*) the lump sum of —— dollars and —— cents, making in all, with weekly payments already received by me, the total sum of —— dollars and —— cents, a weekly payment having been continued for not less than six months. Said payments are received in redemption of the liability for all weekly payments now or in the future due me under the —— Workmen's Compensation Act, for all injuries received by me on or about the —— day of ——, 19—, while in the employ of —— (*name of employer and address*), subject to the approval of the Industrial Accident Commission.

Witness my hand this —— day of ——, 19—.

Witness _____	_____
(Name)	(Name of employé)
_____	_____
(City or town)	(City or town)
_____	_____
(Street and number)	(Street and number)

APPLICATION FOR LUMP SUM SETTLEMENT

In the Matter of	}

Claimant,	
v.	
_____	}

Employer,	
and	

_____	}
Insurer.	
Respondents.	

Name of applicant _____.

Address —— (*street and number*) —— (*city or town*) —— (*state*).

Age _____.

Name of injured or deceased _____.

Date of injury or death —— (*month*) —— (*day*), 19— (*year*). Hour
—— A. M. (*or* P. M.)

Place of injury or death ———.

Date agreement was approved ——— (month) ——— (day), 19— (year).

Date award entered ——— (month) ——— (day), 19— (year).

Amount of compensation or death benefits received to date, \$———. Amount due under award or agreement \$———. Time compensation is to be paid under award or agreement ——— (weeks) ——— (months) ——— (years).

Date of first payment ——— (month) ——— (day), 19— (year).

In Case of Death Benefits, Answer the Following:

What relation do you bear to deceased? ———. If widow, have you re-married? ———. What children receiving benefits have reached age of 18 years? ———. Have any of dependents died? ———. What do you intend to do with the money if a lump sum is granted? If an investment is contemplated, give details.

Wherefore, your petitioner respectfully prays the Commission for a settlement in one lump sum, the balance due under said award or agreement said sum to be computed according to the terms of the Workmen's Compensation Law.

Dated at ———, this ——— day of ———, A. D., 19—.

_____.

PETITION BY EMPLOYÉ OR DEPENDENTS FOR COMMUTATION OF
COMPENSATION

_____	} Compensation Agreement No. _____.

Employé, Dependent—, Personal Representative, Claimant.	} Claim Petition No. _____.
{ v. } { and }	

Employer, Defendant.	

_____, 19—.

To the Workmen's Compensation Board:

——— an injured employé (or a dependent or dependents of a deceased employé) hereby petitions your Honorable Board to commute the future installments of compensation which are payable to ——— by ——— (name of employer, or State Workmen's Insurance Fund) under Compensation Agreement No. ——— (or the award in claim petition No. ———) as provided in section ——— of the Workmen's Compensation Act, and to order the said ——— (name of employer, or State Insurance Fund) to forthwith pay the

present value of such installments in one lump sum payment, and alleges the following facts as the ground of this petition.

(Signature of petitioner.)

(Address.)

Subscribed and sworn to before me, this _____ day of _____, 19—.
_____, Notary Public.
My commission expires on the _____ day of _____, 19—.

§ 270. Petition to terminate or modify

PETITION FOR TERMINATION OR MODIFICATION OF AGREEMENT OR AWARD ON GROUND OF CHANGED DISABILITY

Employé, Dependent—, Personal Representative, Claimant.

{ and
v. }

Employer, Defendant.

Compensation Agreement
No. _____.

Claim Petition No. _____.

_____, 19—.
_____, an employer (or an employé), a party to Compensation Agreement No. _____ (or Award Claim Petition No. _____), hereby petition your Honorable Board to terminate (or modify) the said agreement (or award), and as ground for the petition allege that the disability of _____, entitled to compensation under the said agreement (or award) has terminated (or increased or decreased) as follows: (*State manner in which disability has terminated or the manner in which and the extent to which it has increased or decreased.*)

And in support thereof I state the following facts:

(Name.)

(Address.)

Sworn to and subscribed before me, this _____ day of _____, 19—.
_____, Notary Public.
My commission expires on the _____ day of _____, 19—.

§ 271. Receipt and release

RECEIPT FOR PARTIAL PAYMENTS

Receipt for Partial Payment Under Workmen's Compensation Law

_____, 19—.

Received of _____ the sum of _____ dollars (\$_____) said amount being such part of my weekly wages for a period of _____ from the _____ day of _____, 19—, to the _____ day of _____, 19—, as I am entitled to under the Workmen's Compensation Law on account of an accident sustained by me on or about the _____ day of _____, 19—, while in the employ of _____.

(Name) _____.

(Address) _____.

Witnesses:

_____.

STATE OF _____, }
County of _____. } ss:

_____, being first duly sworn, deposes and says that on the _____ day of _____, A. D. 19—, I read the above receipt to _____, who signed the same, and that before he signed I correctly interpreted the contents of said receipt from the English language into the _____ language to said _____, and the said _____ then stated that he fully knew and understood the contents of said receipt.

_____.

Subscribed and sworn to before me this _____ day of _____, A. D. 19—.

(Seal.)

Notary Public in and for County and State Aforesaid.

RECEIPT SHOWING RELEASE AND FINAL SETTLEMENT

Release and Final Receipt for Compensation Paid Under the Workmen's Compensation Law

_____, 19—.

Received of _____ the sum of _____ dollars (\$_____) making in all, with the weekly payments already received by me, the total sum of _____ dollars (\$_____) such payment being the final payment of compensation under the Workmen's Compensation Law and in consideration of which I hereby release and forever discharge the said _____, _____ heirs, successors and assigns, from any and all actions, causes of action, claims and demands, for, upon or by reason of any damage, loss, injury, suffering and disfigurement which heretofore has been or which hereafter may be sustained by me in

consequence of an accident suffered by me on or about the — day of —, 19—, while in the employ of —.

Witness my hand and seal, this — day of — 19—.

Witnesses:

(Seal.)

STATE OF —, }
County of —. } ss:

—, being first duly sworn, deposes and says that on the — day of —, 19—, he read the above receipt to —, who signed the same, and that before signing, he, this deponent, correctly interpreted the contents of said receipt from the English language in the — language to said —, and the said — then stated to this deponent that he fully knew and understood the contents of said receipt.

Subscribed and sworn to before me this — day of —, A. D. 19—.
(Seal.)

Notary Public in and for County and State Aforesaid.

§ 272. Insurance—Notices

NOTICE TO EMPLOYÉS

As required by — (*statute*) this will give you notice that I (*we*) have provided for payment to our injured employés under the above act by insuring with the — Insurance Co. of — (*insert address of company here*).
Date —.

(Name of employer.)
Address _____,
(City or town, street and number.)

NOTICE THAT AN EMPLOYER HAS CEASED TO BE A SUBSCRIBER

This is to give you notice that I (*we*) have ceased to be a subscriber in any insurance company, under — (*statute*) and that the policy formerly held by me expired — (*or is to expire* —).

(Name of employer.)
Address _____,
(City or town, street and number.)

TABLE OF CASES CITED

Opinions of Attorney Generals of various states will be found in this table under the name of the state.

Opinions of Comptroller of Treasury will be found under "Federal Act" in this table.

Opinions of Special Counsel to Iowa Industrial Commission will be found in this table under "Iowa."

Report of Nevada Industrial Commission will be found in this table under "Nevada."

First Annual Reports Oregon Industrial Accident Commission will be found in this table under "Oregon."

Rulings of Washington Industrial Accident Insurance Commission will be found in this table under "Washington."

A

	Page
Aberdeen Steam Trawling & Fishing Co. v. Gill, 1 B. W. C. C. 274.....	172
Abram Coal Co. v. Southern, 5 W. C. C. 125, H. L.....	575
Ackerson v. National Zinc Co., 96 Kan. 781, 153 Pac. 530.....	653, 728, 750, 761, 763
Acres v. Frederick & Nelson, 79 Wash. 402, 140 Pac. 370, 5 N. C. C. A. 557	737
Acrey v. Holtville, 2 Cal. I. A. C. Dec. 587.....	198, 439, 618, 677, 767
Adams v. Acme White Lead & Color Works, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 282, 283, 6 N. C. C. A. 482.....	6, 110, 275, 276, 278, 298, 537, 539, 540
v. Acme White Lead & Color Works, Op. Mich. Indus. Acc. Bd. 31....	73
v. Shaddox, 2 K. B. 859.....	28
v. Thompson, 5 B. W. C. C. 19, C. A.....	281
Addie & Sons' Collieries v. Trainer, 7 F. 115, Ct. of Sess.....	245
Adler, In re, Op. Sol. Dept. of L. 63, 67, 15 Comp. Dec. 845.....	188, 811
v. Thomas Hefsky Theatre Co., The Bulletin, N. Y., vol. 1, No. 11, p. 13	335, 805
Admiral Fishing Co. v. Robinson, 3 B. W. C. C. 247, C. A.....	171
Agard, In re, Op. Sol. Dept. of L. 550.....	250
Agler v. Michigan Agriculture College, 181 Mich. 559, 148 N. W. 341, 5 N. C. C. A. 897.....	118, 182
v. Michigan Agriculture College, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 25.....	199

	Page
Aiken v. Anderson, 2 Cal. I. A. C. Dec. 323.....	206
Aillo v. Milwaukee Refrigerator Transit & Car Co., Rep. Wis. Indus. Com. 1914-15, p. 18.....	421
Aitken v. Finlayson, Bousfield & Co., 7 B. W. C. C. 918, Ct. of Sess....	299, 406
Akins v. Pacific Light & Power Corp., 2 Cal. I. A. C. Dec. 985.....	506
Albanese v. Stewart, 78 Misc. Rep. 581, 138 N. Y. Supp. 942.....	33, 90, 91, 92
Alcee, In re, Op. Sol. Dept. of L. 61.....	187
Alderidge v. Merry, 6 B. W. C. C. 450, C. A.....	381
Allaire v. Copping, 1 Conn. Comp. Dec. 288.....	727
Allard v. Browne, 2 Cal. I. A. C. Dec. 489.....	691
v. New York, N. H. & H. R. R. Co., 1 Conn. Comp. Dec. 385.....	756, 777
Allen v. Millville, 87 N. J. Law, 356, 95 Atl. 130, 1011, 9 N. C. C. A. 749....	73, 750
v. Southwestern Surety Ins. Co., 1 Cal. I. A. C. Dec. 67.....	479, 512
v. State (Sup.) 160 N. Y. Supp. 85.....	9, 333
Alloa Coal Co. v. Drylie, 6 B. W. C. C. 398, Ct. of Sess., 1 Scot. L. T. 167, 4 N. C. C. A. 899.....	300, 302, 544
Allyn v. Fresno Brewing Co., 2 Cal. I. A. C. Dec. 784.....	440
Alton v. Hopkins & Allen Arms Co., 1 Conn. Comp. Dec. 378.....	486
Alvarez v. Eisenmann, 1 Conn. Comp. Dec. 357.....	240
American Coal Co. v. Allegany County Com'rs, 128 Md. 564, 98 Atl. 143.. 59, 64, 66, 80	
American Ice Co. v. Fitzhugh, 128 Md. 382, 97 Atl. 999..	331, 568, 569, 571, 818
American Legion of Honor v. Perry, 140 Mass. 580, 5 N. E. 634.....	256
American Mut. Liability Ins. Co., In re, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60.....	33, 191, 745, 820, 836
American Mut. Liability Ins. Co., In re, 222 Mass. 461, 111 N. E. 166....	584
American Radiator Co. v. Rogge, 87 N. J. Law, 314, 93 Atl. 1083, affirm- ing 86 N. J. Law, 436, 92 Atl. 85, 94 Atl. 85, 7 N. C. C. A. 144....	39, 41, 115
American R. Co. v. Didricksen, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456	251
Ames v. New York Cent. R. R. Co., The Bulletin, N. Y., vol. 1, No. 12, p. 17	367
Amys v. Barton, 5 B. W. C. C. 117, C. A.....	322, 420, 776
Anderson, In re, vol. 1, No. 7, Bul. Ohio Indus. Comp. p. 90.....	363, 379
v. American Straw Board Co., 1 Conn. Comp. Dec. 11.....	234, 686
v. Ashmore Mut. Tel. Co., Bulletin No. 1, Ill., p. 132.....	331
v. Baird & Co., 40 S. L. R. 263.....	523
v. Baird & Co., 5 F. 373, Ct. of Sess.....	528
v. Balfour, 3 B. W. C. C. 588, C. A.....	284, 427
v. Balfour, 2 I. R. 497.....	433
v. Fielding, 92 Minn. 42, 99 N. W. 357, 104 Am. St. Rep. 665.....	251
v. Fife Coal Co., 3 B. W. C. C. 539, Ct. of Sess.....	372
v. Mickelson, 1 Cal. I. A. C. Dec. 189.....	133
v. National Fireproofing Co., Bulletin No. 1, Ill., p. 41.....	801

	Page
Anderson v. North Alaska Salmon Co., 2 Cal. I. A. C. Dec. 241.....	39, 99
v. Perew, 2 Cal. I. A. C. Dec. (Bulletins 1915) 736.....	177, 349
Anderson & Co. v. Adamson, 6 B. W. C. C. 874, Ct. of Sess.....	432
Andreini v. Cudahy Packing Co., 1 Cal. I. A. C. Dec. 157, 6 N. C. C. A. 390..	501
Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 N. W. 684, 6 N. C.	
C. A. 807.....	25, 587, 594
Andreucetti v. California Brick Co., 2 Cal. I. A. C. Dec. 282, 284.....	550
Andrew v. Alaska Packers' Ass'n, 2 Cal. I. A. C. Dec. 770.....	271
Andrews v. Andrews & Mears, 1 B. W. C. C. 264, C. A.....	129
v. Failsworth Industrial Soc., 2 K. B. 32, 90 L. T. 611.....	426, 429, 430
Angelucci v. H. S. Kerbaugh, Inc., The Bulletin, N. Y. Vol. 1, No. 12,	
p. 16	243, 270
Andrzejewski v. Northwestern Fuel Co., 158 Wis. 170, 148 N. W. 37.....	828
Anslow v. Cannock Chase Colliery Co., 2 B. W. C. C. 361, C. A.....	581
Aquilano v. Lambo, 1 Conn. Comp. Dec. 145.....	499, 527
Arata, In re, Op. Sol. Dept. of L. 264.....	299
Archibald v. Ott (W. Va.) 87 S. E. 791.....	322, 323, 324, 381, 382,
	383, 415, 437, 477, 548
Arizona & N. M. R. Co. v. Clark, 207 Fed. 817, 125 C. C. A. 305, affirmed	
235 U. S. 669, 35 Sup. Ct. 210, 59 L. Ed. 415, L. R. A. 1915C, 834.....	31
Armenis v. Kerr, 1 Conn. Comp. Dec. 338.....	716
Armiger v. Townsend-Davis Baking Co., 1 Cal. I. A. C. Dec. 55.....	483, 650
Armistead, In re, Op. Sol. Dept. of L. 305.....	402
Armitage v. Lancashire & Y. R. Co., 2 K. B. 178.....	324, 426, 433, 441
v. Lancashire & Y. R. Co., 4 W. C. C. 5, C. A.....	435, 436
Armour & Co. v. Industrial Board of Illinois, 273 Ill. 590, 113 N. E. 138..	
	464, 774, 831, 840
Armstrong v. Industrial Commission of Wisconsin, 161 Wis. 530, 154	
N. W. 844	244
Arnold, In re, Op. Sol. Dept. of L. 156, 158.....	344
v. Benjamin, 1 Cal. I. A. C. Dec. 412.....	565
v. Brooklyn, 1 Conn. Comp. Dec. 188.....	480
v. Holeproof Hosiery Co., Rep. Wis. Indus. Com. 1914-15, p. 32..	320, 436
Arnott v. Fife Coal Co., 6 B. W. C. C. 281, Ct. of Sess.....	479
Arrol & Co. v. Kelly, 7 F. 906, 42 S. C. L. 695.....	223, 233
Artenstein v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp.	
Cases 699	177
Ash v. Barker, 2 Cal. I. A. C. Dec. 139.....	510
v. Barker, 2 Cal. I. A. C. Dec. 577.....	480, 488, 500, 701, 710
Ashley v. Lilleshall Co., 5 B. W. C. C. 85, C. A.....	308
Ashton v. Boston & M. R. Co., 222 Mass. 65, 109 N. E. 820, L. R. A.	
1916B, 1281	114
Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 106, 19 Sup. Ct. 609, 43	
L. Ed. 909	80

	Page
Atkins v. Scranton, 1 Conn. Comp. Dec. 34.....	363, 445
Atkinson, In re, Op. Sol. Dept. of L. 235.....	490
Atlas Shoe Co. v. Bloom, 209 Mass. 563, 95 N. E. 952.....	159
Augustine v. Cotter, 2 Cal. I. A. C. Dec. 49.....	206
Aultman & Taylor Co. v. Syme, 163 N. Y. 54, 57, 57 N. E. 168, 79 Am. St. Rep. 565.....	329
Avery, In re, Op. Sol. Dept. of L. 517.....	652
v. Pacific Gas & Electric Co., 2 Cal. I. A. C. Dec. 311....	227, 247, 261, 269
Aylesworth v. Phoenix Cheese Co., 170 App. Div. 34, 155 N. Y. Supp. 916..	330
Aylward v. Oceanic S. S. Co., 2 Cal. I. A. C. Dec. 95.....	534, 535, 681

B

Bacik v. Solvay Process Co., Mich. Wk. Comp. Cases (1916) 48.....	570, 800
Back v. Dick, Kerr & Co., 8 W. C. C. 40, H. L.....	129
Backman v. Dwight Devine & Sons, The Bulletin, N. Y., vol. 1, No. 10, p. 17	512
Badolato, In re, Op. Sol. Dept. of L. 630.....	769
Baggonski v. Clayton Bros., 1 Conn. Comp. Dec. 299.....	580
Bagley v. James, 2 Cal. I. A. C. Dec. 842.....	198
Bailey, In re, Op. Sol. Dept. of L. 297.....	353, 649
v. Kenworthy, 1 B. W. C. C. 351, 371, C. A.....	594
v. United States Fidelity & Guaranty Co., 99 Neb. 109, 155 N. W. 237	142, 654, 659, 660, 662
v. Wheeler Co., 1 Cal. I. A. C. Dec. 142.....	690
Baine v. Libby, McNeil & Libby; 2 Cal. I. A. C. Dec. 433.....	310
Baird, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 28.....	237, 594
Baird & Co. v. Burley, 1 B. W. C. C. 7, Ct. of Sess.....	435, 437
v. Podolska, 8 F. 438, Ct. of Sess.....	235
v. Robson, 7 B. W. C. C. 925.....	407
Baker, In re, Op. Sol. Dept. of L. 100.....	188
v. Armstrong, 2 Cal. I. A. C. Dec. 1057.....	210
Bakiewicz v. National Brake & Electric Co., Rep. Wis. Indus. Com. 1914-15, p. 11.....	511, 703, 755
Ball v. Hunt, 81 L. J. K. B. 782, 787.....	635
v. William Hunt & Sons, 5 B. W. C. C. 459, H. L.; 4 B. W. C. C. 225, C. A.....	479, 599, 601
Banister Co. v. Kriger, 84 N. J. Law, 30, 85 Atl. 1027, rehearing denied 89 Atl. 923.....	629, 634, 646, 650, 662, 805, 837, 839
Bank v. Com., 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236.....	80
Banks v. Adams Exp. Co., The Bulletin, N. Y., vol. 1, No. 7, p. 9.....	510
Barbeary v. Chugg, 8 B. W. C. C. 37, C. A.....	300, 451
Barbour Flax Spinning Co. v. Hagarty, 85 N. J. Law, 407, 89 Atl. 919, 4 N. C. C. A. 586.....	629

	Page
Barclay, Curle & Co. v. McKinnon, 3 F. 436, Ct. of Sess.....	129
Bargewell v. Danies, 98 L. T. R. 257, C. A.....	191
Bargey v. Massaro Macaroni Co., 218 N. Y. 410, 113 N. E. 407, affirming 170 App. Div. 103, 155 N. Y. Supp. 1076.....	332
Barksdale v. Fidelity & Deposit Co. of Maryland, 2 Mass. Wk. Rep. of Comp. Cases, 214.....	549
Barnabas v. Bersham Colliery Co., 3 B. W. C. C. 216, C. C., 102 L. T. R. 621	308, 464
v. Bersham Colliery Co., 4 B. W. C. C. 119, H. L., 103 L. T. R. 513 308, 464, 779	
Barnard v. H. Garber & Co., 1 Conn. Comp. Dec. 572.....	369, 453
Barnes v. Evans & Co., 7 B. W. C. C. 24, C. A.....	212
v. Nunnery Colliery Co., 4 B. W. C. C. 43, C. A.....	389, 444, 457
v. Nunnery Colliery Co., 5 B. W. C. C. 195, 199.....	389, 444, 457, 563
v. Nunnery Colliery Co. (1912) App. C. 44.....	321, 392
Barnett v. Port of London Authority, 6 B. W. C. C. 111.....	584
Barozzi v. Bertin & Lepori Co., 1 Cal. I. A. C. Dec. 484.....	725
Barrett v. Grays Harbor Commercial Co. (D. C.) 209 Fed. 95, 4 N. C. C. A. 756.....	150, 736
v. Shartenberg & Robinson Co., 1 Conn. Comp. Dec. 305.....	380
Barron v. Venice, 2 Cal. I. A. C. Dec. 25.....	184
Barron's Case, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915.....	71
Barry v. Bay State St. R. Co., 222 Mass. 366, 110 N. E. 1031, 155, 159, 160, 724	
Bartley v. Boston & N. St. Ry., 198 Mass. 163, 83 N. E. 1093.....	257
Barten v. Mulvane, 59 Kan. 313, 52 Pac. 883.....	763
v. New York, N. H. & H. R. R. Co., 1 Conn. Comp. Dec. 227... 531, 713, 714	
Bartz v. Friedlander, The Bulletin, N. Y., vol. 1, No. 11, p. 11.....	333, 423
Bassett v. Chicago, R. I. & P. R. Co., Bulletin No. 1, Ill., p. 120.....	46
v. Thomas Graf Edler Co., 1 Cal. I. A. C. Dec. 60.....	583, 706
Batch v. Borough of Groton, 1 Conn. Comp. Dec. 177.....	624
Batchelder v. Kreis, 1 Cal. I. A. C. Dec. 63.....	134, 794
Bateman v. Albion Combing Co., 7 B. W. C. C. 47.....	467
v. Carterville & Big Muddy Coal Co., 188 Ill. App. 357.....	106
Bateman Mfg. Co. v. Smith, 85 N. J. Law, 409, 89 Atl. 979, 4 N. C. C. A. 588.....	585, 626
Bates v. Mirfield Coal Co., 6 B. W. C. C. 165, C. A.....	473
Bathgate v. Caledonian R. Co., 4 F. 313, Ct. of Sess.....	130
Batista v. West Jersey & S. R. Co. (N. J.) 88 Atl. 954, 4 N. C. C. A. 781... 246	
Battenfield v. Atchison, T. & S. F. R. Co., 2 Cal. I. A. C. Dec. 688.....	53
Baur v. Court of Common Pleas, 88 N. J. Law, 128, 95 Atl. 627.....	31, 576, 745, 766
Baumgartner v. New Method Laundry Co., 2 Cal. I. A. C. Dec. 639.....	767
Bayer v. Bayer (Mich.) 158 N. W. 109.....	322
Bayne v. Riverside Storage & Cartage Co., 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837.....	822, 825, 839

	Page
Bayon v. Beckley, 89 Conn. 154, 161, 93 Atl. 139, 8 N. C. C. A. 588.....	25, 110, 111, 327, 732
Beals v. United Railroads of San Francisco, 3 Cal. I. A. C. Dec. 30.....	588
Beam v. Thornton Clancy Lumber Co., Bulletin No. 1, Ill., p. 113.....	801
Beamer v. Southern Pac. Co., 2 Cal. I. A. C. Dec. 737.....	52
Beatty v. Los Angeles County, 2 Cal. I. A. C. Dec. 1058.....	379, 452
Beauchamp v. Chanslor-Canfield Midway Oil Co., 2 Cal. I. A. C. Dec. 510..	307
Beaudry v. Watkins (Mich.) 158 N. W. 16.....	355, 445, 550
Beaumont v. Underground Electric R. Co. of London, 5 B. W. C. C. 247, C. A.	309
Becker v. Blake, 1 Conn. Comp. Dec. 516.....	804
Beckster v. Pattison, 1 Conn. Comp. Dec. 61.....	311
Beddard v. Stanton Ironworks Co., 6 B. W. C. C. 627, C. A.....	599
Bedini v. Northwestern Pac. R. Co., 1 Cal. I. A. C. Dec. 312.....	303, 654, 657
Behringer v. Inspiration Consol. Copper Co., 17 Ariz. 232, 149 Pac. 1065....	24, 91, 102
Beinotovitz v. National Iron Works, 1 Conn. Comp. Dec. 623.....	714
Belcher v. Campo, 1 Conn. Comp. Dec. 612.....	233
Belfast, The, 7 Wall. 624, 19 L. Ed. 266.....	44
Bell v. Hayes-Ionia Co. (Mich.) 158 N. W. 179.....	295, 797, 822, 826
v. Toluca Coal Co., 272 Ill. 576, 112 N. E. 311.....	109
Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232, 237, 10 Sup. Ct. 533, 33 L. Ed. 892.....	80
Bellamy v. Humphries & Sons, 6 B. W. C. C. 53, C. A.....	468
Bender v. Zent, The, 2 B. W. C. C. 22, C. A.....	468
v. Zent, The, 100 L. T. 639.....	469
v. Zent, The, 2 K. B. 41.....	471
Bennett v. San Buenaventura Wharf Co., 1 Cal. I. A. C. Dec. 200.....	239
v. Wordie & Co., 3 F. 908.....	762
Benoit v. Bushnell, 1 Conn. Comp. Dec. 172.....	211, 827
Benson v. Hutchinson Co., 2 Cal. I. A. C. Dec. 901.....	350, 412
v. Lancashire & Yorkshire R. Co., 6 W. C. C. 20, C. A.....	326, 359, 385
Bentley v. Massachusetts Employees Ins. Ass'n, 2 Mass. Wk. Comp. Cases, 42, affirmed 217 Mass. 79, 104 N. E. 432.....	235
Bentley's Case (Bentley, In re) 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559	25, 257, 263, 821, 824, 830
Benton v. Wilson, Bulletin No. 1, Ill., p. 54.....	117, 330
Berg, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 102.....	685
v. Great Lakes Dredge & Dock Co., 158 N. Y. Supp. 718.....	388
Bergeron, Petition of, 220 Mass. 472, 475, 107 N. E. 1007.....	290
Bernard, In re, Op. Sol. Dept. of L. 323.....	371
v. Michigan United Traction Co. (Mich.) 154 N. W. 566.....	101
Bernstein v. Bothman, Bulletin No. 1, Ill., p. 163.....	801, 802
Berry v. Pacific Coast Steel Co., 2 Cal. I. A. C. Dec. 178.....	614

	Page
Berthold v. McCormick S. S. Co., 2 Cal. I. A. C. Dec. 993.....	803
Berton v. Tietken & Land Dry Dock Co. (D. C.) 219 Fed. 763.....	45
Bertram v. Crocker Co., 2 Cal. I. A. C. Dec. 351.....	498
Besnys v. Herman Zohrlaut Leather Co., 157 Wis. 203, 147 N. W. 37, 5 N. C. C. A. 282.....	20, 111, 113
Bianchini v. Selby Smelting & Lead Co., 2 Cal. I. A. C. Dec. 195....	679, 680
Bickelnitzky v. Acme Brewing Co., 3 Cal. I. A. C. Dec. 5.....	611
Biddinger v. Champion Iron Co., Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 70 110, 147, 208, 325, 353, 434, 572	240, 792
Biero v. New Haven Hotel Co., 1 Conn. Comp. Dec. 52.....	450
Biggart v. Minnesota, The, 5 B. W. C. C. 69, C. A.....	807
Billingsley v. United Tuna Packing Co., 2 Cal. I. A. C. Dec. 133.....	635
Billman v. Two Rivers Coal Co., Bulletin No. 1, Ill., p. 69.....	590, 641
Binkley v. Western Pipe & Steel Co., 1 Cal. I. A. C. Dec. 33.....	31, 620, 766, 781, 815
Birmingham v. Lehigh & Wilkesbarre Coal Co. (N. J.) 95 Atl. 242.....	602
Birmingham Cabinet Mfg. Co. v. Dudley, 3 B. W. C. C. 169, C. A.....	305
Birk v. Matson Nav. Co., 2 Cal. I. A. C. Dec. 177.....	318
Birnie v. Contractors' Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 619	239
Bischoff v. American Car & Foundry Co. (Mich.) 157 N. W. 34....	53
Bishop v. Iroquois Iron Co., Bulletin No. 1, Ill., p. 108.....	239
v. Southern Pac. Co., 2 Cal. I. A. C. Dec. 749.....	409
v. United States Crushed Stone Co., Bulletin No. 1, Ill., p. 201....	750
Bisotti v. Behlow Estate Co., 2 Cal. I. A. C. Dec. 986.....	555, 556, 559, 569
Bist v. London & Southwestern R. Co., 9 W. C. C. 19, 24, H. L., 96 L. T. 750	542
Black v. New Zealand Shipping Co., 6 B. W. C. C. 720, C. A.....	183
Blackall v. Winchester Repeating Arms Co., 1 Conn. Comp. Dec. 183.....	227, 275, 515
Blackford v. Green, 87 N. J. Law, 359, 94 Atl. 401.....	630, 666, 684
Blackhurst, In re, Op. Sol. Dept. of L. 690.....	648
Blaine, In re, Op. Sol. Dept. of L. p. 117.....	341
v. McKinsey, 1 Cal. I. A. C. Dec. 641.....	192, 207, 550
Blake v. Head, 5 B. W. C. C. 303, C. A.....	284, 439
v. Head, 106 L. T. R. 822.....	324, 426
v. Herskovitz, Bulletin No. 1, Ill., p. 161.....	519, 801
Blanchard v. Portland & R. F. Ry., 87 Me. 241, 32 Atl. 890.....	186, 187
Blanding v. Sayles, 21 R. I. 211, 42 Atl. 872, 23 R. I. 226, 49 Atl. 992....	822
Blanton v. Wheeler & Howes Co., 1 Conn. Comp. Dec. 415.....	227
Blanz v. Erie R. R. Co., 84 N. J. Law, 35, 85 Atl. 1030.....	231
Blass v. Studebaker Corp. of America, 1 Cal. I. A. C. Dec. 162.....	799
Blatt v. Schoneberger & Noble, The Bulletin, N. Y., vol. 1, No. 6, p. 10....	511
Blauvelt v. Chicago & A. R. Co., Bulletin No. 1, Ill., p. 181.....	16, 46, 47

	Page
Block v. Mutual Biscuit Co., 2 Cal. I. A. C. Dec. 274.....	303, 411, 515
Blood v. Industrial Acc. Commission of California (Cal. App.) 157 Pac. 1140	205
Bloom, In re, 222 Mass. 434, 111 N. E. 45.....	748, 749, 761, 824
v. Jaffe, 94 Misc. Rep. 222, 157 N. Y. Supp. 926.....	719
Blount, In re, Op. Sol. Dept. of L. 137.....	346
Blovell v. Sawyer, 20 T. L. R. 105.....	396
Blovelt v. Sawyer, 6 W. C. C. 16, C. A.....	380
Blynn v. Pontiac, 185 Mich. 35, 151 N. W. 681, 8 N. C. C. A. 793.....	222, 327
Boardman v. Whitworth, 3 W. C. C. 33.....	287
Board of Water Supply, In re, 170 App. Div. 107, 155 N. Y. Supp. 753....	823
Bobbey v. Crosbie, 8 B. W. C. C. 236, C. A.....	124, 128
Bockwich v. Housatonic Power Co., 1 Conn. Comp. Dec. 266.....	476, 491
Bode v. Shreve & Co., 1 Cal. I. A. C. Dec. 6.....	350, 353
Boehme v. Owl Drug Co., 2 Cal. I. A. C. Dec. 529.....	467
Boggeln v. Coronada Hotel, 1 Cal. I. A. C. Dec. 276.....	499
Bohma v. Western Union Tel. Co., 2 Cal. I. A. C. Dec. 246.....	552
Bolger v. North Pacific S. S. Co., 2 Cal. I. A. C. Dec. 268.....	561
Bolles v. New York Motion Picture Corp., 2 Cal. I. A. C. Dec. 501.....	372
Bolton v. Bridgeport Brass Co., 1 Conn. Comp. Dec. 515.....	521
Bonsall v. Midland Colliery Owners' Mut. Indemnity Co., 7 B. W. C. C. 613, C. A.....	607
Bonsanar, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 87.....	260
Boody v. K. & C. Mfg. Co., 77 N. H. 208, 90 Atl. 859, L. R. A. 1916A, 10, Ann. Cas. 1914D, 1280, 5 N. C. C. A. 840.....	109, 277, 325, 328, 411, 453
Boon v. Quance, 3 B. W. C. C. 106, C. A.....	180
Booth v. Burnett, 2 Cal. I. A. C. Dec. 125.....	373
v. Leeds & Liverpool Canal Co., 7 B. W. C. C. 434, C. A.....	474
Borgnis v. Falk Co. (Borgnis Case) 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489, 3 N. C. C. A. 649.....	71, 72, 77, 82, 85, 86, 98, 772, 829
Borland v. Watson, Gow & Co., 5 B. W. C. C. 514, Ct. of Sess.....	318, 517
Boschetti v. Lecas, 3 Cal. I. A. C. Dec. 39.....	192
Boston & M. R. R. Co. v. Trafton, 151 Mass. 229, 23 N. E. 829.....	33
Boswell v. Gilbert, 2 B. W. C. C. 251, C. C.....	120
Boucher v. Olson & Mahony S. S. Co., 1 Cal. I. A. C. Dec. 248.....	375, 453
Bowdish v. Northwestern Pac. R. Co., 2 Cal. I. A. C. Dec. 777.....	407
Bowen, In re, Op. Sol. Dept. of L. 340.....	647
Bowhill Coal Co. v. Neish, 2 B. W. C. C. 253, Ct. of Sess.....	241
Bowne v. S. W. Bowne Co., The Bulletin, N. Y., vol. 1, No. 12, p. 17....	173, 334
Boyd v. Doharty, 2 B. W. C. C. 257, Ct. of Sess.....	214
v. Pratt, 72 Wash. 306, 130 Pac. 371.....	644, 843
Boyington v. Stoddard, 1 Conn. Comp. Dec. 103.....	211, 566
Brackins v. Trinity Asbestos Mining Co., 3 Cal. I. A. C. Dec. 22.....	396
Bradbury v. Belworth Coal & Iron Co., 2 W. C. C. 138, C. A.....	677

	Page
Bradford v. Union Hollywood Water Co., 2 Cal. I. A. C. Dec. 792.....	272
Bradley v. Wallaces, Ltd., 6 B. W. C. C. 706, C. A.....	154
v. Waterbury Clock Co., 1 Conn. Comp. Dec. 179.....	700
Brady v. Grove, 1 Conn. Comp. Dec. 240.....	123
Brain v. Eislefelder, 2 Cal. I. A. C. Dec. 30.....	130, 133, 205, 206, 680
Braithwaite v. Rowley, 1 Conn. Comp. Dec. 355.....	804
Braithwaite & Kirk v. Cox, 5 B. W. C. C. 77, C. A.....	526
Bramley v. Evans & Sons, 3 B. W. C. C. 34, C. A.....	753
Brandt v. Globe Indemnity Co., 1 Cal. I. A. C. Dec. 309.....	623, 682
Branch, In re, Op. Sol. Dept. of L. 576.....	249, 256
Branconnier, In re, 223 Mass. 273, 111 N. E. 792.....	620
Bravis v. Chicago, M. & St. P. R. Co., 217 Fed. 234, 133 C. C. A. 228.....	55
Breakwater Co. v. U. S., 183 Fed. 112, 114, 105 C. C. A. 404.....	183
Breakwell v. Clee Hill Granite Co., 5 B. W. C. C. 133, C. A.....	752
Brennan v. Travelers Ins. Co., 2 Mass. Wk. Comp. Cases, 503.....	600
Brenner v. Brenner, 127 Md. 189, 96 Atl. 287.....	12, 28, 817
Brewer v. Belcher, 1 Conn. Comp. Dec. 111.....	107, 742, 754
v. Smith, 6 B. W. C. C. 651, C. A.....	545
Brice v. Lloyd, Limited, 2 B. W. C. C. 26.....	379, 380, 455
v. Lloyd, Limited, 2 K. B. 809.....	327
Bridge v. Southern Pac. Co., 2 Cal. I. A. C. Dec. 736.....	52
Bridgewood v. Union Iron Works Co., 2 Cal. I. A. C. Dec. 599.....	315
Briere v. Taylor, 126 Wis. 347, 105 N. W. 817.....	821
Briggs v. Mitchell, 4 B. W. C. C. 400, Ct. of Sess.....	242
Brightman, In re, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321, 8	
N. C. C. A. 102.....	309, 407, 416, 510, 830
Brine v. May, Ellis, Grace & Co., 6 B. W. C. C. 134, C. A.....	127
Brinkley, In re, Op. Sol. Dept. of L. (1915) 603.....	687
Brintons, Limited, v. Turvey, 6 W. C. C. 1, C. A., 74 L. J. K. B. 474...	302, 538
v. Turvey, 7 W. C. C. 1, H. L.....	302
Brio v. Carpenter, Boxley & Herrick, The Bulletin, N. Y., vol. 1, No. 5,	
p. 11.....	656
Briscoe, In re, Op. Sol. Dept. of L. 776.....	345
Bristol v. Bristol, 1 Conn. Comp. Dec. 368.....	580
v. Gartland, 1 Cal. I. A. C. Dec. 632.....	262, 641
Bristow, In re, Op. Sol. Dept. of L. 150.....	343
Brockman v. Sheridan, 2 Cal. I. A. C. Dec. 1061.....	205
Broderick v. London County Council, 1 B. W. C. C. 219, C. A.....	274, 541
v. San Francisco Stevedoring Co., 2 Cal. I. A. C. Dec. 293.....	741
v. Southern Pac. Co., 4 N. Y. St. Dep. Rep. 371.....	482
Broforst v. Blomfield, The. 6 B. W. C. C. 613.....	306
Brooker v. Warren, 9 W. C. C. 26, C. A.....	562
Brooklyn Mining Co. v. Industrial Acc. Commission of California (Cal.)	
159 Pac. 162.....	550

	Page
Brooks v. Central California Traction Co., 2 Cal. I. A. C. Dec. 420.....	613
Brown, In re (Sup.) 159 N. Y. Supp. 1047.....	334
Brown, In re, Op. Sol. Dept. of L. 102.....	187
Brown, In re, Op. Sol. Dept. of L. 137.....	343
Brown, In re, Op. Sol. Dept. of L. 328.....	402
v. Berkeley Daily Gazette, 2 Cal. I. A. C. Dec. 844.....	283, 395, 433
v. Clark, 80 Conn. 419, 423, 68 Atl. 1001.....	824
v. Corona Citrus Ass'n, 2 Cal. I. A. C. Dec. 144.....	533, 534
v. Davies-Leavitt Co., 2 Cal. I. A. C. Dec. 12.....	787, 788
v. Decatur, 188 Ill. App. 147.....	125, 339, 419
v. J. J. Thornecroft & Co., 5 B. W. C. C. 386.....	599, 676
v. Kemp, 6 B. W. C. C. 725, C. A.....	462
v. Kent, 6 B. W. C. C. 745, C. A.....	515
v. Kidman, 4 B. W. C. C. 199, C. A.....	482
v. Lochgelly Iron & Coal Co. (1907) S. C. 198, Ct. of Sess.....	752
v. Mauston, Bul. Wis. Indus. Com. vol. 1, p. 97.....	199, 755
v. Pioneer Fruit Co., 2 Cal. I. A. C. Dec. 827.....	395
v. Richmond Light & R. R. Co., The Bulletin, N. Y., vol. 1, No. 6, p. 12	376
v. Scott, 1 W. C. C. 11, C. C.....	405
v. Sheffield Scientific School, 1 Conn. Comp. Dec. 419.....	728
v. South Eastern & Chatham R. Co.'s Managing Committee, 3 B. W. C. C. 428, C. A.....	663
v. Thornecroft & Co., 5 B. W. C. C. 386, C. A.....	599, 676
v. Watson, Limited, 6 B. W. C. C. 416, Ct. of Sess.....	300, 491
v. Watson, Limited, 7 B. W. C. C. 259, H. L.....	300, 491
Bruce v. Taylor & Maliskey (Mich.) 158 N. W. 153.....	822
Bryant v. Fissell, 84 N. J. Law, 72, 86 Atl. 458, 460, 3 N. C. C. A. 585 29, 162, 276, 281, 288, 321, 322, 323, 324, 346, 347, 396, 408, 433, 437, 464, 465, 570, 571, 839	
Bryce v. Edward Lloyd Co., 2 B. W. C. C. 26.....	397
Bryce & Co. v. Connor, 7 F. 193, Ct. of Sess.....	606
Bryne v. Baltinglass Rural District Council & Kelly, 5 B. W. C. C. 566, C. A.....	212
Buchanan v. White Lumber Co., 2 Cal. I. A. C. Dec. 796.....	225, 227
Bucherri v. Hartford Rubber Works Co., 1 Conn. Comp. Dec. 622.....	655
Buckley v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 186, affirmed 218 Mass. 354, 105 N. E. 979, Ann. Cas. 1916B, 474...	237
v. London & India Docks, 2 B. W. C. C. 327, C. A.....	586
Buell v. New York Cent. & H. R. R. Co., The Bulletin, N. Y., vol. 1, No. 5, p. 12.....	48
Bullard, In re, Op. Sol. Dept. of L. 140.....	343
Bullworthy v. Glanfield, 7 B. W. C. C. 191, C. A.....	390
Burbage v. Lee, 87 N. J. Law, 36, 93 Atl. 859.....	597
Burgess v. Star, 2 Cal. I. A. C. 269.....	299, 541

	Page
Burgess & Co. v. Jewell, 4 B. W. C. C. 145, C. A.....	507
Burkard v. San Francisco Breweries, 2 Cal. I. A. C. Dec. 365.....	534, 711
Burke, In re, Op. Sol. Dept. of L. 139.....	343
v. Shepard, 1 Conn. Comp. Dec. 106.....	757
Burman v. Zodiac Steam Fishing Co., 7 B. W. C. C. 767, C. A.....	171
Burnes v. Swift & Co., 186 Ill. App. 460.....	121
Burnham v. Thames Nat. Bank, 1 Conn. Comp. Dec. 339.....	173, 174
Burnham & Co. v. Taylor, 3 B. W. C. C. 569, Ct. of Sess.....	213
Burns, In re, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787, 5 N. C. C. A. 635.....	290, 507, 548, 674, 824
In re, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 5.....	581, 582, 713, 720
v. Manchester & Salford Wesleyan Mission, 99 L. T. 581, C. A.....	182
v. Summerlee Iron Co., 6 B. W. C. C. 320, C. A.....	404
Burrell v. Holloway Bros., 4 B. W. C. C. 239, 241, C. A.....	749, 758, 761
Burt v. Brigham, 117 Mass. 307.....	785
Burwash v. Leyland & Co., 5 B. W. C. C. 663, C. A.....	473
Busek v. Wisconsin Gas & Electric Co., Rep. Wis. Indus. Com. 1914-15, p. 38.....	672
Bush v. Ickleheimer Bros. Co., 1 Cal. I. A. C. Dec. 522.....	415, 427, 465
Bustamente v. Gate City Ice & Precooling Co., 2 Cal. I. A. C. Dec. 918.....	261, 268
Butler, In re, Op. Sol. Dept. of L. 502.....	572
v. Burton-on-Trent Union, 5 B. W. C. C. 355, C. A.....	420
v. Sheffield Farms, The Bulletin, N. Y., vol. 1, No. 4, p. 11.....	310
Butt v. Gellyceidrim Colliery Co., 3 B. W. C. C. 44, C. A.....	756
v. Provident Clothing Supply Co., 6 B. W. C. C. 18, C. A.....	401
Butti v. MacRorie-McLaren Co., 2 Cal. I. A. C. Dec. 535.....	198
Buzby, In re, Op. Sol. Dept. of L. 141.....	343
Byer's Case, 84 Ohio St. 408, 95 N. E. 917, 38 L. R. A. (N. S.) 913.....	93
Bystrom Bros. v. Jacobson, 162 Wis. 180, 155 N. W. 919.....	278, 279, 477

C

Cadwalader, In re, Op. Sol. Dept. of L. 182.....	345
Cahill, In re, 159 N. Y. Supp. 1060.....	743
Cain v. Leyland & Co., 1 B. W. C. C. 351, 368, C. A.....	592
v. National Zinc Co., 94 Kan. 679, 146 Pac. 1165, 148 Pac. 251, 653, 694, 842	
Calef v. Union Oil Co. of California, 2 Cal. I. A. C. Dec. 488.....	765
Calico Printers' Ass'n v. Higham, 5 B. W. C. C. 110.....	579
California State Board of Prison Directors v. Dickerson, 1 Cal. I. A. C. Dec. 262.....	227
Callaghan v. Maxwell, 2 F. 420, Ct. of Sess.....	457, 562
Callender, In re, Op. Sol. Dept. of L. 637.....	770
Camellier v. Cardilli, 1 Conn. Comp. Dec. 215.....	135

	Page
Cameron v. Chicago, M. & St. P. R. Co., 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 553.....	82
v. Pillsbury (Cal.) 159 Pac. 149.....	173
v. Port of London Authority, 5 B. W. C. C. 416, C. A.....	492
Campanella v. Frank Stola Const. & Bldg. Co., The Bulletin, N. Y., vol. 1, No. 12, p. 17.....	361
Campbell v. Ætna Life Ins. Co., 2 Mass. Wk. Comp. Cases, 701.....	494
v. L. E. White Lumber Co., 3 Cal. I. A. C. Dec. 33.....	700, 709
v. Los Angeles, 2 Cal. I. A. C. Dec. 300.....	184
Campos v. Southern Pac. Co., 2 Cal. I. A. C. Dec. 747.....	54
Canavan v. Universal, The, 3 B. W. C. C. 355, C. A.....	451
Cannon v. Original Min. & Mill. Co., 1 Cal. I. A. C. Dec. 278.....	264
Canton v. Bender, The Bulletin, N. Y., vol. 1, No. 8, p. 12.....	332
Cantor v. Rubin Musicant Co., 3 N. Y. St. Dep. Rep. 392.....	173
Cantwell v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases, 246.....	519
Canwell v. Kelsall Bros. & Beeching, 5 B. W. C. C. 667, C. A.....	171
v. Kelsall Bros. & Beeching, 6 B. W. C. C. 480, H. L.....	171
Cardiff Corp. v. Hall, 4 B. W. C. C. 159, 1 K. B. 1009.....	599, 606
Cardinale v. Valencano, Bulletin No. 1, Ill., p. 114.....	773, 790
Cardoza v. Pacific Gas & Electric Co., 1 Cal. I. A. C. Dec. 435.....	822
v. Pillsbury, 169 Cal. 106, 145 Pac. 1015.....	834
Carey, In re, Op. Sol. Dept. of L. 139.....	343
Carinduff v. Gilmore, 7 B. W. C. C. 981, C. A.....	380, 415
Carini v. Nickel Plate R. Co., 4 N. Y. St. Dep. Rep. 423.....	380, 448
Carls v. Pekin Cooperage Co., Bulletin No. 1, Ill., p. 75.....	396
Carlson v. Emanuelson, 1 Conn. Comp. Dec. 139.....	522, 532, 579
Carmicheal v. Hogrefe, 2 Cal. I. A. C. Dec. 734.....	497
Carney, In re, Op. Sol. Dept. of L. 173.....	345
Carpenter v. Detroit Forging Co. (Mich.) 157 N. W. 374.....	629, 684, 729, 828
Carrigan v. Winchester Repeating Arms Co., 1 Conn. Comp. Dec. 327....	443
Carroll, In re, Op. Sol. Dept. of L. 367.....	648
v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, reversing 169 App. Div. 450, 155 N. Y. S. 1.....	512, 776, 777, 836, 841
v. United States Casualty Co., 2 Mass. Wk. Comp. Cases, 488.....	469
v. What Cheer Stables Co. (R. I.) 96 Atl. 208.....	280, 461, 463, 825
Carstens v. Pillsbury (Cal.) 158 Pac. 218.....	749, 785, 788, 793, 820
Carswell v. Sharp, 3 B. W. C. C. 552, Ct. of Sess.....	124, 180
Carter, In re, 221 Mass. 105, 108 N. E. 911, 9 N. C. C. A. 579.....	238
v. Hume-Bennett Lumber Co., 2 Cal. I. A. C. Dec. 42.....	348, 413
v. Llewellyn Iron Works, 2 Cal. I. A. C. Dec. 971.....	487
Casanegri v. Madera Sugar Pine Co., 1 Cal. I. A. C. Dec. 589.....	693, 707
Casey v. Humphries, 6 B. W. C. C. 520, C. A., 4 N. C. C. A. 881.....	563
Cason v. Star Laundry, 1 Cal. I. A. C. Dec. 485.....	664
Casparson v. Munn, Bulletin No. 1, Ill., p. 151.....	390

	Page
Cass v. Great Lakes Dredge & Dock Co., Bulletin No. 1, Ill., p. 99.....	725
Cassell v. Simon Millinery Co., 2 Cal. I. A. C. Dec. 1071.....	564
Cassidy, In re, Op. Sol. Dept. of L. 180.....	345
Casson v. Northwestern Pac. R. Co., 2 Cal. I. A. C. Dec. 729.....	656
Castellotti v. McDonnell, 1 Cal. I. A. C. Dec. 351.....	197, 206
Caton v. Summerlee & M. I. & S. Co., 39 Scotch L. R. 762.....	368
Catterson v. Los Angeles County, 2 Cal. I. A. C. Dec. 981.....	658
Catto v. G. Cudemo & Co., 1 Conn. Comp. Dec. 374.....	655
Cavagnero v. American Mills Co., 1 Conn. Comp. Dec. 163.....	381, 448
Cavanaugh v. Morton Salt Co., 152 Wis. 375, 140 N. W. 53.....	109
Cavett, In re, Vol. I, No. 7, Bul. Ohio Indus. Com. p. 150.....	228
Cegrelski v. Lehon Co., Bulletin No. 1, Ill., p. 35.....	717
Central R. Co. of New Jersey v. Kellett, 86 N. J. Law, 84, 90 Atl. 1005, 5 N. C. C. A. 529.....	722
Cernich, In re, Op. Sol. Dept. of L. 539.....	649
Cerny v. Wood Street Mill Co., Bulletin No. 1, Ill., p. 52.....	779
Cetefont v. Camden Coke Co., 78 N. J. Law, 662, 75 Atl. 913, 27 L. R. A. (N. S.) 1058.....	61
Chaboya v. Becker, 2 Cal. I. A. C. Dec. 958.....	365
Challis v. London & S. W. R. Co., 2 K. B. 154.....	426, 433, 437
v. London & S. W. R. Co., 7 W. C. C. 23, C. A.....	284
Chamberlain v. Southern Fish Co., 2 Cal. I. A. C. Dec. 424.....	317
Chambers, In re, Op. Sol. Dept. of L. 291.....	371
Chandler v. Great Western R. Co., 5 B. W. C. C. 254, C. A.....	468
Chapin v. Jenkins, 50 Kan. 385, 31 Pac. 1084.....	763
Chappelle v. 412 Broadway Co. (N. Y.) 112 N. E. 569, reversing (Sup.) 155 N. Y. Supp. 858.....	331
Charles v. Walker, Limited, 2 B. W. C. C. 5, C. A.....	474
Charvil v. Manser & Co., 5 B. W. C. C. 385, C. A.....	474
Chase, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 53.....	352
Cheever, In re, 219 Mass. 244, 106 N. E. 861.....	201
Chenoweth v. Mitchell, 2 Cal. I. A. C. Dec. 75.....	487
Cheski v. Connecticut Mills Co., 1 Conn. Comp. Dec. 213.....	594
Chicago, K. & W. R. Co. v. Chase County Com'rs, 49 Kan. 399, 30 Pac. 456.....	763
Chicago, M. & St. P. R. Co. v. Westby, 102 C. C. A. 65, 178 Fed. 619, 47 L. R. A. (N. S.) 97.....	80
Chicago Sav. Bank & Trust Co. v. Chicago Rys. Co., Bulletin No. 1, Ill., p. 104.....	330, 685, 790
Chicago & N. W. R. Co. v. Railroad Commission, 156 Wis. 47, 145 N. W. 216, 974.....	772, 780, 829
Chiesa v. United States Crushed Stone Co., Bulletin No. 1, Ill., p. 82....	503
Childs v. American Exp. Co., 197 Mass. 337, 84 N. E. 128.....	779
Chilton v. Blair & Co., 7 B. W. C. C. 607, C. A.....	457

	Page
Ching Shee v. Madera Sugar Pine Co., 2 Cal. I. A. C. Dec. 1014.....	235, 791
Chippewa B. Co. v. Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.....	821
Chisholm v. Walker & Co., 2 B. W. C. C. 261, Ct. of Sess.....	212
Christensen v. R. W. Bartelmann Co., 273 Ill. 346, 112 N. E. 686.....	817
Christiansen v. St. Mary's Hospital, Rep. Wis. Indus. Com. 1914-15, p. 20	466, 532
Christianson v. Barber, Bulletin, No. 1, Ill., p. 71.....	330
Christophson v. Turner Const. Co., 1 Conn. Comp. Dec. 591.....	714
Chulata v. Ransome-Crummey Const. Co., 2 Cal. I. A. C. Dec. 1026.....	260
Cianetti v. Fremont Consol. Mining Co., 2 Cal. I. A. C. Dec. 947.....	679
Cieck v. Standard Oil Co., 1 Cal. I. A. C. Dec. 135.....	500
City of Butte v. Industrial Accident Board (Mont.) 156 Pac. 130.....	125
City of Cleveland v. Hastings, 2 Cal. I. A. C. Dec. 15.....	563
City of Goshen v. England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.....	513
City of Milwaukee v. Althoff, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A, 327	359
v. Industrial Commission, 160 Wis. 238, 239, 240, 151 N. W. 247 447, 477, 487, 823, 825, 826	
v. Miller, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149.....	7, 8, 27, 190, 688, 691, 693, 714, 716, 720, 721
v. Ritzow, 158 Wis. 376, 149 N. W. 480, 7 N. C. C. A. 498.....	644, 645
City of Superior v. Industrial Commission, 160 Wis. 541, 152 N. W. 151, 9 N. C. C. A. 960.....	125, 347
City of Winfield v. Bell, 89 Kan. 96, 130 Pac. 680.....	73
Clapp v. Carter, 7 B. W. C. C. 28, C. A.....	753
Clark, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 125.....	353
In re, Op. Sol. Dept. of L. 49.....	220
In re, Op. Sol. Dept. of L. 120.....	342
In re, Op. Sol. Dept. of L. 188.....	275, 277, 291
In re, Op. Atty. Gen., Op. Sol. Dept. of L. 200.....	291
In re, Op. Sol. Dept. of L. 270.....	300
In re, Op. Sol. Dept. of L. 381.....	596
v. Clark (Mich.) 155 N. W. 507.....	400, 434
v. Fruit Dispatch Co., 2 Cal. I. A. C. Dec. 993.....	727
v. Gaslight & Coke Co., 7 W. C. C. 119, C. A.	606
v. Gaslight & Coke Co., 21 L. T. R. 184.....	601
v. Los Angeles County, 1 Cal. I. A. C. Dec. 623.....	551, 590
v. Morrison & Burns, 2 Cal. I. A. C. Dec. 90.....	178
v. Taylor & Co., 7 B. W. C. C. 856, Ct. of Sess. 871, H. L.....	504
Clarke, In re, Op. Sol. Dept. of L. 133.....	342
v. Baillieborough Co-Op. Agricultural & Dairy Soc., 47 Ir. L. T. R. 113, C. A.....	214

	Page
Clarke v. Bigelow-Hartford Carpet Co., 1 Conn. Comp. Dec. 166.....	655
Clarkson v. Charente S. S. Co., 6 B. W. C. C. 540, C. A.....	312
Claudio v. California Street Cable R. Co., 3 Cal. I. A. C. Dec. 7.....	236, 246, 260, 261, 271
Clausen, In re (Clausen's Case) 65 Wash. 156, 117 Pac. 1102, 37 L. R. A. (N. S.) 466.....	65, 68
Clayton v. Hardwick Colliery Co., 7 B. W. C. C. 643, C. A.....	434
Clayton & Co. v. Hughes, A. C. 242, 26 T. L. R. 359.....	276
Clem v. Chalmers Motor Car Co., Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 40.....	384, 412, 550
v. Chalmers Motor Co., 178 Mich. 340, 144 N. W. 848, L. R. A. 1916A, 352, 4 N. C. C. A. 876.....	389, 444, 550
Clementi v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases, 330.....	612
Clements, In re, Op. Sol. Dept. of L. 228.....	306
v. Columbus Sawmill Co., Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 161.....	26, 117, 199, 202, 327
Cleveland v. Foland, 174 Ind. 411, 91 N. E. 594, 92 N. E. 165.....	79
v. Hastings, 2 Cal. I. A. C. Dec. 15.....	194, 197, 563
Cleverley v. Gas Light & Coke Co., 1 B. W. C. C. 82, H. L.....	570
Clifford v. Joy, 2 B. W. C. C. 32, C. A.....	420
Cline v. Studebaker Corp. (Mich.) 155 N. W. 519, L. R. A. 1916C, 1139	300, 469, 626
Clover, Clayton & Co. v. Hughes, 3 B. W. C. C. 275, 280, H. L.....	276, 282, 306, 461
v. Hughes (1910) A. C. 242.....	309
Coakley v. Coakley, 216 Mass. 71, 102 N. E. 930, Ann. Cas. 1915A, 867, 4 N. C. C. A. 508.....	267
v. Mason Mfg. Co., 37 R. I. 46, 90 Atl. 1073.....	104
Coakley's Case, 216 Mass. 71, 102 N. E. 930, Ann. Cas. 1915A, 867, 4 N. C. C. A. 508.....	25
Coal Co. v. Illinois, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872.....	82
Cochran v. Fenton, 1 Conn. Comp. Dec. 690.....	541
v. Whiting Wrecking Co., 1 Cal. I. A. C. Dec. 186.....	694
Cody v. Beach, 1 Conn. Comp. Dec. 447.....	486
Coe v. Fife Coal Co., 2 B. W. C. C. 8, Ct. of Sess.....	279, 542
Coelho v. Rideout Co., 2 Cal. I. A. C. Dec. 773.....	548, 551, 556
Coffey v. Borden's Condensed Milk Co., 1 Conn. Comp. Dec. 167.....	203, 493
Cohen v. Union News Co., 1 Conn. Comp. Dec. 62.....	37, 448
Cohnhoff v. Thomas & Schneider Art Glass Co., 2 Cal. I. A. C. Dec. 564..	602
Cokolon v. Kentra, The, 5 B. W. C. C. 658, C. A.....	415
Cole v. Callahan & Sperry, 4 N. Y. St. Dep. Rep. 348.....	277
v. Cole, 27 Wis. 531.....	821
v. Evans, Son, Lescher & Webb, 4 B. W. C. C. 138, C. A.....	401
Coleman, In re, Op. Sol. Dept. of L. 544.....	652

	Page
Coleman v. Guilfooy Cornice Works, 1 Cal. I. A. C. Dec. 31.....	587, 692
Coller v. Donohue, 1 Conn. Comp. Dec. 654.....	699
Collins v. Bodin, 2 Cal. I. A. C. Dec. 153.....	556, 561, 562
v. Brooklyn Union Gas Co. (Sup.) 156 N. Y. S. 957, 959, 171 App. Div. 381	18, 419, 780, 795, 823
v. Collins, 2 I. R. 104, C. A.....	324, 439
v. Terminal Transfer Co. (Wash.) 157 Pac. 1092.....	341
v. York Bradford Co., 2 Cal. I. A. C. Dec. 220.....	593
Colonial Development Co. v. Bragdon, 219 Mass. 170, 106 N. E. 633.....	159
Colot v. Union Lumber Co., 1 Cal. I. A. C. Dec. 512.....	616, 665
Colson v. Burbank, 2 Cal. I. A. C. Dec. 127.....	351, 439
Coltman v. Morrison & Mason, 7 B. W. C. C. 194, C. A.....	758
Comerford, In re (Mass.) 113 N. E. 460.....	136, 221
Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109.....	483
Condron v. Gavin Paul & Sons, 6 F. 29, Ct. of Sess.....	546, 553
Connell & Co. v. Barr, 116 L. T. 127, Ct. of Sess.....	511
Conner v. Acme Cement & Plaster Co., 1 Cal. I. A. C. Dec. 143....	692, 717, 788
v. Drake (Conner's Case) 1 Ohio St. 166.....	72
Connors v. Public Service Electric Co. (N. J.) 97 Atl. 792.....	226, 256, 257, 595, 650, 686, 842
v. Sugar Pine R. Co., 2 Cal. I. A. C. Dec. 879.....	54, 563
Connole v. Norfolk & W. R. Co. (D. C.) 216 Fed. 823.....	50
Connolly v. California Salt Co., 2 Cal. I. A. C. Dec. 115.....	692
v. Connolly, 2 Cal. I. A. C. Dec. 790.....	216
Connor, In re, Op. Sol. Dept. of L. 330.....	355
Connors v. Gross, 144 N. Y. Supp. 18.....	751
v. Semet-Solvay Co., 159 N. Y. Supp. 431.....	739
Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 Pac. 465, 5 N. C. C. A. 742.....	24, 91, 102, 739, 741
Consumers' Lignite Co. v. Grant (Tex. Civ. App.) 181 S. W. 202....	65, 66, 67, 73, 74, 84, 109
Contractors' Mut. Liability Ins. Co., In re, 217 Mass. 511, 105 N. E. 376...	634
In re (Mass.) 113 N. E. 460.....	136, 221
Contractors or Jobbers at Neopit Indian Sawmill, In re, Op. Sol. Dept. of L. p. 58.....	220
Conway v. Pumpherson Oil Co., 4 B. W. C. C. 392, Ct. of Sess.....	390, 391
Cook v. Home Telephone & Telegraph Co., 2 Cal. I. A. C. Dec. 120.....	378
v. Manvers Main Collieries, 7 B. W. C. C. 696, C. A.....	383, 456
v. Montreal, The, 6 B. W. C. C. 220, C. A.....	450
v. New York Cent. & H. R. R. Co., The Bulletin, N. Y., Vol. 1, No. 8, p. 9.....	412
Coons v. John De Michiel & Bros., 1 Conn. Comp. Dec. 446.....	727
Cooper, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 180.....	117, 180
v. Massachusetts Employés Ins. Ass'n, 2 Mass. Wk. Comp. Cases, 573..	282

	Page
Cooper v. New Haven Rigging Co., 1 Conn. Comp. Dec. 157.....	454, 566
Corcoran v. Farrel Foundry & Machine Co., 1 Conn. Comp. Dec. 42....	256, 480
Corea v. Higuera, 153 Cal. 451, 95 Pac. 882, 17 L. R. A. (N. S.) 1018.....	785
Corliss v. Keown, 207 Mass. 149, 93 N. E. 143.....	122
Corn Ass'n v. Auditor General, 150 Mich. 69, 113 N. W. 582.....	70
Coronado Beach Co. v. Pillsbury (Cal.) 158 Pac. 212, 218....	324, 408, 409, 442
Corral v. William H. Hamlyn & Son (R. I.) 94 Atl. 877.....	464, 513, 778, 839
Cory Bros. & Co. v. Hughes, 4 B. W. C. C. 291.....	602
Cory & Son v. France, Fenwick & Co., 1 K. B. 114, C. A.....	155
Costa v. C. W. Blakeslee & Sons, 1 Conn. Comp. Dec. 457.....	531, 750
Costello, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com., p. 54.....	586
v. Kelsall Bros. & Beeching, 5 B. W. C. C. 667, C. A.....	171
v. Kelsall Bros. & Beeching, 6 B. W. C. C. 480, H. L.....	171
v. Taylor, 217 N. Y. 179, 111 N. E. 755, affirming 169 App. Div. 905, 153 N. Y. Supp. 1111, 11 N. C. C. A. 320.....	331, 337
Cotter v. Johnson, 5 B. W. C. C. 568, C. A.....	191
Cottun v. I. Newman & Sons, 1 Conn. Comp. Dec. 289.....	619
Coughlin v. R. Wallace & Sons, 1 Conn. Comp. Dec. 652.....	718
Coulson v. South Moor Colliery Co., 8 B. W. C. C. 253, C. A.....	751
Coulthard v. Consett Iron Co., 8 W. C. C. 87, C. A.....	246
Courter v. Simpson Const. Co., 264 Ill. 488, 106 N. E. 350.....	826
Covert v. Goldstone, 1 Cal. I. A. C. Dec. 618.....	498
Cowan, In re, Op. Sol. Dept. of L. 184.....	345
v. Simpson, 3 B. W. C. C. 4, C. A.....	609
Cowell v. Mason, 1 Cal. I. A. C. Dec. 614.....	464
Cowen v. Cowen New Shirt Laundry, The Bulletin, N. Y., Vol. 1, No. 8, p. 11	436
Cowles v. Alexander & Kellogg, 2 Cal. I. A. C. Dec. 615.....	197, 204, 206
v. Wilkenda Land Co., 1 Conn. Comp. Dec. 361.....	627
Coyle v. Massachusetts Employés Ins. Ass'n, 2 Mass. Wk. Comp. Cases, 704	202, 591
Coylton Coal Co. v. Davidson, 7 F. 727, Ct. of Sess.....	129
Craft v. State, 3 Kan. 451.....	735
Craig, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 38.....	352
v. Axt, 1 Cal. I. A. C. Dec. 72.....	587, 588, 590
v. Calabria, The, 7 B. W. C. C. 932, Ct. of Sess.....	388, 449
v. Hartson, 2 Cal. I. A. C. Dec. 235.....	192
Crandall, In re, Op. Sol. Dept. of L. 77.....	188
Cranfield v. Ansell, 4 B. W. C. C. 57, C. A.....	674
Craske v. Wigan, 2 B. W. C. C. 35, C. A.....	420
v. Wigan, 2 K. B. 635.....	426
Crawford, In re, Op. Sol. Dept. of L. 56.....	220
Craycroft v. Craycroft-Herrold Brick Co., 2 Cal. I. A. C. Dec. 654....	173, 439

	Page
Creamer, In re, Op. Sol. Dept. of L. 109.....	186
Crehan v. Los Angeles, 1 Cal. I. A. C. Dec. 252.....	185
Cremins v. Gest, Keen & Nettlefold, 1 B. W. C. C. 160, C. A.....	377
v. Gest, Keen & Nettlefold, 1 K. B. 469.....	376
Cripp, In re (Cripp's Case) 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828	639, 682, 724, 739, 740, 836
Cripps v. Aetna Life Ins. Co., 2 Mass. Wk. Comp. Cases, 68, affirmed 216 Mass. 586, Ann. Cas. 1915B, 828, 104 N. E. 565.....	299, 411
Cristoforo v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 364	543
Crittenden v. Robbins, 1 Conn. Comp. Dec. 523.....	211
Croad v. Paraffine Paint Co., 1 Cal. I. A. C. Dec. 179.....	40
Crockett v. State Ins. Fund, 170 App. Div. 122, 155 N. Y. Supp. 692.....	819
Crofut v. Bredow & Bohm, 1 Conn. Comp. Dec. 524.....	531
Cromowy v. Sulzberger & Sons Co., Bulletin No. 1, Ill., p. 37.....	348, 416
Cronin v. Silver, 4 B. W. C. C. 221, C. A.....	404
Crooks v. Tazewell Coal Co., 263 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C, 304, 5 N. C. C. A. 410.....	64, 101, 107, 731
Crosby v. Strong, 2 Cal. I. A. C. Dec. 408.....	207, 216
Crouch v. Ritter, 2 Cal. I. A. C. Dec. 702.....	488
Crow v. Los Angeles Ry. Corp., 1 Cal. I. A. C. Dec. 449.....	376
Crowley v. Lowell, 223 Mass. 288, 111 N. E. 786.....	189, 461
Crucible Steel Forge Co. v. Moir, 135 C. C. A. 49, 219 Fed. 151, 8 N. C. C. A. 1006	109
Cruz v. California Portland Cement Co., 2 Cal. I. A. C. Dec. 155.....	563
Csuprinski v. Mechanical Mfg. Co., Bul. No. 1, Ill., p. 105.....	627
Cue v. Port of London Authority, 7 B. W. C. C. 447, C. A.....	586, 592
Cuebas v. Atchison, T. & S. F. R. Co., 3 Cal. I. A. C. Dec. 17.....	53
Cunka v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 491..	616
Cunningham, In re, Op. Sol. Dept. of L. 81.....	188
v. Buffalo C. & B. Rolling Mills (Sup.) 155 N. Y. Supp. 797. .631, 821, 823	
v. McGregor, 3 F. 775, Ct. of Sess.....	245
v. McNaughton & Sinclair, 3 B. W. C. C. 577, Ct. of Sess.....	674
v. Northwestern Imp. Co., 44 Mont. 180, 119 Pac. 554....	71, 74, 82, 85, 98
Cunningham's Case, 44 Mont. 180, 119 Pac. 554.....	62
Curless v. Peninsula Warehouse, 1 Cal. I. A. C. Dec. 354.....	557
Currie v. Royal Indemnity Co., 2 Mass. Wk. Comp. Cases, 174.....	490
Curry v. Dosford & Sons, 8 B. W. C. C. 19, C. A.....	609
v. Hull, 2 Cal. I. A. C. Dec. 994.....	727
Curtis v. Plumbtre, 6 B. W. C. C. 87, C. A.....	212
v. Talbot & Kidderminster Infirmary Committee, 5 B. W. C. C. 41, C. A.	401
Cushner v. H. C. Rowe & Co., 1 Conn. Comp. Dec. 574.....	655, 789
Cutaria v. Swieberg, Bulletin No. 1, Ill., 153.....	748, 773

	Page
Cutty v. Carson, 125 Md. 25, 93 Atl. 302, 305.....	28
Cypher v. United Development Co., 1 Cal. I. A. C. Dec. 425.....	133, 705

D

Dabila v. Brandon & Lawson, 1 Cal. I. A. C. Dec. 239.....	622
Daff v. Midland Colliery Owners' Mut. Indemnity Co., 5 B. W. C. C. 67, C. A.	146
v. Midland Colliery Owners' Mut. Indemnity Co., 6 B. W. C. C. 799, H. L.	146
Dahl v. Jensen, 2 Cal. I. A. C. Dec. 749.....	718
Daigle v. Steele & Johnson Mfg. Co., 1 Conn. Comp. Dec. 196.....	727
Dailly v. Watson, 2 F. 1044, Ct. of Sess.	560
Daily News v. McNamara & Co., 7 B. W. C. C. 11, K. B. D.....	156
Dale v. Saunders Bros. (In re Workmen's Compensation Commission) 218 N. Y. 59, 112 N. E. 571, affirming 171 App. Div. 528, 157 N. Y. S. 1062... 175, 330, 336, 394, 826	826
Dalgiesh v. Gartside & Co., 7 B. W. C. C. 535, C. A.....	757
Dalton v. Connecticut Co., 1 Conn. Comp. Dec. 142.....	551
v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 231	347, 414
Da Luz v. Rideout, 2 Cal. I. A. C. Dec. 359.....	226, 227
Daly v. Mahoney Bros., 1 Cal. I. A. C. Dec. 625.....	807
v. Mahoney Bros., 2 Cal. I. A. C. Dec. 34.....	809
Damerow v. Paine Lumber Co., Rep. Wis. Indus. Com. 1914-15, p. 34....	308
Damps v. Michigan Cent. R. Co., Mich. Wk. Comp. Cases (1913) 25....	748, 764
Damrau v. Kuetemeyer, Rep. Wis. Indus. Com. 1914-15, p. 19.....	645
Dana v. De Turk, 2 Cal. I. A. C. Dec. 954.....	198
Daniels v. Charles Boldt Co. (W. Va.) 88 S. E. 613.....	101
Darlington v. Roscoe & Sons, 9 W. C. C. 1, C. A.....	254
David v. Windsor Steam Coal Co., 4 B. W. C. C. 177, C. A.....	607
Davidheiser v. Hay Foundry & Iron Works, 87 N. J. Law, 688. 94 Atl. 309, affirming 94 Atl. 1103.....	39, 41, 593
Davies v. Crown Perfumery Co., 6 B. W. C. C. 649, C. A.....	404
v. Gillespie, 5 B. W. C. C. 64, C. A.....	432
v. Point of Ayr Collieries, 2 B. W. C. C. 157, C. A.....	760
v. Rhymney Iron Co., 2 W. C. C. 22, C. A.....	378
v. Rhymney Iron Co., 16 Times Law Rep. 329.....	376
Davis, In re, Op. Sol. Dept. of L. 516.....	651
Davis, In re, Op. Sol. Dept. of L. 740.....	317
Day v. Lincoln Sightseeing Co., 1 Cal. I. A. C. Dec. 269.....	710
Dazy v. Apponaug Co., 36 R. I. 81, 89 Atl. 160, 4 N. C. C. A. 594....	224, 225
Dean v. London & N. W. R. Co., 3 B. W. C. C. 351, C. A.....	492
Dearborn v. Peugeot Auto Import Co., 170 App. Div. 93, 155 N. Y. Supp. 769	738, 820

	Page
Deavers, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 62.....	402
De Biasi v. Normandy Water Co. (D. C.) 228 Fed. 235.....	731, 732, 733
De Constantin v. Public Service Commission, 75 W. Va. 32, 83 S. E. 88, L. R. A. 1916A, 329.....	828
Decormier v. Western Indemnity Co., 2 Cal. I. A. C. Dec. 764.....	491
Decounter v. United Greenwater Copper Co., 2 Cal. I. A. C. Dec. 700....	658
Deem v. Kalamazoo Paper Co. (Mich.) 155 N. W. 584.....	825
Deeny v. Wright & Cobb Lighterage Co., 36 N. J. Law J. 121.....	36
De Fazio v. Goldschmidt Detinning Co. (N. J. Sup.) 88 Atl. 705, 4 N. C. C. A. 716.....	312, 325
De Fillipis v. Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761....	284, 321, 383, 444
De Francesco v. Piney Mining Co. (W. Va.) 86 S. E. 777, 10 N. C. C. A. 1015	85, 111
Deibelkis v. Link-Belt Co., 261 Ill. 454, 104 N. E. 211, 215, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401.....	64, 69, 81, 82, 85, 92, 95, 96, 99, 100, 111
De La Gardelle v. Hampton Co., 167 App. Div. 617, 153 N. Y. Supp. 162, 9 N. C. C. A. 703.....	329
v. Hampton Co., 169 App. Div. 905, 153 N. Y. Supp. 1112.....	336
Delaware, L. & W. R. Co. v. Hardy, 59 N. J. Law, 35, 34 Atl. 986.....	839
Delgado v. California Portland Cement Co., 1 Cal. I. A. C. Dec. 436..	247, 248, 262, 269
DeLong v. Krebs, 1 Cal. I. A. C. Dec. 592.....	399, 410, 412, 806, 811
v. Krebs, 2 Cal. I. A. C. Dec. 256.....	794
v. Krebs, 2 Cal. I. A. C. Dec. 376.....	402
DeMott v. Stone & Webster Const. Co., 1 Cal. I. A. C. Dec. 187.....	689, 713
Denehy v. Panama-Pacific International Exposition Co., 1 Cal. I. A. C. Dec. 109	677, 700, 706
Denker v. Pacific Stevedoring & Ballasting Co., 1 Cal. I. A. C. Dec. 14....	778
Dennehy v. Flinn & Tracy, 1 Cal. I. A. C. Dec. 302.....	272, 641
Denver-Laraine Realty Co. v. Wyoming Trout & Produce Co., 219 Fed. 155, 135 C. C. A. 53.....	110
DePalma v. Home Const. Co., 1 Conn. Comp. Dec. Co. 358.....	124
De Pasquale v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 497	237
v. Mason Mfg. Co. (R. I.) 97 Atl. 816.....	105, 106
Derbeck v. Pfister & Vogel Leather Co., Bul. Wis. Indus. Com. Vol. 1, p. 92	773
Derkinderen v. Rundle Mfg. Co., Rep. Wis. Indus. Com. 1914-15, p. 16...	280
De Rosa v. Fred T. Ley & Co., 1 Conn. Comp. Dec. 75.....	531
Detroit Steel Products Co. v. Jendrus, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 21.....	533
Detwiler v. Kettering, 2 Cal. I. A. C. Dec. 810.....	219

	Page
Devaney v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 233	235
Devanzo v. Jarvis, 1 Conn. Comp. Dec. 435.....	439
Devine, In re, Op. Sol. Dept. of L. 277.....	306
v. Brunswick Balke Co., 270 Ill. 504, 110 N. E. 780.....	774
v. Caledonian R. Co., 1 F. 1105.....	407
v. Delano, 272 Ill. 166, 111 N. E. 742.....	64
De Vito v. Atlantic Insulated Wire & Cable Co., 1 Conn. Comp. Dec. 407..	631
Devlin v. Pelaw Main Collieries, 5 B. W. C. C. 349, C. A.....	247
v. Smith, 1 Cal. I. A. C. Dec. 418.....	702, 717
Devney v. Boston, 223 Mass. 270, 111 N. E. 788.....	183
De Voe v. New York State Rys., 218 N. Y. 318, 113 N. E. 256, affirming 169 App. Div. 472, 155 N. Y. Supp. 12.....	26, 333, 423
Devons v. Anderson & Sons (1911) S. C. 181, C. A.....	762
Dewhurst v. Mather, 1 B. W. C. C. 328, C. A.....	200, 585
DeWitt v. Jacoby Bros., 1 Cal. I. A. C. Dec. 170.....	285, 299, 540
Dexter v. People's Cloak & Suit Co., 2 Cal. I. A. C. Dec. 567.....	721
De Zeng Standard Co. v. Pressey, 86 N. J. Law, 469, 92 Atl. 278....	597, 665
Diaz, In re, 217 Mass. 36, 104 N. E. 384, 5 N. C. C. A. 609.....	822
v. Contractors' Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 150, affirmed 217 Mass. 36, 104 N. E. 384.....	604
Dibilio v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 485	617
Dick v. Knoperbaum, 157 N. Y. Supp. 754.....	742
Dickinson v. Barmak, Limited (1908) L. T. Jo. 403, C. A.....	367
Dickson v. Scott, Limited, 7 B. W. C. C. 1007, C. A.....	154
Dieselma, In re, Op. Sol. Dept. of L. 401.....	572
Dietz v. Big Muddy Coal & Iron Co., 263 Ill. 480, 105 N. E. 289, 5 N. C. C. A. 419.....	64, 100, 101, 102, 111
Dight v. Craster Hall, The, 6 B. W. C. C. 674, C. A.....	753
Diminico v. Fidelity & Casualty Co. of New York, 2 Mass. Wk. Comp. Cases, 328.....	781
Dirken v. Great Northern Paper Co. (Dirken's Case), 110 Me. 374, 86 Atl. 320, Ann. Cas. 1914D, 396.....	81, 82
Diskon v. Bubb, 88 N. J. Law, 513, 96 Atl. 660.....	647, 815, 843
Dissosway v. Jallade, The Bulletin, N. Y., vol. 1, No. 6, p. 13.....	43, 119
Dittmar v. Wilson, Sons & Co., 2 B. W. C. C. 178, C. A.....	128
Dittmat v. V 393, The, 2 B. W. C. C. 178, C. A.....	128
Dixon v. Ambient, The, 5 B. W. C. C. 428, C. A.....	473
Dobbies v. Egypt & Levant S. S. Co., 2 B. W. C. C. 348, Ct. of Sess.....	257
Dobby v. Wilson, Pease & Co., 2 B. W. C. C. 370, C. A.....	604
Dobson v. United Collieries, 8 F. 241, 246, Ct. of Sess.....	559, 564
Dodge v. Boston & Providence R. R., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318.....	235

	Page
Doggett v. Waterloo Taxicab Co., 3 B. W. C. C. 371, C. A.....	179
Doherty, In re, 222 Mass. 98, 109 N. E. 887.....	464, 475, 805, 820, 822
Dolan v. Judson, 1 Conn. Comp. Dec. 362.....	137
v. Massachusetts Employés Ins. Ass'n., 2 Mass. Wk. Comp. Cases, 259	544
Dolbeer & Carson Lumber Co. v. Watson, 1 Cal. I. A. C. Dec. 654.....	228
Dominick v. Brainerd, Shaler & Hall Quarry Co., 1 Conn. Comp. Dec. 655	610
Donahue v. R. A. Sherman's Sons Co. (R. I.) 98 Atl. 109.....	753, 840
Donaldson v. Atchison, T. & S. F. R. Co., 2 Cal. I. A. C. Dec. 699.....	52
Donnachie v. United Collieries (1910) S. C. 503, Ct. of Sess.....	560
Donnelly v. Baird & Co., 45 Scottish Law Rep. 394, 1 B. W. C. C. 95.....	523, 524, 525, 530
Donovan, In re (Donovan's Case) 217 Mass. 76, 79, 104 N. E. 431, Ann. Cas.	
1915C, 778, 4 N. C. C. A. 549.....	376, 821, 822
v. Holy Cross Cemetery, 1 Cal. I. A. C. Dec. 510.....	640
Dooley v. Sullivan, 218 Mass. 597, 106 N. E. 604.....	109
Dorrance v. New England Pin Co., 1 Conn. Comp. Dec. 24....	323, 348, 415, 431
Dothie v. MacAndrew & Co., 1 B. W. C. C. 308, C. A.....	576
Dotzauer v. Strand Palace Hotel, 3 B. W. C. C. 387, C. A.....	307, 462
Dougal v. Westbrook, 6 B. W. C. C. 705, C. A.....	403
Dougherty v. Wisconsin, Bul. Wis. Indus. Com. vol. 1, p. 99.....	645
Doughton v. Hickman, Limited, 6 B. W. C. C. 77, C. A.....	306
Douglas v. J. & J. Drug Co., 2 Cal. I. A. C. Dec. 164.....	704
v. Kimbol, 1 Cal. I. A. C. Dec. 543.....	411, 571
v. United Mineral Mining Co., 2 W. C. C. 15, C. A.....	392, 561, 563
Dowd v. Bennie & Son, 40 S. L. R. 239.....	523
v. Bennie & Son, 5 F. 268, Ct. of Sess.....	530
Dowling v. New York Cent. & H. R. R. Co., The Bulletin, N. Y. vol. 1,	
No. 10, p. 17.....	369, 567
Downer v. Lasky Feature Play Co., 2 Cal. I. A. C. Dec. 316.....	548, 554
Doyle v. Cork Steam Packet Co., 5 B. W. C. C. 350, C. A.....	663
Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 N. E. 999, 10 N. C. C.	
A. 475.....	24, 64, 406, 416, 464
Drapeau v. Stoddard, 1 Conn. Comp. Dec. 590.....	633
Draper v. Lore & Co., 1 Cal. I. A. C. Dec. 132.....	484
Dray, In re, Op. Sol. Dept. of L. 540.....	651
Driscoll v. Cushman's Exp. Co., Mass. Wk. Comp. Cases (July 1, 1912-	
June 20, 1913) pp. 125, 130.....	461
Drolshagen v. Milwaukee Pattern & Mfg. Co., Wis. Indus. Com. 1914-15,	
p. 25.....	314
Dube v. Clayton Bros., 1 Conn. Comp. Dec. 441.....	311, 756
Duberly v. Mace, 6 B. W. C. C. 82, C. A.....	576, 577
Ducy v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 513..	
	684, 698

	Page
Duden v. City & County of San Francisco, 2 Cal. I. A. C. Dec. 1067.....	348
Duer, In re, Op. Sol. Dept. of L. 507.....	573
Duffy, In re, Op. Sol. Dept. of L. 594.....	250
Dufrene v. Risdon Tool & Machine Co., 1 Conn. Comp. Dec. 411.....	295
Duke v. E. Horton & Son, 1 Conn. Comp. Dec. 673.....	454
Dundee Steam Trawling Co. v. Robb, 48 S. L. R. 13.....	479
Dunham v. Clare, 2 K. B. 292, C. A.....	491, 505, 508
v. Phelan & Sullivan, The Bulletin, N. Y., vol. 1, No. 9, p. 30.....	720
Dunnigan v. Cavan & Lind, 4 B. W. C. C. 386, Ct. of Sess.....	530
v. Cavan & Lind (1911) S. C. 579, Ct. of Sess.....	507
Dupreis v. Holt Lumber Co., Rep. Wis. Indus. Com. 1914-15, p. 32.....	496
Duprey v. Maryland Casualty Co., 219 Mass. 189, 106 N. E. 686.....	599, 608, 617, 802, 837
Durham v. Brown Bros. Co., 1 F. 278, Ct. of Sess.....	388, 389
Durney, In re, 222 Mass. 461, 111 N. E. 166.....	584
Durrant v. Smith & Co., 7 B. W. C. C. 415, C. A.....	467
Dutton v. Priest (Dutton's Case) 67 Fla. 370, 65 South. 282.....	62, 80
Dyer v. James Black Masonry & Contracting Co., Mich. Wk. Comp. Cases (1916) 52, 158 N. W. 959.....	201, 215
Dyke v. Conlon, 2 Cal. I. A. C. Dec. 814.....	740

E

Eagle Chemical Co. v. Nowak, 161 Wis. 446, 154 N. W. 636.....	823
Earnshaw v. Lancashire & Y. R. Co., 115 L. T. Jour. 89, 5 B. W. C. C. 28..	384
Eastman v. State Compensation Insurance Fund, 2 Cal. I. A. C. Dec. 390..	184, 423
Eaton, In re, Op. Sol. Dept. of L. 183.....	345
v. Evans, 5 B. W. C. C. 82, C. A.....	756
Eaves v. Blaenclydach Colliery Co., 2 B. W. C. C. 329, C. A.....	293, 294, 603
Ebner, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com., p. 47.....	509
Eby v. Weaver, 2 Cal. I. A. C. Dec. 715.....	706
Eccles v. Scovill Mfg. Co., 1 Conn. Comp. Dec. 241.....	531
Edgley v. Firth, 1 Cal. I. A. C. Dec. 651.....	346, 386
Edmonds, In re, Op. Sol. Dept. of L. 259.....	299
Edmunds v. Peterston, The, 5 B. W. C. C. 157, C. A.....	392
Edwards v. International Coal Co., 5 W. C. C. 21.....	400
v. Wingham Agricultural Implements Co., 6 B. W. C. C. 511, C. A....	378
Edwardson v. Jarvis Lighterage Co., 168 App. Div. 368, 153 N. Y. Supp. 391	34, 357, 475
Egerton v. Moore, 5 B. W. C. C. 284, C. A.....	758
Ehrhart v. Industrial Acc. Commission of California (Cal.) 158 Pac. 193..	768
Elde v. Horn, Bulletin No. 1, Ill., p. 44.....	693
Eke v. Hart-Dyke, 3 B. W. C. C. 482, C. A.....	541, 751

	Page
Eldorado Coal & Mining Co. v. Mariotti, 131 C. C. A. 359, 215 F. 51, 7 N. C. C. A. 966.....	92, 734
Eldredge v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 639	628
Eldridge v. Endicott-Johnson & Co., The Bulletin, N. Y., vol. 1, No. 8, p. 8	493
Ellett, In re, Op. Sol. Dept. of L. 112.....	187
Elliott v. Rex, 6 W. C. C. 27.....	427
Ellis v. Ellis & Co., 7 W. C. C. 97, C. A.....	180
v. Fairfield Shipbuilding & Engineering Co., 6 B. W. C. C. 308, Ct. of Sess.....	752
v. U. S., 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589	183
Ellmore, In re, Op. Sol. Dept. of L. 245.....	299
Ely v. Maryland Casualty Co., 1 Cal. I. A. C. Dec. 335.....	651, 706, 799
v. M. S. Brooks & Sons, 1 Conn. Comp. Dec. 390.....	435, 443
Emerson v. Massachusetts Employes' Ins. Ass'n, 2 Mass. Wk. Comp. Cases, 181	222
Emmert v. Trustees of Preston School of Industry, 1 Cal. I. A. C. Dec. 17..	283
Employers' Assur. Corp. v. California Industrial Acc. Commission, 2 Cal. I. A. C. Dec. 452, 453, 170 Cal. 800, 151 Pac. 423, 424.....	314, 775, 826, 828
Employers' Liability Assur. Corp., In re, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, 4 N. C. C. A. 522.....	29, 267, 321, 322, 324, 326, 426, 432
Encinas, In re, Op. Sol. Dept. of L. 601.....	249
Englebreton v. Indus. Acc. Com., 2 Cal. I. A. C. Dec. 449.....	314, 775
v. Indus. Acc. Com., 170 Cal. 793, 151 Pac. 421, 10 N. C. C. A. 545....	310, 772, 774, 776, 826, 834
English v. Cain, 2 Cal. I. A. C. Dec. 399.....	142, 204, 206, 207, 570, 809
Ennis v. Hanna D. Co., 148 Wis. 655, 134 N. W. 1051.....	825
Erickson, In re, Op. Sol. Dept. of L. (1915) 774.....	811
v. Empire Laundry Co., 1 Cal. I. A. C. Dec. 612.....	419
v. Massachusetts Employes' Ins. Ass'n, 2 Mass. Wk. Comp. Cases, 149 (decision of Com. of Arb.).....	543, 544
v. Peppard & Burrill, Rep. Wis. Indus. Com. 1914-15, p. 27.....	214
Erie R. Co. v. Williams, 233 U. S. 685, 34 Sup. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097.....	45
Espy v. Crossman, 2 Cal. I. A. C. Dec. 328.....	381, 383, 412
Estell v. Los Angeles Ice & Cold Storage Co., 1 Cal. I. A. C. Dec. 501..	809, 810
Estorga, In re, Op. Sol. Dept. of L. 566.....	250
Etherington & Lancashire & Yorkshire Acc. Ins. Co., In re, 1 K. B. 591, C. A.....	492
Etienne, In re, Op. Sol. Dept. of L. 163.....	345
Euman v. Dalziel & Co., 6 B. W. C. C. 900, Ct. of Sess.....	482
Evanhoff v. State Industrial Acc. Commission, 78 Or. 503, 154 Pac. 106....	24, 63, 66, 67, 70, 73, 94, 97

	Page
Evans, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com., p. 55	251
v. Cory Bros. & Co., 5 B. W. C. C. 272, C. A.....	601
v. Dood, 5 B. W. C. C. 305, C. A.....	542
v. Holloway, 7 B. W. C. C. 248, C. A.....	385
v. Pacific Coast Casualty Co., 1 Cal. I. A. C. Dec. 140.....	707
v. Penwyllt Dinas Silica Brick Co., 4 W. C. C. 101.....	214
Evenson, In re, Op. Sol. Dept. of L. 187	345
Everitt v. Eastaff & Co., 6 B. W. C. C. 184, C. A	401
Eydmann v. Premier Accumulator Co., 8 B. W. C. C. 121, C. A	757
Ezykowski v. F. B. Dashiell Co., 1 Conn. Comp. Dec. 236	692

F

Fabbian v. C. W. Blakeslee & Sons, 1 Conn. Comp. Dec. 305	240, 655, 790
Fahey, In re, Op. Sol. Dept. of L. 283	365
Fair, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 83	299
Fairchild v. Pennsylvania R. Co., 170 App. Div. 135, 155 N. Y. Supp. 751 46, 825	
Falconer v. London & Glasgow Engineering & Iron Shipbuilding Co., 3 F. 564, Ct. of Sess.....	419, 443
Fannah v. Midland Great Western Ry., 4 B. W. C. C. 440, C. A	470
Farinholt v. Luckhard, 90 Va. 936, 21 S. E. 817, 44 Am. St. Rep. 953	186
Farley v. Koch, 2 Cal. I. A. C. Dec. 986	219
Farmer v. Barber, 3 Cal. I. A. C. Dec. 21	844
v. Stafford, Allen & Sons, 4 B. W. C. C. 223, C. A.....	311
Farrell v. Casualty Co. of America, 2 Mass. Wk. Comp. Cases, 423	347, 411
Farris v. Potomac Oil Co., 2 Cal. I. A. C. Dec. 487	133
Farrish v. Nugent, 1 Cal. I. A. C. Dec. 98	486
Fasulo v. Andrew B. Hendryx Co., 1 Conn. Comp. Dec. 29	610
Favero v. Board of Public Library Trustees, 1 Cal. I. A. C. Dec. 225	519
Favro v. Superior Coal Co., 188 Ill. App. 203	105, 111
Feder v. Iowa State Traveling Men's Ass'n, 107 Iowa, 538, 78 N. W. 252, 43 L. R. A. 693, 70 Am. St. Rep. 212.....	283
Federal Act, Op. Sol. Dept. of L. p. 779	341
p. 781	782
p. 783	250
p. 784	248
p. 785	730
p. 786	647
p. 794	648
p. 795	648
Federal Rubber Mfg. Co. v. Havolic, 162 Wis. 341, 156 N. W. 143	
25, 285, 325, 409, 417, 418, 443	
Feehan v. Tevis, 2 Cal. I. A. C. Dec. 434	194, 195, 206

	Page
Feinman v. Albert Mfg. Co., 170 App. Div. 147, 155 N. Y. Supp. 909.....	631
Felsen v. Atchison, T. & S. F. R. Co., 3 Cal. I. A. C. Dec. 11.....	598
Feltis, In re, Op. Sol. Dept. of L. 123.....	342
Fenn v. Miller, 2 W. C. C. 55, C. A.....	129
Fennah v. Midland Great Western Ry., 4 B. W. C. C. 440, C. A.....	416, 461
Fensler v. Associated Supply Co., 1 Cal. I. A. C. Dec. 447.....	425
Fenton, In re, Op. Sol. Dept. of L. 127.....	342
v. J. Thorley & Co. (1903) A. C. 443, 19 L. T. R. 684.....	279, 288
v. Thorley & Co., 5 W. C. C. 1, 6, 9, H. L.....	276, 278, 288, 295, 315
Fenz, In re, Op. Sol. Dept. of L. 116.....	187
Fergusson v. Royal Indemnity Co., 1 Cal. I. A. C. Dec. 11.....	366, 411
Fergus v. Russel, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120.....	64
Ferguson v. Barclay Sons & Co., 5 F. 105, Ct. of Sess.....	129
Fernandez, In re, Op. Sol. Dept. of L. 187.....	344, 345
Ferranti v. Kennedy, 1 Conn. Comp. Dec. 196.....	180
Fidelity & Deposit Co. of Maryland v. Industrial Acc. Commission, 2 Cal. I. A. C. Dec. 973, 171 Cal. 728, 154 Pac. 834.....	514, 551, 560, 826
Field v. New York, N. H. & H. R. R. Co., 1 Conn. Comp. Dec. 199.....	580
Fierro's Case, In re, 223 Mass. 378, 111 N. E. 957.....	259, 263, 270, 766, 772, 805, 822
Fife Coal Co. v. Wallace, 2 B. W. C. C. 264, Ct. of Sess.....	270
Filer & S. Co., In re, 146 Wis. 629, 132 N. W. 584.....	57
Filler, In re, Op. Sol. Dept. of L. (1915) 663.....	770
Filliger v. Allen, 1 Conn. Comp. Dec. 35.....	247, 566
Findley v. Judah Co., 2 Cal. I. A. C. Dec. 760.....	374
Fineblum v. Singer Sewing Mach. Co., 1 Conn. Comp. Dec. 123.....	168
Finlay v. Tullamore Guardians, 7 B. W. C. C. 973, C. A.....	124, 541
Finley v. San Francisco Stevedoring Co., 2 Cal. I. A. C. Dec. 174.....	293, 681
Finn v. Detroit, Mt. Clemens & Marine City Ry., Mich. Wk. Comp. Cases (1916) 222.....	262
Fiocca v. Dillon, The Bulletin, N. Y., vol. 1, No. 6, p. 13.....	352
Fiorio v. Ferrie, 1 Conn. Comp. Dec. 459.....	123, 728, 803
First Annual Reports Industrial Accident Commission will be found in this table under "Oregon."	
First Nat. Bank v. Industrial Commission, 161 Wis. 526, 154 N. W. 847...	772, 780, 823, 829
Fischer v. Union Ice Co., 2 Cal. I. A. C. Dec. 72.....	303, 621
Fisco v. Hazel Gold Mining Co., 1 Cal. I. A. C. Dec. 30.....	555
Fise v. Andrew B. Hendryx Co., 1 Conn. Comp. Dec. 29.....	610
Fisher, In re, 220 Mass. 581, 108 N. E. 361.....	290, 830
v. Dunshee, 2 Cal. I. A. C. Dec. 849.....	218
Fishering v. Daly Bros., 2 Cal. I. A. C. Dec. 940.....	435
v. Pillsbury (Cal.) 158 Pac. 215.....	442
Fitt v. Central Illinois Public Service Co., Bulletin No. 1, Ill., p. 129..	100, 725

	Page
Fitzgerald v. Clarke & Son, 1 B. W. C. C. 197, C. A.....	443
v. Lozier Motor Co., 187 Mich. 660, 154 N. W. 67.....	466, 467, 773, 829
v. Manchester Liners (1910) A. C. 498, 500.....	347
v. W. G. Clarke & Son, 2 K. B. 796, 77 L. J. K. B. 1018....	322, 323, 324, 408
Fitzpatrick, In re, Op. Sol. Dept. of L.....	306
v. Hindley Field Colliery Co., 4 W. C. C. 7, C. A.....	374
Flaherty v. Locomobile Co. of America, 1 Conn. Comp. Dec. 354.....	486
Flanagan v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 441	698
Flannery v. O'Brien, 1 Conn. Comp. Dec. 264.....	797
Flash v. Pattridge Metal Equipment Co., Bulletin No. 1, Ill. p. 46.....	106
Fleet v. Johnson & Sons, 6 B. W. C. C. 60, C. A.	468
v. Johnson & Sons, 6 B. W. C. C. 633.....	504
Fleming v. Massachusetts Employés Ins. Ass'n, 2 Mass. Wk. Comp. Cases, 411	306
Flemmings, In re, Op. Sol. Dept. of L. 225.....	353
Fletcher, In re, Op. Sol. Dept. of L. 744.....	358
v. Duchess, The (1911) A. C. 671.....	469, 474, 779
v. Duchess, The, 3 B. W. C. C. 239, C. A.....	449
v. Duchess, The, 4 B. W. C. C. 317, H. L.....	449
Flint v. Coronado Beach Co., 2 Cal. I. A. C. Dec. 395.....	353, 435
Floccher v. Fidelity & Deposit Co. of Maryland, 221 Mass. 54, 108 N. E. 1032	526, 625, 630
Flora, In re, Op. Sol. Dept. of L. 226.....	291
Flotat v. Union Hardware Co., 1 Conn. Comp. Dec. 5.....	305, 727
Fly v. San Diego Transfer Co., 2 Cal. I. A. C. Dec. 714.....	702, 717
Flynn v. Burgess (1914) W. C. & Ins. Rep. 238, C. A.....	663
Fobes v. Killeen, Bulletin No. 1, Ill. p. 68.....	316
Fogarty v. National Biscuit Co., The Bulletin, N. Y., vol. 1, No. 6, p. 9..	312, 333
Fogg, In re, Op. Sol. Dept. of L. 509.....	651
Foley v. A. T. Demarest & Co., 1 Conn. Comp. Dec. 661.....	701, 779
v. Detroit United Ry. (Mich.) 157 N. W. 45.....	581, 805
Fonseca v. Cunard S. S. Co., 153 Mass. 553, 555, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660.....	159
Fontes v. Scott's Exp. Co., 2 Cal. I. A. C. Dec. 829.....	725, 726
Forbes v. Brown, 1 Conn. Comp. Dec. 202.....	563
v. Humboldt County, 2 Cal. I. A. C. Dec. 887.....	132, 720
Ford v. Gaiety Theatre Co., 7 B. W. C. C. 197, C. A.....	757
Forde, In re, Op. Sol. Dept. of L. 309.....	365
Foreman Bros. Banking Co. v. George Lanz & Co., Bulletin No. 1, Ill., p. 81	396
Forgues v. Southern Pac. Co., 2 Cal. I. A. C. Dec. 1038.....	701
Forrest v. Roper Furniture Co., 267 Ill. 331, 108 N. E. 328.....	735
v. Roper Furniture Co., 187 Ill. App. 504.....	304
Forte v. Waterbury Mfg. Co., 1 Conn. Comp. Dec. 685.....	700

	Page
Fortino v. Merchants' Dispatch Transp. Co. (Sup.) 156 N. Y. Supp. 262...	632
Foster v. Shepherd, 258 Ill. 164, 101 N. E. 411, 45 L. R. A. (N. S.) 167, Ann. Cas. 1914B, 572.....	774
Foth v. Macomber & Whyte Rope Co., 161 Wis. 549, 154 N. W. 369, 11 N. C. C. A. 599.....	27, 190
Foust v. Hartford Builders' Finish Co., 1 Conn. Comp. Dec. 512.....	481
Fowler, In re, Op. Sol. Dept. of L. 180.....	345
v. Risedorph Bottling Co., The Bulletin, N. Y., vol. 1, No. 7, p. 7.....	495
v. Zellerbach-Levison Co., 1 Cal. I. A. C. Dec. 609.....	576, 668
Fox v. Masons' Fraternal Acc. Ass'n, 96 Wis. 390, 394, 395, 71 N. W. 363..	72
v. Union Oil Co. of Cal., 2 Cal. I. A. C. Dec. 414.....	765
Frabbie v. Freeburg, 1 Conn. Comp. Dec. 614.....	486
Fralin v. United States Casualty Co., 2 Mass. Wk. Comp. Cases, 758.....	512
Frandsen v. J. Llewellyn Co., 3 Cal. I. A. C. Dec. 23.....	144, 767
Frankfort General Ins. Co. v. Pillsbury (Cal.) 159 Pac. 150.....	587, 598, 613, 792, 800, 824, 834
Fraser v. Great North of Scotland R. Co., 3 F. 908, Ct. of Sess.....	762
Frazer v. Riddell & Co., 7 B. W. C. C. 841, Ct. of Sess.....	460
Frech v. San Joaquin Light & Power Corp., 2 Cal. I. A. C. Dec. 948.....	303
Fredenburg v. Empire United Rys., 168 App. Div. 618, 154 N. Y. Supp. 351 593, 626, 633	633
Fred E. Sanders, The (D. C.) 208 Fed. 724.....	44
Fred E. Sanders, The (D. C.) 212 Fed. 545, 5 N. C. C. A. 97.....	739
Freeland v. Macfarlane, Lang & Co., 2 F. 832, Ct. of Sess.....	601, 602
Freeman v. East Jordan & S. R. Co. (Mich.) 158 N. W. 204.....	115
Freid v. Smith Lumber Co., 2 Cal. I. A. C. Dec. 117.....	565, 569
French v. Cloverleaf Coal Mining Co., 190 Ill. App. 400.....	105, 112
v. Underwood, 5 W. C. C. 119.....	225
Frey v. Kerens-Donnewald Coal Co., 271 Ill. 121, 110 N. E. 824.....	467
Friscia v. Drake Bros. Co., 167 App. Div. 496, 153 N. Y. Supp. 392....	230, 231
Frith v. Louisianian, The, 5 B. W. C. C. 410, C. A.....	452
Fry v. Cheltenham Corp., 5 B. W. C. C. 162, C. A.....	752, 756
Fryer v. Mt. Holly Water Co., 87 N. J. Law, 57, 93 Atl. 679.....	627
Fumiciello's Case, 219 Mass. 488, 107 N. E. 349.....	471
Furness, Withy & Co. v. Bennett, 3 B. W. C. C. 195, C. A.....	607
Furniss v. Gartside & Co., 3 B. W. C. C. 411, C. A.....	401
Furnival v. Johnson's Iron & Steel Co., 5 B. W. C. C. 43, C. A.....	471, 483

G

Gabriel v. Northwestern Pac. R. Co., 2 Cal. I. A. C. Dec. 129.....	614
Gaherty v. International Silver Co., 1 Conn. Comp. Dec. 403.....	497, 756
Gailey v. Peet Bros. Mfg. Co., 98 Kan. 53, 157 Pac. 431.....	597, 613, 763
Galante v. Mammoth Copper Mining Co. of Maine, 2 Cal. I. A. C. Dec. 732 613, 657	732

	Page
Galelli v. Magnesite Products Co., The Bulletin, N. Y., vol. 1, No. 6, p. 12..	178
Gallagher, In re, 219 Mass. 140, 106 N. E. 558.....	263
v. Federal Transfer Co., 1 Cal. I. A. C. Dec. 39.....	178
v. Los Angeles, 2 Cal. I. A. C. Dec. 26.....	588
v. New York Cent. R. Co., The Bulletin, N. Y., vol. 1, No. 11, p. 21..	120
v. Western Steam Nav. Co., 1 Cal. I. A. C. Dec. 525.....	39
Gallant v. Gabir, The, 6 B. W. C. C. 9, C. A.....	389
Gallup v. Pomona, 1 Cal. I. A. C. Dec. 242.....	346, 354, 362
Gambling v. Haight, 59 N. Y. 354.....	164, 731
Gane v. Norton Hill Colliery Co., 2 B. W. C. C. 42, C. A.....	374, 828
v. Norton Hill Colliery Co., 2 K. B. 439.....	376
Ganley v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 159	357, 449
Garbroski's Case, 111 Iowa, 496, 82 N. W. 959, 56 L. R. A. 570, 82 Am.	
St. Rep. 524.....	79
Garcia, In re, Op. Sol. Dept. of L. 611.....	248
v. Atchison, T. & S. F. R. Co., 2 Cal. I. A. C. Dec. 741.....	54
v. Industrial Accident Commission of California, 2 Cal. I. A. C. Dec.	
630, 171 Cal. 57, 151 P. 741.....	257, 268
Gardiner v. State of California Printing Office, 1 Cal. I. A. C. Dec. 21.....	
	370, 692, 697
Gardner v. Horseheads Const. Co., 171 App. Div. 66, 156 N. Y. Supp. 899	
	42, 783, 795, 827
Gare v. Vorton Hill Colliery Co., 2 K. B. 539.....	365
Gariella v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases,	
237	543
Garls v. Pekin Cooperage Co., Bulletin No. 1, Ill., p. 75.....	434
Garratt-Callahan Co. v. Industrial Accident Commission of State of Cali-	
fornia, 2 Cal. I. A. C. Dec. 953, 171 Cal. 334, 153 Pac. 239.....	821, 834
Garsia, In re, Op. Sol. Dept. of L. 166.....	344
Gaskill v. Voorhies Co., 2 Cal. I. A. C. Dec. 1020.....	386, 424
Gaynor, In re, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363, 4 N. C.	
C. A. 502.....	200
Geary v. Ginzler & Co., 6 B. W. C. C. 72, C. A.....	405
Georgandas v. Panama-Pacific International Exposition, 2 Cal. I. A. C.	
Dec. 520.....	198
George v. Glasgow Coal Co. (1909) A. C. 123.....	569
v. Glasgow Coal Co., 2 B. W. C. C. 125, 129, H. L.....	560, 564
George W. Helme Co. v. Middlesex Common Pleas, 84 N. J. Law, 531, 87	
Atl. 72, 4 N. C. C. A. 674.....	633
Gerber v. Central Council of Stockton, 2 Cal. I. A. C. Dec. 580....	14, 119, 803
Gerow, In re, Op. Sol. Dept. of L. 282.....	378
Gertel v. H. W. Dorman & Co., 1 Conn. Comp. Dec. 616.....	106, 168
Getzlaff v. Enloe, 3 Cal. I. A. C. Dec. 18.....	219, 348, 351

	Page
Giachas v. Cable Co., 190 Ill. App. 285.....	607
Giacobbia v. Kerno-Domewald Coal Co., Bulletin No. 1, Ill., p. 196....	348, 410
Giampolini-Lombardi Co. v. Employers' Liability Assur. Co., 2 Cal. I. A. C. Dec. 1010.....	413, 478, 516
Gibney v. Caspar Lumber Co., 2 Cal. I. A. C. Dec. 825.....	612
Gibson v. Aves, 2 Cal. I. A. C. Dec. 185.....	466
v. Dunkerley Bros., 3 B. W. C. C. 345, C. A.....	156
Gignac v. Studebaker Corp., 186 Mich. 576, 152 N. W. 1037.....	569
Gilbert v. Nizam, The, 3 B. W. C. C. 455, C. A.....	450
v. Nizam, The, 79 L. J. K. 1172.....	469
Gilbey v. Great Western R. Co., 102 L. T. 202, 3 B. W. C. C. 135.....	776, 777
Gilfillen, In re, Op. Sol. Dept. of L. 654.....	771
Gilkey, In re, Op. Sol. Dept. of L. 288.....	359
Gill, In re, Op. Sol. Dept. of L. 170.....	345
Gillen v. Ocean Accident & Guarantee Corp., 2 Mass. Wk. Comp. Cases, 812	600
Gillen's Case, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A, 371.....	599
Gilliland v. Kearns, 1 Conn. Comp. Dec. 277.....	683
Gilmore, Ex parte, 3 Eng. Com. B. 967.....	266
v. Sexton, 1 Cal. I. A. C. Dec. 257.....	210
Gilmour v. Dorman, Long & Co., 4 B. W. C. C. 279, C. A.....	371
Gilroy v. Mackie (Leith Distress Committee) 2 B. W. C. C. 269, Ct. of Sess.	182, 663
Gilson, In re, Op. Sol. Dept. of L. 326.....	399
Ginther v. Knickerbocker Co., 1 Cal. I. A. C. Dec. 458.....	206, 207, 590
Giovanellie v. C. W. Blakeslee & Sons, 1 Conn. Comp. Dec. 164.....	610
Giovanni, In re, Op. Sol. Dept. of L. 287.....	374
Girten v. National Zinc Co., 98 Kan. 405, 158 Pac. 33.....	654, 815
Gitting's Case, 2 Ohio St. 21.....	72
Glasgow Coal Co. v. Sneddon, 7 F. 485, Ct. of Sess.....	546
Glasgow & S. W. R. Co. v. Laidlaw, 2 F. 708, Ct. of Sess.....	551
Glass, In re, Op. Sol. Dept. of L. 393.....	572
Gleisner v. Gross & Herbener, 170 App. Div. 37, 155 N. Y. Supp. 946.....	175, 176, 330, 829
Glidder v. Haliver, The Bulletin, N. Y., vol. 1, No. 4, p. 10.....	674
Globe Indemnity Co. v. Terry, 2 Cal. I. A. C. Dec. 682.....	305
Gloyd, In re, Vol. 1, No. 7, Bul. Ohio Indus. Comp. p. 79.....	242, 243
Goering v. Brooklyn Mining Co., 2 Cal. I. A. C. Dec. 141....	174, 373, 385, 558
Golden, In re, Op. Sol. Dept. of L. 68.....	187
Golden, In re, Op. Sol. Dept. of L. 159.....	344
v. Delta Creamery Co., 2 Cal. I. A. C. Dec. 744.....	213, 363
Golder v. Caledonian R. Co., 5 F. 123, Ct. of Sess.....	509, 511
Goldstein v. Centre Iron Works, 167 App. Div. 526, 153 N. Y. Supp. 224...	821
Gomez v. Thomas & Ettinger, 2 Cal. I. A. C. Dec. 877.....	789
Gonzales, In re, Op. Sol. Dept. of L. 333.....	371

	Page
Gonzales v. Lee Moor Contracting Co., 2 Cal. I. A. C. Dec. 302.....	392, 456
Gooding v. Ott (W. Va.) 87 S. E. 863.....	33, 34, 38, 99
Goodlet v. Caledonian R. Co., 4 F. 986.....	382
Goodley, In re, Op. Sol. Dept. of L. 619, overruled, Op. Sol. Dept. of L. 648	768
Goodwin v. Libby, McNeil & Libby, 2 Cal. I. A. C. Dec. 211.....	420
Gordon v. Eby, 1 Cal. I. A. C. Dec. 16.....	373
v. Evans, 1 Cal. I. A. C. Dec. 94.....	589, 618, 681, 795
v. San Francisco-Oakland Terminal Rys., 1 Cal. I. A. C. Dec. 232....	557
Gorley v. Backworth Collieries, 7 W. C. C. 19.....	279, 542
Gorman v. George Gibson & Co. (1910) S. C. 317, 47 S. L. R. 394.....	126
Gorrell v. Battelle, 93 Kan. 370, 144 Pac. 244.....	107, 599, 609, 653, 674, 822
Goslan v. Gillies & Co. (1907) S. C. 68, Ct. of Sess.....	405
Gough v. Crawshay Bros., 1 B. W. C. C. 374, C. A.....	577
Gould, In re (Gould's Case) 215 Mass. 480, 486, 102 N. E. 693, Ann. Cas.	
1914D, 372, 4 N. C. C. A. 60.....	32, 36, 274
Gove v. Royal Indemnity Co., 223 Mass. 187, 111 N. E. 702.....	30, 172, 591, 638
Grace v. Adams, 100 Mass. 505, 507, 97 Am. Dec. 117, 1 Am. Rep. 131....	159
Grady v. Fidelity & Deposit Co. of Maryland, Mass. Wk. Comp. Cases, 678	579
Graf v. Brooklyn Rapid Transit Co., The Bulletin, N. Y., vol. 1, No. 6, p. 9	314
Graham, In re, Op. Sol. Dept. of L. 629.....	769
v. Barr & Thornton, 6 B. W. C. C. 412, Ct. of Sess.....	363, 370, 372
v. Bay Counties Exp. Co., 2 Cal. I. A. C. Dec. 37.....	395
v. Daly Bros., 2 Cal. I. A. C. Dec. 794.....	422
Grandfield v. Bradley Smith Co., 1 Conn. Comp. Dec. 479.....	397, 443, 563
Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St.	
Rep. 123	774
Grand Rapids Lumber Co. v. Blair (Mich.) 157 N. W. 29.....	30, 60
Grand Trunk R. Co. of Canada v. Knapp (C. C. A.) 233 Fed. 950....	16, 46, 742
Grant, In re, Op. Sol. Dept. of L. 94.....	185, 186, 187
Grant, In re, Op. Sol. Dept. of L. 660.....	771
v. Narlian, 1 Cal. I. A. C. Dec. 482.....	478
Graves v. Connecticut Mills Co., 1 Conn. Comp. Dec. 657.....	349, 414
v. Pacific Coast Casualty Co., 2 Cal. I. A. C. Dec. 22.....	145
Gray, In re, Op. Sol. Dept. of L. 118.....	342
Gray, In re, Op. Sol. Dept. of L. 648, overruling Op. Sol. Dept. of L. 619	768
Gray's Appeal, 80 Conn. 248, 251, 67 Atl. 891.....	824
Great Northern R. Co. v. Dawson, 7 W. C. C. 114, C. A.....	576
v. Whitehead, 4 W. C. C. 39, K. B. D.....	156
Great Western Power Co. v. Pillsbury, 2 Cal. I. A. C. Dec. 482.....	493
v. Pillsbury, 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 466.....	
548, 557, 822, 823, 826, 833	
v. Pillsbury, 171 Cal. 69, 151 Pac. 1136, L. R. A. 1916A, 281, 11 N. C.	
C. A. 493.....	493, 515
Green, In re, Op. Sol. Dept. of L. 237.....	300
v. Alameda County, 2 Cal. I. A. C. Dec. 636.....	656

	Page
Green v. Appleton Woolen Mills, 162 Wis. 145, 155 N. W. 958.....	105
v. Burke, 1 Cal. I. A. C. Dec. 591.....	718
Greene v. Caldwell, 170 Ky. 571, 186 S. W. 648, 649.....	
64, 74, 78, 79, 80, 86, 97, 98, 785, 786	
v. Greene, 2 Gray (Mass.) 361, 364, 61 Am. Dec. 454.....	289
v. Shaw, 5 B. W. C. C. 573, C. A.....	360, 418, 423
v. Shawe, 2 Ir. 430, 5 B. W. C. C. 530.....	376
Greenock v. Drake, 2 Cal. I. A. C. Dec. 379.....	582, 583, 586, 715
Greer v. Lindsay Thompson, Limited, 5 B. W. C. C. 586, C. A., 46 Ir. L. T. 89.....	391, 397
Gregg v. Frankfort General Ins. Co., 2 Mass. Wk. Comp. Cases, 581.....	544
Gregory v. Merrill Metallurgical Co., 1 Cal. I. A. C. Dec. 408.....	609, 711
Gregutis v. Waclark Wire Works, 86 N. J. Law, 610, 92 Atl. 354.....	5, 61, 108, 731, 732
v. Waclark Wire Works (N. J.) 91 Atl. 98.....	240
Griffin v. A. Roberson & Sons, The Bulletin, N. Y., vol. 1, No. 10, p. 18	311, 443, 510
Griffiths v. American Bitumastic Enamels Co., The Bulletin, N. Y., vol. 1, No. 7, p. 8.....	43
v. Atkinson, 5 B. W. C. C. 345, C. A.....	753
Griga v. London & Northwestern Ry., 3 B. W. C. C. 116.....	675
Griggs v. Gamecock, The, 6 B. W. C. C. 15, C. A.....	400
Grigsby v. Atchison, T. & S. F. R. Co., 2 Cal. I. A. C. Dec. 748.....	53
Grime v. Fletcher, 8 B. W. C. C. 69, C. A.....	509
Grinnell v. Wilkinson (R. I.) 98 Atl. 103.....	37, 840
Grischuck v. S. Borden & Co., 1 Conn. Comp. Dec. 633.....	122
Gron v. Massachusetts Employés Ins. Ass'n, 2 Mass. Wk. Comp. Cases, 736	244
Grove v. Michigan Paper Co., 184 Mich. 449, 151 N. W. 554.....	823
Groves v. Burroughes & Watts, 4 B. W. C. C. 185, C. A.....	462, 467
Grybowski v. Erie R. Co., 88 N. J. Law, 1, 95 Atl. 764.....	49
Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116.....	72
Guerin, In re, Op. Sol. Dept. of L. 324.....	371
Guerrieri v. Industrial Ins. Commission, 84 Wash. 266, 146 Pac. 608, 8 N. C. C. A. 440.....	328, 340
Guilfoyle v. Fennessy, 6 B. W. C. C. 453, C. A.....	455
Guisse v. Oliver, 51 Ark. 356, 11 S. W. 515.....	186
Gulf & B. V. R. Co. v. Berry, 31 Tex. Civ. App. 408, 72 S. W. 1049.....	186
Gurney v. Los Angeles Soap Co., 1 Cal. I. A. C. Dec. 163.....	303, 471, 479
Gutheil v. Consolidated Gas Co. of New York, 94 Misc. Rep. 690, 158 N. Y. Supp. 622.....	338
Guthrie v. Boase Spinning Co., 3 F. 769.....	559
Gylfe v. Suburban Ice Co., Bulletin No. 1, Ill., p. 167.....	331, 352, 411

H

	Page
Haberski v. Peck, Stowe & Wilcox Co., 1 Conn. Comp. Dec. 278.....	725
Hackford v. Veeder & Brown, The Bulletin, N. Y., vol. 1, No. 8, p. 10....	291
Hackney v. School Board of City of New Britain, 1 Conn. Comp. Dec. 160	667
Hade v. Simmons (Minn.) 157 N. W. 506.....	162
Haffemayer v. United Keanograph Film Mfg. Co., 1 Cal. I. A. C. Dec. 620	552, 562
Hagen v. Weinstein Co., 1 Cal. I. A. C. Dec. 615.....	499
Hakala v. Jacobsen-Bade Co., 1 Cal. I. A. C. Dec. 328.....	293, 703, 705
Hale v. Johnson, 2 Cal. I. A. C. Dec. 339.....	130, 213
Haley, In re, Op. Sol. Dept. of L. 255.....	291
v. Hardenburg, 1 Cal. I. A. C. Dec. 127.....	681
v. United Collieries (1907) S. C. 214, Ct. of Sess.....	375
Hallett v. Jevne Co., 2 Cal. I. A. C. Dec. 231.....	484
Halloran, In re, Op. Sol. Dept. of L. 756.....	306
Halm v. Marshall, 2 Cal. I. A. C. Dec. 605.....	438, 439
Halverhout v. S. W. Milling Co., 97 Kan. 484, 155 Pac. 916.....	653, 728, 764
Halvorsen v. Salvesen, 5 B. W. C. C. 519, Ct. of Sess.....	450
Hamang's Estate v. Paragon Refining Co., Bulletin No. 1, Ill., p. 23.....	457
Hamilton, In re, Op. Sol. Dept. of L. 381.....	596
Hammill v. Pennsylvania R. Co., 87 N. J. Law, 388, 94 Atl. 313.....	49, 226, 230, 233, 722
Hammond-Chandler Lumber Co. v. Industrial Commission of Wisconsin, 158 N. W. 292.....	817, 821
Hancock v. British Westinghouse Electric Co., 3 B. W. C. C. 210, C. A....	758
Hanley v. Union Stockyards Co. (Neb.) 158 N. W. 939.....	676, 812, 816, 838
Hanlon v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 716	608
Hansen v. Patterson Ranch Co., 2 Cal. I. A. C. Dec. 769.....	564
Hanson, In re, Op. Sol. Dept. of L. 51.....	229
v. Commercial Sash Door Co., Bulletin No. 1, Ill., p. 30.....	313, 567
v. Scott, 2 Cal. I. A. C. Dec. 730.....	194
Hapelman v. Poole, 2 B. W. C. C. 48.....	407
Harbart v. Bryson Estate Co., 1 Cal. I. A. C. Dec. 515.....	664
Harbroe, In re, 223 Mass. 139, 111 N. E. 709.....	351, 410, 415, 440, 549
Harding, In re, Op. Sol. Dept. of L. 553.....	250
v. Brynddu Colliery Co., 4 B. W. C. C. 269, 271, C. A.....	391, 547, 562
Haries, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 101.....	488
Harley v. Walsall Wood Colliery Co., 8 B. W. C. C. 86, C. A.....	467
Harpestad v. Alexander, Bulletin No. 1, Ill., p. 14.....	635
Harrington v. San Diego & A. R. Co., 2 Cal. I. A. C. Dec. 797.....	54
Harris, In re, Op. Sol. Dept. of L. 598.....	249

	Page
Harris v. Claremont Country Club, 2 Cal. I. A. C. Dec. 1047.....	723
v. Hobart Iron Co., 127 Minn. 399, 149 N. W. 662, 7 N. C. C. A. 44....	102
v. Western Pac. R. Co., 2 Cal. I. A. C. Dec. 697.....	52
Harrison v. Whitaker Bros., 2 W. C. C. 12, C. A.....	406
Harrod v. Latham, 77 Kan. 466, 95 Pac. 11.....	73
Hart, In re, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 18.....	276, 712
Hartford Accident & Indemnity Co. v. Bono, 2 Cal. I. A. C. Dec. 668..	499, 501
Hartnett v. Steen, 2 N. Y. St. Dep. Rep. 492, affirmed 169 App. Div. 905, 153 N. Y. Supp. 1119, and 216 N. Y. 101, 110 N. E. 170.....	283, 433
Hartz v. Hartford Faience Co., 90 Conn. 539, 97 Atl. 1020.....	290, 396, 397, 510, 797, 830
Harwood v. Wyken Colliery Co., 6 B. W. C. C. 225, C. A.....	511
Hasenstab v. Chicago House Wrecking Co., Bulletin No. 1, Ill., p. 62.....	316
Hatch v. I. Newman & Sons, 1 Conn. Comp. Dec. 65.....	511
Hatchman v. New England Casualty Co., 2 Mass. Wk. Comp. Cases, 419..	575
Hattan v. Hattan, 1 Cal. I. A. C. Dec. 324.....	133, 134, 145, 788
Haughland v. Howe, 1 Conn. Comp. Dec. 401.....	612
Havey v. Erie R. Co., 87 N. J. Law, 444, 95 Atl. 124.....	182, 233, 257, 271
v. Erie R. Co., 88 N. J. Law, 684, 96 Atl. 995.....	232, 256, 643
Haward v. Rowsell & Matthews, 7 B. W. C. C. 552, C. A.....	468, 752
Hawkins v. Bleakley (D. C.) 220 Fed. 378, 381.....	63, 65, 71, 85, 92, 95, 98
v. Powell's Tillery Steam Coal Co., 4 B. W. C. C. 178, C. A.....	308
Hayden v. Dick, 5 F. 150, Ct. of Sess.....	212
v. Massachusetts Employés' Ins. Ass'n, 2 Mass. Wk. Comp. Cases 198	639
Hayes v. S. J. Thompson & Co., 6 B. W. C. C. 130, C. A.....	128
v. State of Missouri, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578.....	80
Haynes, In re, Op. Sol. Dept. of L. (1915) 761.....	782
Hayward v. Westleigh Colliery Co., 7 B. W. C. C. 53, C. A.....	468, 760
v. Westleigh Colliery Co., 8 B. W. C. C. 278, H. L.....	468, 760
Head v. Head Drilling Co., 2 Cal. I. A. C. Dec. 279.....	552
v. Head Drilling Co., 2 Cal. I. A. C. Dec. 973, 171 Cal. 728, 154 Pac. 834	514, 551, 560, 826
Healy v. State, 115 Md. 377, 80 Atl. 1074.....	28
Hedges v. Los Angeles, 1 Cal. I. A. C. Dec. 394.....	548, 552, 557, 569
Heffernan v. Morse Detective & Patrol Service Co., 2 Cal. I. A. C. Dec. 364	722
Heileman Brewing Co. v. Industrial Commission, 161 Wis. 46, 152 N. W. 446	298
v. Schultz, 161 Wis. 46, 152 N. W. 446.....	466, 823
v. Shaw, 161 Wis. 443, 154 N. W. 631.....	312, 313, 470
Heitz, In re, 218 N. Y. 148, 112 N. E. 750, affirming (Sup.) 155 N. Y. Supp. 1112	11, 17, 18, 26, 322, 330, 352, 838
Held v. Lee, 2 Cal. I. A. C. Dec. 728.....	402

	Page
Helme Co. v. Middlesex Common Pleas, 84 N. J. Law, 531, 87 Atl. 72, 4 N. C. C. A. 674.....	633
Helms v. Harris Const. Co., 1 Conn. Comp. Dec. 498.....	480
Henderson v. Glasgow Corp., 2 F. 1127.....	383
Hendricks v. Seeman Bros., 170 App. Div. 133, 155 N. Y. Supp. 638.....	337, 407, 823
Hendrickson v. Public Service R. Co., 87 N. J. Law, 366, 94 Atl. 402....	765
Hendry v. Caledonian R. Co., (1907) S. C. 732, Ct. of Sess.....	401
v. United Collieries, 3 B. W. C. C. 567, Ct. of Sess.....	374
Henne v. Hjul, 1 Cal. I. A. C. Dec. 133.....	522
Henneberry v. Doyle, 5 B. W. C. C. 580, C. A.....	405
Henning v. Henning, 2 Cal. I. A. C. Dec. 733.....	351, 438, 550
Henry, In re, Op. Sol. Dept. of L. (1915) 635.....	769
Hensey v. White, 2 W. C. C. 1.....	288
v. White, 1 Q. B. 481.....	278
Henson v. Standard Oil Co., 1 Cal. I. A. C. Dec. 383.....	378
Herbert v. Fox & Co., 8 B. W. C. C. 94, C. A.....	457
Herkey v. Agar Mfg. Co., 90 Misc. Rep. 457, 153 N. Y. Supp. 369.....	91, 99
Herrick, In re (Herrick's Case) 217 Mass. 111, 112, 104 N. E. 432.....	256, 821, 822
v. Employers' Liability Assur. Co., 2 Mass. Wk. Comp. Cases, 122, affirmed 217 Mass. 111, 104 N. E. 432, 4 N. C. C. A. 564.....	237, 347, 453
v. Wells Fargo & Co., 2 Cal. I. A. C. Dec. 85.....	440
Herron, In re, Op. Sol. Dept. of L. 124.....	342
Hertert v. Wood Lumber Co., 1 Cal. I. A. C. Dec. 58.....	499
Hetzel v. Wasson Piston Ring Co. (N. J.) 98 Atl. 306.....	190
Hewette v. Stanley Bros., 6 B. W. C. C. 501, C. A.....	313
Hewitt, In re, Op. Sol. Dept. of L. 248.....	291
v. Red River Lumber Co., 2 Cal. I. A. C. Dec. 286.....	566, 567, 568, 807
Hey v. Pacific Coast Casualty Co., 1 Cal. I. A. C. Dec. 38.....	679
Hickman, In re, Op. Sol. Dept. of L. 751.....	306
Hickox v. Beloit Concrete Co., Rep. Wis. Indus. Com. 1914-15, p. 37.....	671
Hicks, In re, Op. Sol. Dept. of L. 217.....	318
v. Maxton, 124 L. T. Jo. 135, 1 B. W. C. C. 150.....	32
Higgins v. Campbell, 1 K. B. 328, affirmed A. C. 230.....	302
v. Hanover & Butler, Rep. Wis. Indus. Com. 1914-15, p. 37....	631, 671
Higgs & Hill v. Unicum, 6 B. W. C. C. 205, C. A.....	607
Higley v. Belcher, 2 Cal. I. A. C. Dec. 839.....	767
Hill, In re, Op. Sol. Dept. of L. 369.....	649
v. Begg, 1 B. W. C. C. 320, C. A.....	200
v. Fuller & Co., 1 Cal. I. A. C. Dec. 155.....	243
v. Guardian Casualty & Guaranty Co., 1 Cal. I. A. C. Dec. 415.....	678, 680
v. Ocean Coal Co., 3 B. W. C. C. 29, C. A.....	605

Hillestad v. Industrial Ins. Commission, 80 Wash. 426, 141 Pac. 913, Ann. Cas. 1916B, 789, 6 N. C. C. A. 763.....	26, 176, 190
Hillis v. Shaw, Workmen's Compensation Reports (England) 1913, p. 744..	442
Hills v. Blair, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409...	311, 320, 325, 358, 362, 363, 368, 380, 385, 386, 464
v. Oval Wood Dish Co. (Mich.) 153 N. W. 214.....	675
v. Oval Wood Dish Co., Mich. Wk. Comp. Cases (1916) 11.....	303
v. Pere Marquette R. R., Op. Mich. Indus. Acc. Bd. Bul. No. 3, p. 32..	364
Himes v. Powers Inv. Co., 2 Cal. I. A. C. Dec. 1035.....	692
Hindman v. Acme Universal Joint Mfg. Co., Mich. Wk. Comp. Cases (1916) 56	539
Hine, The, v. Trevor, 4 Wall. 555, 567, 568, 18 L. Ed. 451.....	44
Hirschhorn v. Fiege Desk Co., 184 Mich. 239, 150 N. W. 851.....	626
Hiserman v. Garside, 1 Cal. I. A. C. Dec. 516.....	358
Hoare v. Arding & Hobbs, 5 B. W. C. C. 36, C. A.....	751, 755
v. Cecil Rhodes, The, 5 B. W. C. C. 49, C. A.....	181
Hockley v. West London Timber & Joinery Co., 7 B. W. C. C. 652, C. A..	128
Hodge v. Hoffman, 1 Conn. Comp. Dec. 322.....	694, 710, 715
Hodges v. Swastika Oil Co. (Tex. Civ. App.) 185 S. W. 369.....	111, 733
Hodgkinson v. Southern Pac. Co., 2 Cal. I. A. C. Dec. 1039.....	422
Hodgson v. Owners of West Stanley Colliery, 2 B. W. C. C. 275, C. A.....	228
v. Owners of West Stanley Colliery, 3 B. W. C. C. 260, 267.....	228, 637
v. Robins, Hay, Waters & Hay, 7 B. W. C. C. 232, C. A.....	518, 759
Hoenig v. Industrial Commission of Wisconsin, 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339, 8 N. C. C. A. 192.....	320, 429, 823
Hoey v. Superior Laundry Co., 85 N. J. Law, 119, 88 Atl. 823.....	815
Hoff v. Hackett, 148 Wis. 32, 134 N. W. 132.....	266
Hoffman, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 41.....	236, 268
v. Korn, 2 Cal. I. A. C. Dec. 166.....	300, 622
Hogan, In re, Op. Sol. Dept. of L. 180.....	345
Hoguet v. Wallace, 28 N. J. Law, 523.....	231
Holden, In re, Op. Sol. Dept. of L. 268.....	648
v. Maryland Casualty Co., 1 Cal. I. A. C. Dec. 14.....	310, 483
Holland v. Fidelity & Deposit Co. of Maryland, 2 Mass. Wk. Comp. Cases, 308	669
Hollas v. Illinois Steel Co., Bulletin No. 1, Ill., p. 158.....	801, 802
Holleron v. Hill, 2 Cal. I. A. C. Dec. 289.....	227, 238, 247, 261, 269
Holmes v. Great Northern R. Co., 2 Q. B. 409.....	376
v. Great Northern R. Co., 2 W. C. C. 19, C. A.....	358, 377
v. Japan Beautiful Nippon Kyosin Kaisha, 2 Cal. I. A. C. Dec. 894..	213
Holmquist v. Shipowners' & Merchants' Tugboat Co., 1 Cal. I. A. C. Dec. 224	589
Holness v. Mackay & Davis, 1 W. C. C. 13, C. A.....	359
Holt v. Yates & Thorn, 3 B. W. C. C. 75, C. A.....	603

	Page
Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365.....	72
v. Swigert, 104 Ill. 653.....	24
Honor v. Painter, 4 B. W. C. C. 188, C. A.....	506
Hoover v. Engvick, 2 Cal. I. A. C. Dec. 875.....	205, 206, 488
Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310	325, 421
Hopwood v. Olive & Partington, 3 B. W. C. C. 357, C. A.....	545
Hora, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 173.....	236, 268
Horgan v. Kinney, 2 Cal. I. A. C. Dec. 1006.....	218
Horn, In re, Op. Sol. Dept. of L. 504.....	573
Horn, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 35.....	371, 578
Hornburg v. Morris (Wis.) 157 N. W. 556.....	166, 375
Horsfall v. Jura, The, 6 B. W. C. C. 213, C. A.....	457
Horsman v. Glasgow Nav. Co., 3 B. W. C. C. 27, C. A.....	662
Horvat, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 155.....	126
Hosegood & Sons v. Wilson, 4 B. W. C. C. 30, C. A.....	663
Hoskins v. Lancaster, 3 B. W. C. C. 476, C. A.....	368, 370, 371, 376
Hotchkiss v. Boyer, 2 Cal. I. A. C. Dec. 51.....	144, 690
Hotel Bond Co., Appeal of, 89 Conn. 143, 93 Atl. 245. .4, 6, 12, 16, 25, 29, 85, 92, 99, 111, 177, 225, 233, 252, 256, 796, 818, 821, 824, 827	188
Hott, In re, Op. Sol. Dept. of L. 89.....	373
Hott, In re, Op. Sol. Dept. of L. 302.....	29
Hough v. Dayton Mfg. Co., 66 Ohio St. 427, 64 N. E. 521.....	575
Houghton v. Sutton Heath & Lea Green Collieries Co., 3 W. C. C. 173, C. A.....	256
Houlihan v. Connecticut River R. R., 164 Mass. 555, 42 N. E. 108.....	349
House, In re, Op. Sol. Dept. of L. 325.....	84, 85
Hovis v. Cudahy Refining Co., 95 Kan. 505, 148 Pac. 626.....	191, 408
Howard, In re, 218 Mass. 404, 105 N. E. 636, 5 N. C. C. A. 449.....	172
v. George Howard, Inc., The Bulletin, N. Y., Vol. 1, No. 11, pp. 14, 20	826
v. Ludwig, 171 N. Y. 507, 64 N. E. 172.....	203
v. Massachusetts Employes Ins. Ass'n, 2 Mass. Wk. Comp. Cases. 1, af- firmed 218 Mass. 404, 105 N. E. 636.....	180, 213
v. Republic Theater, 2 Cal. I. A. C. Dec. (Bulletins 1915) 514....	33
Howarth v. Lombard, 175 Mass. 570, 572, 56 N. E. 888, 49 L. R. A. 301..	469
Howe v. Fernhill Collieries, 5 B. W. C. C. 629, C. A.....	250
Howell, In re, Op. Sol. Dept. of L. 549.....	251
v. Bradford & Co., 4 B. W. C. C. 203, C. A.....	682
v. Bradford Co., 104 L. T. R. N. S. 433.....	215
Howells v. Thomas, 120 L. T. Jo. 79, C. A.....	225
v. Vivian & Sons, 85 L. T. 529, 4 W. C. C. C. 106.....	357
Howley, In re, Op. Sol. Dept. of L. 686.....	157
Huckle v. London County Council, 3 B. W. C. C. 536, Div. Ct.....	

	Page
Huckle v. London County Council, 4 B. W. C. C. 113, C. A.....	157
Huff, In re, Op. Sol. Dept. of L. 567, 568.....	249, 647, 648
Huggins v. Guest, Keen & Nettlefolds, 6 B. W. C. C. 80, C. A.....	504
Hughes, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 148.....	238, 257, 268
v. Coed Talon Colliery Co., 2 B. W. C. C. 159, C. A.....	749, 760
v. Degen Belting Co., 1 Cal. I. A. C. Dec. 203.....	505, 506, 720, 721
v. Degen Belting Co., 2 Cal. I. A. C. Dec. 595.....	255
v. Postlethwaite, 4 B. W. C. C. 105, C. A.....	181
Hugo v. Larkins & Co., 3 B. W. C. C. 228, C. A.....	483
Hulley v. Moosbrugger, 87 N. J. Law, 103, 93 Atl. 79, 8 N. C. C. A. 283	324, 570
v. Moosbrugger, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203	322, 441, 458, 839, 840
Humber Towing Co. v. Barclay, 5 B. W. C. C. 142, C. A.....	520
Hummer v. Hennings, 2 Cal. I. A. C. Dec. 859.....	53, 423
Humphreys, In re, Op. Sol. Dept. of L. 111.....	187
Hunnewell, In re, 220 Mass. 351, 107 N. E. 934.....	293, 601, 603, 619, 675, 683, 783, 805
v. Casualty Co. of America, 2 Mass. Wk. Comp. Cases, 827, affirmed 220 Mass. 351, 107 N. E. 934.....	619
Hunt v. Highley Mining Co., 7 B. W. C. C. 716, C. A.....	759
v. Highley Mining Co., (1914) W. C. & Ins. Rep. 406.....	761
v. New York, N. H. & H. R., 212 Mass. 102, 107, 98 N. E. 787, 40 L. R. A. (N. S.) 778.....	122
Hunter v. Colfax Consol. Coal Co. (Iowa) 154 N. W. 1037, 11 N. C. C. A. 886.....	24, 31, 58, 61, 62, 63, 65, 67, 68, 69, 70, 71, 79, 80, 82, 83, 84, 85, 86, 88, 93, 94, 95, 96, 97, 115
v. Colfax Consol. Coal Co. (Iowa) 157 N. W. 145.....	67, 115, 812, 818
v. Mitchell, 2 Cal. I. A. C. Dec. 817.....	803
v. Tracy, 104 Minn. 378, 116 N. W. 922.....	82
Hurle, In re, 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527.....	274, 289, 292, 302
v. American Mutual Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 79, affirmed 17 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919.....	414
Hurlowski v. American Brass Co., 1 Conn. Comp. Dec. 6....	580, 610, 711, 797
Hurt, In re, Op. Sol. Dept. of L. 384.....	596
Huscroft v. Bennett, 7 B. W. C. C. 41, C. A.....	121
Hussey v. Franey, 205 Mass. 413, 91 N. E. 391, 137 Am. St. Rep. 460....	122
Husvick v. Simms, 1 Cal. I. A. C. Dec. 266.....	489
Hutchinson v. Elk River Mill & Lumber Co., 2 Cal. I. A. C. Dec. 816....	358
v. Pacific Engineering & Construction Co., 2 Cal. I. A. C. Dec. 600.. 354, 445	354, 445
Hutton, In re, Op. Sol. Dept. of L. (1915) 408, 409.....	572, 811

	Page
Huyett v. Pennsylvania R. Co., 86 N. J. Law, 683, 92 Atl. 58.....	73, 593
Hyndman v. Craig & Co., 4 B. W. C. C. 438, C. A.....	450

I

Iacovazzi v. Coppolo, 1 Conn. Comp. Dec. 476.....	123, 804
Ianczewski v. Central Locomotive & Car Works, Bulletin No. 1, Ill., p. 32	522
Iannace v. Jobson-Gifford Co., 1 Conn. Comp. Dec. 118.....	240
Immel v. American Beet Sugar Co., 2 Cal. I. A. C. Dec. 385.....	583, 614, 615
Industrial Commission of Ohio v. Brown, 92 Ohio St. 309, 110 N. E. 744, L. R. A. 1916B, 1277.....	29, 536, 540
Ing v. Higgs, 7 B. W. C. C. 65, C. A.....	759
Inniss, In re, Op. Sol. Dept. of L. 81.....	186
In re, Op. Sol. Dept. of L. 160.....	346
Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552....	80
v. Morse, 20 Wall. 445, 22 L. Ed. 365.....	72
International Harvester Co. v. Industrial Commission, 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330, 5 N. C. C. A. 822.....	350, 394, 598, 780, 785, 786, 795, 796, 827
Interstate Telephone & Telegraph Co. v. Public Service Electric Co., 86 N. J. Law, 26, 90 Atl. 1062, 5 N. C. C. A. 524.....	162
Intorigne v. Smith & Cooley, 1 Conn. Comp. Dec. 228.....	610
Iowa, Opinions Special Counsel to Industrial Commission 1915, p. 3.....	90, 101, 115, 116, 139, 172, 199, 222
p. 5.....	92, 101, 192
p. 6	208, 327
p. 7.....	125, 139, 183, 208, 222
p. 8	125, 184
p. 9	192, 195
p. 11	192, 193
p. 12	193
p. 13	119, 139
p. 14	170
p. 15	170, 210
p. 16	170, 196, 197
p. 18.....	176, 178, 209
p. 20	168
p. 22.....	33, 34, 39, 189
p. 24.....	390, 565, 740
p. 26.....	281, 299, 490, 537
p. 28	412
p. 30	264, 711
p. 32.....	155, 734

	Page
Iowa, Opinions Special Counsel to Industrial Commission 1915, p. 33.....	156
p. 34	647
p. 35	116
p. 36	109, 548
Irving, In re, Op. Sol. Dept. of L. 249.....	277, 291
Irwin v. Globe Indemnity Co. of New York, 1 Cal. I. A. C. Dec. 547....	235, 259, 641
Isaacson v. White Lumber Co., 2 Cal. I. A. C. Dec. 819.....	549, 410, 478
Isidora v. Rockford Gas Light & Coke Co., Bulletin No. 1, Ill., p. 42....	779
Isitt v. Railway Passengers' Ass'n Co., 22 Q. B. D. 504.....	491
Ismay, Imrie & Co. v. Williamson, 1 B. W. C. C. 230, 232, 235, H. L....	277, 306, 461, 544
Ives, In re, Op. Sol. Dept. of L. 175.....	344
v. South Buffalo R. Co., 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517.. 4, 15, 17, 18, 19, 65, 75, 83, 85, 98	

J

Jackson, In re, Op. Sol. Dept. of L. 320.....	388
v. Denton Colliery Co., 7 B. W. C. C. 92, C. A.....	391
v. Erie R. Co., 86 N. J. Law, 550, 91 Atl. 1035, 6 N. C. C. A. 944.....	224, 233, 839
v. General Steam Fishing Co., 2 B. W. C. C. 56, H. L., Ct. of Sess....	384
v. Mammoth Copper Mining Co. of Maine, 2 Cal. I. A. C. Dec. 915....	798
v. Vickers, Limited, 5 B. W. C. C. 430, C. A.....	748, 758
Jaco v. Los Angeles Gas & Electric Co., 2 Cal. I. A. C. Dec. 512.....	534
Jacobs v. American Steel & Wire Co., 1 Conn. Comp. Dec. 100.....	579, 619
v. Davis-Schonwasser Co., 2 Cal. I. A. C. Dec. 1013.....	446
Jacobson's Case, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765	83
Jacowicz v. Delaware, L. & W. R. Co., 87 N. J. Law, 273, 92 Atl. 946, Ann. Cas. 1916B, 1222.....	682
Jacques v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases, 478.....	670
Jakubowski v. Brooks, 1 Conn. Comp. Dec. 281.....	234, 245
James v. Morley, Carver & Co., 6 B. W. C. C. 680, C. A.....	603, 606
v. San Pedro, L. A. & S. L. R. Co., 3 Cal. I. A. C. Dec. 13.....	53
v. Witherbee, Sherman & Co., 2 N. Y. St. Dep. Rep. 483.....	127
James A. Banister Co. v. Kriger, 84 N. J. Law, 30, 85 Atl. 1027, rehearing denied 89 Atl. 923.....	629, 634, 646, 650, 662, 805, 837, 839
Jameson v. Bush, 1 Cal. I. A. C. Dec. 507.....	497, 690, 705
Jamieson v. Clark, 2 B. W. C. C. 228, Ct. of Sess.....	180
v. Fidelity & Deposit Co. of Maryland, 2 Mass. Wk. Comp. Cases, 772..	617
Janes, In re, 217 Mass. 192, 104 N. E. 556, 4 N. C. C. A. 552.....	687, 837

	Page
Janes v. Fidelity & Casualty Co. of New York, 2 Mass. Wk. Rep. of Comp. Cases, 217, affirmed 217 Mass. 192, 104 N. E. 556.....	255
Janiec v. Mitchell-Lewis Motor Co., Bul. Wis. Indus. Com., 1912-13, p. 30..	598
Jankowski v. American Car & Foundry Co., Mich. Wk. Comp. Cases (1916), 327	549
Jansen v. Balboa Amusement Producing Co., 1 Cal. I. A. C. Dec. 477..354,	558
Jarvis, In re, Op. Sol. Dept. of L. 174.....	345
Jarvis, In re, Op. Sol. Dept. of L. 219.....	306
Jaskulka v. Hartford & N. Y. Transp. Co., 1 Conn. Comp. Dec. 542.....	430
Jefferson, In re, Op. Sol. Dept. of L. 564.....	253
Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. Ed. 364, 7 N. C. C. A. 570.....	81, 86, 88, 96
v. Blagg, 90 Ohio St. 376, 108 N. E. 465.....	65
Jendrus v. Detroit Steel Products Co., 178 Mich. 265, 144 N. W. 563, L. R. A. 1916A, 381, Ann. Cas. 1915D, 476, 4 N. C. C. A. 864.....	524, 525, 530
Jenkins, In re, Op. Sol. Dept. of L. 334.....	373
v. Carman Mfg. Co., (Or.) 155 Pac. 703, 11 N. C. C. A. 547.....	731, 735
v. Pieratt, 1 Cal. I. A. C. Dec. 114.....	193, 316, 691
v. Standard Colliery Co., 5 B. W. C. C. 71, C. A.....	487
Jenkinson v. Harrison, Ainslie & Co., 4 B. W. C. C. 194, C. A.....	404
Jensen v. Southern Pac. Co., (Jensen, Matter of) 215 N. Y. 514, 109 N. E. 600, 603, 604 L. R. A. 1916A, 403, Ann. Cas. 1916B, 276, 9 N. C. C. A. 286	45, 47, 60, 75, 87, 88, 95, 98, 163, 571, 731
Jerman, In re, Op. Sol. Dept. of L. 152.....	343
Jerome v. Queen City Cycle Co., 163 N. Y. 351, 57 N. E. 485, affirming 24 App. Div. 632, 48 N. Y. Supp. 1107.....	838
Jibb v. Chadwick & Co., 8 B. W. C. C. 152, C. A.....	455
Jillson v. Ross (R. I.) 94 Atl. 717..7, 11, 61, 389, 415, 814, 815, 822, 828, 839, 840	
Jiminez, In re, Op. Sol. Dept. of L. 657.....	771
Jobson v. Cory & Sons, 4 B. W. C. C. 284, C. A.....	251
Joeogan v. Hershman, 1 Conn. Comp. Dec. 229.....	761
Johansen v. Union Stockyards Co., 99 Neb. 328, 156 N. W. 511...276, 478, 659	
John v. Albion Coal Co., 4 W. C. C. 15, C. A.....	553
Johns, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 172.....	208, 210
Johnson, In re, Op. Sol. Dept. of L. 185.....	345
Johnson, In re, Op. Sol. Dept. of L. 748.....	317
v. Bauer Pottery Co., 1 Cal. I. A. C. Dec. 72.....	539
v. Casualty Co. of America, 2 Mass. Wk. Comp. Cases, 170.....	488
v. Cluett Peabody Co., 2 Cal. I. A. C. Dec. 7.....	615, 667, 668
v. Engstrum Co., 2 Cal. I. A. C. Dec. 788.....	766, 767
v. Hammond Lumber Co., 1 Cal. I. A. C. Dec. 574.....	614
v. London Guarantee & Accident Co., 2 Mass. Wk. Comp. Cases, 108, affirmed 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843.....	292, 293, 414, 543, 544

	Page
Johnson v. Lowe, 2 Cal. I. A. C. Dec. 568.....	304
v. Marshall, Sons & Co. (1906) A. C. 409, 411.....	548, 555
v. Marshall, Sons & Co., 8 W. C. C. 10, H. L.....	547, 559
v. Nelson, 128 Minn. 158, 150 N. W. 620.....	35, 37, 38, 64, 101
v. Pacific Surety Co., 1 Cal. I. A. C. Dec. 560.....	681, 704, 711
v. Southern California Box Factory, 1 Cal. I. A. C. Dec. 577.....	505
v. Southern Pac. Co., 2 Cal. I. A. C. Dec. 738.....	52
v. Spring Glen Farm, 1 Conn. Comp. Dec. 593.....	714
v. Sudden & Christenson, 1 Cal. I. A. C. Dec. 422.....	484, 485, 754, 795
v. Wootton, 4 B. W. C. C. 258, C. A.....	762
Johnston v. Monasterevan General Store Co., 2 Ir. R. 108, C. A.....	191
v. Mountain Commercial Co., 1 Cal. I. A. C. Dec. 100.....	126, 277, 284, 373, 571
Jolley v. O'Shea, 2 Cal. I. A. C. Dec. 569.....	720
Jones, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 57.....	387
Jones, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. 187.....	243, 262
Jones, In re, Op. Sol. Dept. of L. 155.....	344
v. Com., 2 Mass. Wk. Comp. Cases, 721.....	169
v. Penwyllt Dinas Silica Brick Co., 6 B. W. C. C. 491, C. A.....	214
v. Public Service R. Co., 86 N. J. Law, 646, 92 Atl. 397.....	304
v. Ship Alice and Eliza, 3 B. W. C. C. 495, C. A.....	181, 384, 445
Jorgensen v. Healy-Tibbitts Const. Co., 2 Cal. I. A. C. Dec. 46.....	500, 514
Jost v. General Electric Co., 1 Cal. I. A. C. Dec. 527.....	500, 501
Joyce v. Great Northern R. Co., 100 Minn. 225, 110 N. W. 975, 8 L. R. A. (N. S.) 756.....	82
Judd v. Metropolitan Asylums Board, 5 B. W. C. C. 420, C. A.....	754
July, In re, Op. Sol. Dept. of L. 261.....	542

K

Kagaroff v. Southern California Gas Co., 1 Cal. I. A. C. Dec. 43.....	650
Kaiser v. Pinney, 1 Conn. Comp. Dec. 562.....	647
Kalanquin v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases, 748.....	543
Kalucki v. American Car & Foundry Co., Mich. Wk. Comp. Cases (1916) 390	625, 766
Kandalets v. Swift & Co., Bulletin No. 1, Ill., p. 24.....	598
Kane v. Merry & Cuninghame, 4 B. W. C. C. 379, Ct. of Sess.....	456
v. New Haven Union Co., 1 Conn. Comp. Dec. 492.....	226, 413
Karas v. Northwestern Pacific R. Co., 2 Cal. I. A. C. Dec. 84.....	679
Karemaker v. Corsican, The, 4 B. W. C. C. 285, C. A.....	431
Karny v. Northwestern Malleable Iron Co., 160 Wis. 316, 151 N. W. 786..	110, 114
Karras v. Southern Pac. Co., 2 Cal. I. A. C. Dec. 748.....	53
Karumbellas, In re, Op. Sol. Dept. of L. 614.....	253

	Page
Kasovitch v. Wattis Co., 2 Cal. I. A. C. Dec. (Bulletins 915) 319.....	168, 210
Kavas v. Northern Electric R. Co., 2 Cal. I. A. C. Dec. 196.....	295, 501
Keaney, In re, 217 Mass. 5, 104 N. E. 438, 4 N. C. C. A. 556.....	192, 196
Kearney, In re, Op. Sol. Dept. of L. 147.....	343
Kearns v. New London Marine Iron Works Co., 1 Conn. Comp. Dec. 225..	515
Kearon v. Kearon, 4 B. W. C. C. 435, C. A.....	450, 451
Keast v. Santa Fé R. Co., 2 Cal. I. A. C. Dec. 694.....	53
Keating, In re, Op. Sol. Dept. of L. 91.....	188
Keatley v. Shields & Son, 1 Cal. I. A. C. Dec. 191.....	845
Keck v. Morehouse, 2 Cal. I. A. C. Dec. 264.....	485
Keehan v. Milwaukee, Bul. Wis. Indus. Com. 1912-13, p. 24.....	506
Keen v. Scott Co., 2 Cal. I. A. C. Dec. 533.....	463, 694
Keenan v. Flemington Coal Co., 5 F. 164, Ct. of Sess.....	383
Keene v. St. Clements Press, 7 B. W. C. C. 542, C. A.....	398, 416
Keigher v. General Electric Co., 158 N. Y. Supp. 939.....	689
Kelley v. Manley, 2 Cal. I. A. C. Dec. 318.....	713, 721
Kelley's Case, In re, 222 Mass. 538, 111 N. E. 395.....	235, 687, 802
Kelliher v. Great Western Power Co., 2 Cal. I. A. C. Dec. 378.....	678
Kellogg v. Church Charity Foundation, 203 N. Y. 191, 96 N. E. 406, 38 L.	
R. A. (N. S.) 481, Ann. Cas. 1913A, 883.....	826
Kelly, In re, Op. Sol. Dept. of L. 337.....	647
Kelly, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 141.....	765
v. Auchenlea Colliery Co., 4 B. W. C. C. 417, Ct. of Sess.....	300
v. Buchanan, 47 Ir. L. T. 228, C. A.....	191
v. Foam Queen, The, 3 B. W. C. C. 113, C. A.....	449
v. Haylock (Wis.) 157 N. W. 1094.....	328
v. Hopkins, 2 Ir. R. 84, C. A.....	245
v. Kerry County Council, 42 Ir. L. T. 23.....	430
v. Miss Evans, The, 6 B. W. C. C. 916, C. A.....	181
v. Pacific Electric R. Co., 1 Cal. I. A. C. Dec. 150.....	294, 706, 708
v. Snare & Triest Const. Co., 1 Cal. I. A. C. Dec. 471.....	656
Kemp v. Lewis, 7 B. W. C. C. 422, C. A.....	177
Kemp & Dougall v. Darngavil Coal Co. (1909) S. C. 1314, Ct. of Sess.....	154
Kempson v. Moss Rose, The, 4 B. W. C. C. 101, C. A.....	662
Kennedy, In re, Op. Sol. Dept. of L. 131.....	342
Kennedy v. American Brass Co., 1 Conn. Comp. Dec. 406.....	234
v. David Kaufman & Sons Co. (N. J. Sup.) 91 Atl. 99.....	221
v. Guardian Casualty & Guaranty Co., 1 Cal. I. A. C. Dec. 152... 253,	657
v. Kennedy Mfg. Co., The Bulletin, N. Y., vol. 1, No. 5, p. 12. 34,	173, 581
v. Utah Const. Co., 2 Cal. I. A. C. Dec. 60.....	502
Kennelly v. Stearns Salt & Lumber Co. (Mich.) 157 N. W. 378.....	
	403, 444, 449, 822, 825
Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372, L. R. A.	
1916A, 436.....	7, 25, 34, 44, 48, 49, 100, 234, 238, 821

	Page
Kenny, In re, Op. Sol. Dept. of L. 57.....	220
v. Union R. Co., 166 App. Div. 497, 152 N. Y. Supp. 117, 8 N. C. C. A. 986	9, 18, 30, 100, 141, 176, 179, 835
Kent v. Porter, 38 S. L. R. 482, Ct. of Sess.....	129
Kentucky State Journal Co. v. Workmen's Compensation Board, 161 Ky. 562, 170 S. W. 1166, L. R. A. 1916A, 389, Ann. Cas. 1916B, 1273, affirmed 162 Ky. 387, 172 S. W. 674, L. R. A. 1916A, 402.....	76, 78
Kerr v. Ayr Steam Shipping Co., 6 B. W. C. C. 324, Ct. of Sess.....	473
v. Ayr Steam Shipping Co., 7 B. W. C. C. 801, H. L.....	473
v. Baird & Co., 4 B. W. C. C. 397, Ct. of Sess.....	404
v. Ritchies, 6 B. W. C. C. 419, Ct. of Sess.....	308
Kerrigan v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 360	669
Kesler v. Massachusetts Employé's Ins. Ass'n, 2 Mass. Wk. Comp. Cases, 168	463
Ketron v. United Railroads of San Francisco, 1 Cal. I. A. C. Dec. 528.....	359, 421, 424, 426, 427
Keyes-Davis Co. v. Alderdyce, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 19	35
Keyser v. Burdick & Co., 4 B. W. C. C. 87, C. A.....	372
v. Gilbert & Bennett Mfg. Co., 1 Conn. Comp. Dec. 636.....	569
Kid v. New York Motion Picture Co., 1 Cal. I. A. C. Dec. 475.....	578, 582
Kiernan v. Priestedt Underpinning Co., 171 App. Div. 539, 157 N. Y. Supp. 900	350
v. Schermerhorn, The Bulletin, vol. 1, No. 8, p. 12.....	337
v. Turlock Irrigation District, 2 Cal. I. A. C. Dec. 259.....	185, 499, 521
Kilberg v. Vitch, 171 App. Div. 89, 156 N. Y. Supp. 971.....	643
Kilbride v. Pratt & Whitney Co., 1 Conn. Comp. Dec. 688.....	631, 674
Kill v. Hollister, 1 Wilson, 129.....	72
v. Industrial Commission, 160 Wis. 549, 152 N. W. 148, L. R. A. 1916A, 14.....	516
Killoy v. Evans, 1 Conn. Comp. Dec. 277.....	611
King, In re, Vol. 1, No. 7 Bul. Ohio Indus. Com. p. 37.....	237, 371, 594
King, In re (King's Case) 220 Mass. 290, 107 N. E. 959.....	201, 231, 270, 471
v. Greenwood Cemetery Ass'n, 67 Ohio St. 244, 65 N. E. 882.....	29
v. Viscoloid Co., 219 Mass. 420, 106 N. E. 988, 7 N. C. C. A. 254.....	251, 584, 730, 734
Kinghorn v. Guthrie, 6 B. W. C. C. 887, Ct. of Sess.....	432
Kingsley v. Donovan, 169 App. Div. 828, 155 N. Y. Supp. 801.....	394, 412, 823, 825
Kiniavsky v. New Haven Carriage Co., 1 Conn. Comp. Dec. 119.....	713
Kinney, In re, Op. Sol. Dept. of L. (1915) 768.....	811
Kinney's Case, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. (N. S.) 711.....	79
Kitchenham v. Johannesburg, The, 4 B. W. C. C. 91, C. A.....	449
v. Johannesburg, The, 4 B. W. C. C. 311, 312, H. L.....	320, 449

	Page
Klawinski v. Lake Shore & M. S. R. Co., 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A, 342.....	8, 428, 429, 430
Kline, In re, Op. Sol. Dept. of L. 92.....	188
v. Russell, 113 Ga. 1085, 39 S. E. 477.....	186
Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 643, 648, 20 Sup. Ct. 824, 44 L. Ed. 921.....	44
Knight v. Bucknill, 6 B. W. C. C. 160, C. A.....	200
Knoll v. Salina, 98 Kan. 428, 157 Pac. 1167.....	754, 764, 765, 843
Knopp v. American Car & Foundry Co., 186 Ill. App. 605, 5 N. C. C. A. 798	350, 444
Knott v. Tingle, Jacobs & Co., 4 B. W. C. C. 55, C. A.....	575
Koch v. Oakland Brewing & Malting Co., 1 Cal. I. A. C. Dec. 373.....	284, 383, 441
Koether v. Union Hardware Co., 1 Conn. Comp. Dec. 38.....	638
Kohler v. Frohmann, 167 App. Div. 533, 153 N. Y. Supp. 559.....	176, 335
Konkel v. Ford Motor Co., Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 29....	722
Konzelski v. Griffin-Neuberger Tobacco Co., 1 Conn. Comp. Dec. 50.....	414
Koponen v. Union Lumber Co., 2 Cal. I. A. C. Dec. 1055.....	707
Kordellos v. Northwestern Pacific R. Co., 1 Cal. I. A. C. Dec. 586.....	518, 520
Kowalski v. Trostel & Sons, Rep. Wis. Indus. Com. p. 17.....	302
Kozlowski v. Illinois Steel Co., Rep. Wis. Indus. Com. 1914-15, p. 19.....	502
Kraljivich v. Yellow Aster Min. & Mill. Co., 1 Cal. I. A. C. Dec. 554.....	547, 558, 568, 612
Kramer, In re, Op. Sol. Dept. of L. 322.....	361
v. Schalke, The Bulletin, N. Y., vol. 1, No. 8, p. 8.....	136
Krasmeski v. New Haven Clock Co., 1 Conn. Comp. Dec. 699.....	527
Kraus v. Fritz & Son, 87 N. J. Law, 321, 93 Atl. 578.....	226
Kreppel v. Boyland, 2 N. Y. St. Dep. Rep. 489.....	667
Krisan v. American Steel Foundries, Bulletin No. 1, Ill., p. 156.....	773
Krisman v. Johnston City & Big Muddy Coal & Mining Co., 190 Ill. App. 612	107
Kruger v. Strehlow, Freese & Peterson, 2 Cal. I. A. C. Dec. 334.....	657
Krulla v. Casualty Co. of America, 2 Mass. Wk. Comp. Cases, 409.....	600
Krzus v. Crow's Nest Pass Coal Co., 6 B. W. C. C. 271.....	239
Kuehnle, In re, Op. Sol. Dept. of L. (1915) 665.....	771
Kunze v. Detroit Shade Tree Co. (Mich.) 158 N. W. 851.....	355, 426

L

Lacey v. Mowlem & Co., 7 B. W. C. C. 135, C. A.....	759
Lachuga v. Kataoka, 2 Cal. I. A. C. Dec. 766.....	218
La Fluer v. Wood, The Bulletin, N. Y., vol. 1, No. 7, p. 7.....	482, 510
Lagerholm, In re, Op. Sol. Dept. of L. 104.....	188
Lakos v. Pacific Coast Casualty Co., 2 Cal. I. A. C. Dec. 21.....	145
Lambert, In re, Op. Sol. Dept. of L. 122.....	342

	Page
Lambert v. Southern Pac. Co., 2 Cal. I. A. C. Dec. 743.....	54
Lamkin, In re, Op. Sol. Dept. of L. 128.....	342, 343
Lane v. Æolian Co., 1 Conn. Comp. Dec. 32.....	551
v. Herrick, 3 Cal. I. A. C. Dec. 29.....	118
v. Joyland Co., 2 Cal. I. A. C. Dec. 872.....	350
Lannigan v. Lannigan, 222 Mass. 198, 110 N. E. 285....	320, 464, 465, 471, 822
Lantis v. Sacramento, 2 Cal. I. A. C. Dec. 680.....	741
Lantry v. Mede, 127 App. Div. 557, 560, 111 N. Y. Supp. 833.....	329
Lanzy, In re, Op. Sol. Dept. of L. 373.....	595
Lardie v. Grand Rapids Show Case Co., Mich. Wk. Comp. Cases (1916) 17	624, 625
Larke v. John Hancock Mut. Life Ins. Co., 90 Conn. 303, 97 Atl. 320.....	300, 346, 347, 354, 489, 822, 824
Larnhart v. Rice-Landswick Co., 1 Cal. I. A. C. Dec. 557.....	582, 617, 678
Larsen, In re, 218 N. Y. 252, 112 N. E. 725, affirming 169 App. Div. 838,	155 N. Y. Supp. 759.....
v. Paine Drug Co., 169 App. Div. 838, 155 N. Y. Supp. 759.....	335, 338
Larson v. Holbrook, McGuire & Cohen, 2 Cal. I. A. C. Dec. 105.....	590, 692
v. Powers, 2 Cal. I. A. C. Dec. 265.....	485
La Salle v. Whiting-Mead Commercial Co., 1 Cal. I. A. C. Dec. 346.....	253
Lauruska v. Empire Mfg. Co., 271 Ill. 304, 111 N. E. 82.....	64
La Veck v. Park, Davis & Co. (Mich.) 157 N. W. 72.....	300, 309, 823
Lavin v. Wells Bros. Co., 272 Ill. 609, 112 N. E. 271.....	836
Lawrence, In re, Op. Sol. Dept. of L. 178.....	345
Lawson v. Stockton Motorcycle & Supply Co., 2 Cal. I. A. C. Dec. 649.....	395, 552
Lawton v. Los Angeles Transfer Co., 2 Cal. I. A. C. Dec. 1063.....	358
Leach v. Hickson, 4 B. W. C. C. 153, C. A.....	759
v. Oakley, Street & Co., 1 K. B. 523.....	474
v. Oakley, Street & Co., 4 B. W. C. C. 91, 98, C. A.....	321, 387, 451
Leary v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases, 184.....	465
Ledford v. Caspar Lumber Co., 2 Cal. I. A. C. Dec. 691.....	255
Ledoux v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 493	299, 409
Lee v. Baird & Co., 1 B. W. C. C. 34, Ct. of Sess.....	511, 608
v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 753..	543
v. Pacific Coast Steel Co., 3 Cal. I. A. C. Dec. 28.....	614
v. Bessie, The, 5 B. W. C. C. 55, C. A.....	247
v. St. George, The, 7 B. W. C. C. 85, C. A.....	450
v. Stag Line, Limited, 5 B. W. C. C. 660, C. A.....	470
Lees v. Dunkerley Bros., 4 B. W. C. C. 115, H. L.....	156
Legge v. Nixon's Nav. Co., 7 B. W. C. C. 521, C. A.....	498
Legget & Sons v. Burke, 4 F. 693, Ct. of Sess. (Act of 1897).....	271
Lehmann v. Great Western Acc. Ass'n, 42 L. R. A. (N. S.) 562.....	279
v. Ramo Films, Inc., 92 Misc. Rep. 418, 155 N. Y. Supp. 1032..	43, 332, 813

	Page
Leishman v. Dixon, Limited, 3 B. W. C. C. 560.....	569
Leishman v. Dixon, Limited, 3 B. W. C. C. 500, Ct. of Sess.....	553
Leite v. Paraffine Paint Co., 2 Cal. I. A. C. Dec. 1022.....	362, 449, 454
Lemanes, In re, Op. Sol. Dept. of L. 613.....	254
Lemieux v. Contractors' Mut. Liability Ins. Co., 223 Mass. 346, 111 N. E. 782	683, 762, 822
Lentz v. Estabrook Co., 2 Cal. I. A. C. Dec. 205.....	38
Leon v. Exposition Wheel Chair Co., 2 Cal. I. A. C. Dec. 845.....	219
v. Galceran, 11 Wall. 185, 20 L. Ed. 74.....	44
Leonard v. Fremont Hotel, 2 Cal. I. A. C. Dec. 998.....	383, 448, 533
Lera v. Fairchild-Gilmore-Wilton Co., 1 Cal. I. A. C. Dec. 44.....	412
Lesh v. Illinois Steel Co. (Wis.) 157 N. W. 539...25, 27, 476, 514, 523, 524,	526
Lester v. Otis Elevator Co., 169 App. Div. 613, 155 N. Y. Supp. 524, af- firming 90 Misc. Rep. 649, 153 N. Y. Supp. 1058.....	163, 737
Leveroni v. Travelers' Ins. Co. (Fumicello's Case) 219 Mass. 488, 107 N. E. 349.....	362
Lewandowski v. Crosby Transp. Co., Rep. Wis. Indus. Com. 1914-15, p. 9	40, 576
Lewis v. Garratt-Callahan Co., 2 Cal. I. A. C. Dec. 952.....	214
v. Goodyear India Rubber Glove Mfg. Co., 1 Conn. Comp. Dec. 238...	627
v. Great Western Ry. Co., 3 Q. B. D. 195, 206, 213.....	548, 549
v. Heafey, 2 Cal. I. A. C. Dec. 492.....	270
v. Port of London Authority, 7 B. W. C. C. 577, C. A.....	495
v. Stanbridge, 6 B. W. C. C. 568, C. A.....	215
Lewis & Clark County v. Industrial Acc. Board (Mont.) 155 Pac. 268....	4, 8, 17, 65, 69, 73, 74
Leyman v. Amalgamated Oil Co., 2 Cal. I. A. C. Dec. 921.....	794
Lichtenberger v. Strack, Rep. Wis. Indus. Com. 1914-15, p. 13.....	282
Lightbrown v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 243	307
Lima v. Ætna Life Ins. Co., 2 Mass. Wk. Comp. Cases, 800.....	489
Limron v. Blair, 181 Mich. 76, 147 N. W. 546, 5 N. C. C. A. 866.....	674
Linck v. Millard, 4 N. Y. St. Dept. Rep. 385.....	277
Lindebauer v. Weiner, 94 Misc. Rep. 612, 159 N. Y. Supp. 987...11, 17, 25, 743	
Lindh v. Toyland Co., 2 Cal. I. A. C. Dec. 646.....	602, 677
Lindsay v. McGlashen & Son, 1 B. W. C. C. 85, Ct. of Sess.....	247
Lindstrom v. Mutual S. S. Co. (Minn.) 156 N. W. 669.....45, 48, 49, 68, 730	
Lines v. Pacific Gas & Electric Co., 2 Cal. I. A. C. Dec. 837.....	558
Linnane v. Ætna Brewing Co., 1 Conn. Comp. Dec. 677.....	280, 362
Linsner v. Consumers' Ice & Fuel Co., Mich. Wk. Comp. Cases (1916) 61...	300
Linsteadt v. Louis Sands Salt & Lumber Co. (Mich.) 157 N. W. 64.....	593, 823
Liondale Bleach, Dye & Paint Works v. Riker, 85 N. J. Law, 426, 89 Atl. 929, 4 N. C. C. A. 713.....	280, 299, 539, 541
Lipscomb, In re, Op. Sol. Dept. of L. 50.....	220

	Page
Lissy, In re, Op. Sol. Dept. of L. 752.....	317
Little, In re, Op. Sol. Dept. of L. 78.....	188
Lloyd v. Midland R. Co., 7 B. W. C. C. 72, C. A.....	586
v. Power Specialty Co., The Bulletin, N. Y., vol. 1, No. 6, p. 9.....	43, 58
v. Sugg & Co., 2 W. C. C. 5, C. A.....	307, 511
Lockwood v. Pacific Gas & Electric Co., 3 Cal. I. A. C. Dec. 26.....	557
Loesser v. East Shore Amusement Co., 1 Conn. Comp. Dec. 449.....	440
Logue v. Fullerton, Hodgart & Barclay, 3 F. 1006, 1010, Ct. of Sess.....	392, 565, 568
Lohrke v. Benicia Iron Works, 1 Cal. I. A. C. Dec. 261.....	483
Lommen v. Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 33 L. R. A. 437, 60 Am. St. Rep. 450.....	63, 82
London & Edinburgh Shipping Co. v. Brown, 7 F. 488, Ct. of Sess.....	285, 406
v. Brown, 42 Scottish L. R. 357.....	417
Long v. Bergen County Court of Common Pleas, 84 N. J. Law, 117, 86 Atl. 529.....	661, 837
Lopez v. Fremont Consol. Mining Co., 3 Cal. I. A. C. Dec. 31.....	260
Lorenzo v. Bigelow-Hartford Carpet Co., 1 Conn. Comp. Dec. 216.....	310
Losh v. Evans & Co., 5 B. W. C. C. 17, C. A.....	403
Lough v. Standard Oil Co., 1 Cal. I. A. C. Dec. 41.....	604, 650
Loustalet v. Metropolitan Laundry Co., 1 Cal. I. A. C. Dec. 318.....	281, 463, 698, 713
Lovelady v. Berrie, 2 B. W. C. C. 62, C. A.....	313, 468
Loveland v. Parish of St. Thomas Church, 1 Conn. Comp. Dec. 14.....	173, 348, 447, 742
Lowe v. Myers & Son, 8 W. C. C. 22, C. A.....	764
v. Pearson, 1 W. C. C. 5, C. A.....	403
Lowry v. Sheffield Coal Co., 1 B. W. C. C. 1, C. A.....	356
Lowth v. Ibbotson, 1 W. C. C. 46, C. A.....	129
Lucien v. Judian Mfg. Co., 1 Cal. I. A. C. Dec. 509.....	479
v. Judson Mfg. Co., 1 Cal. I. A. C. Dec. 59.....	310
Luckwill v. Auchen Steam Shipping Co., 6 B. W. C. C. 51, C. A.....	128
Luke v. Atchison, T. & S. F. R. R. Co., 2 Cal. I. A. C. Dec. 1011.....	54
Lumber Co. v. Industrial Commission of Wisconsin, 154 Wis. 114, 142 N. W. 187, L. R. A. 1916A, 374, Ann. Cas. 1915B, 997.....	95
Luttrell, In re, Op. Sol. Dept. of L. 219.....	291
Lutz v. Gladding, McBean & Co., 1 Cal. I. A. C. Dec. 8.....	556
Lutze v. Atchison, T. & S. F. R. Co., 2 Cal. I. A. C. Dec. 739.....	52
Lyall v. Whitton, S. C. 1267, Ct. of Sess.....	551
Lydman v. De Haas, 185 Mich. 128, 151 N. W. 718, 8 N. C. C. A. 649.....	109
Lyman, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 182.....	125, 222
Lynch v. Abel, 1 Conn. Comp. Dec. 520.....	173
v. Baers Express & Storage Co., Bulletin No. 1, Ill., p. 79.....	801
v. Chase, 55 Kan. 367, 40 Pac. 666.....	73

	Page
Lynch v. Great Atlantic & Pacific Tea Co., 1 Conn. Comp. Dec. 163.....	510
v. Lansdowne, 48 Ir. L. T. 90, C. A.....	766
v. Pennsylvania R. R. Co., 88 N. J. Law, 408, 96 Atl. 395.....	49, 99
v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases, 591.....	496
Lynn v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 507	386, 446
Lyon v. Windsor (Sup.) 159 N. Y. Supp. 162.....	333, 334
Lysons v. Andrew Knowles & Sons, 3 W. C. C. I. 1, H. L.....	119
Lyster v. Lyster, 111 Mass. 327.....	263
Lyte, In re, Op. Sol. Dept. of L. 397.....	572

M

McAdam v. Harvey, 2 I. R. 511, C. A.....	128
McAdoo v. Cudahy Packing Co., 2 Cal. I. A. C. Dec. 512.....	488
McAllan v. Perthshire County Council, 8 F. 783, Ct. of Sess.....	402
McAllister, In re, Op. Sol. Dept. of L. 121.....	342
McAllister, In re, Op. Sol. Dept. of L. 680.....	648
v. National Fireproofing Co., Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 107	125
McAuliffe, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 144.....	202, 237
McBride v. Union Iron Works, 1 Cal. I. A. C. Dec. 376.....	708
McCabe v. North & Sons, 6 B. W. C. C. 504, C. A.....	398, 404
McCafferey v. Great Northern R. Co., 36 Ir. L. T. 27, C. A.....	546
McCahill v. New York Transp. Co., 201 N. Y. 221, 94 N. E. 616, 48 L. R. A.	
(N. S.) 131, Ann. Cas. 1912A, 961.....	481, 512
McCarrell, In re, Op. Sol. Dept. of L. 607.....	251
McCarthy, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 190.....	360
v. McAllister Steamboat Co., 94 Misc. Rep. 692, 158 N. Y. Supp. 563..	43
v. Norcott, 2 B. W. C. C. 279, C. A.....	200
v. Southern Pac. Co., 2 Cal. I. A. C. Dec. 752, 780.....	53
McCay v. Bruce, 2 Cal. I. A. C. Dec. 54.....	793
v. Bruce, 2 Cal. I. A. C. Dec. 975, 171 Cal. 319, 153 Pac. 24.....	346, 532, 719, 794
McClennan v. Allith Prouty Co., Bulletin No. 1, Ill., p. 116.....	632, 725
McComsey v. Simmons, The Bulletin, N. Y., vol. 1, No. 6, p. 13.....	333
McConnell v. Galbraith, 7 B. C. W. C. C. 968, C. A.	212
McCord v. City of Liverpool, The, 7 B. W. C. C. 767, C. A.....	172
McCormick, In re, Op. Sol. Dept. of L. 186.....	345
McCoy v. Kirkpatrick, 1 Cal. I. A. C. Dec. 599.....	208, 210
v. Michigan Screw Co., 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A,	
323, 5 N. C. C. A. 455.....	311, 464, 471, 481, 488
McCracken v. Missouri Valley Bridge & Iron Co., 96 Kan. 353, 150 Pac.	
832	653, 655
McCrae, In re, Op. Sol. Dept. of L. 375.....	647

	Page
McCready v. Dunlop & Co., 2 F. 1027, Ct. of Sess.....	125
McCrae, Limited, v. Renfrew, 7 B. W. C. C. 898, Ct. of Sess.....	460
McCreery, In re, Op. Sol. Dept. of L. 134.....	342
McCrystle v. Enos, 2 Cal. I. A. C. Dec. 43.....	571
McCutcheon v. Marinette, T. & W. R. Co., Rep. Wis. Indus. Com. 1914-15, p. 13.....	178, 726
McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579.....	52
McDaid v. Steel, 4 B. W. C. C. 412, Ct. of Sess.....	456
McDiarmid v. Ogilvy Bros., 6 B. W. C. C. 878, Ct. of Sess.....	403
McDermott v. Fanning, 3 Cal. I. A. C. Dec. 14.....	204
v. Tintoretto, The, 2 B. W. C. C. 208, C. A.....	663
v. Tintoretto, The, 4 B. W. C. C. 123, H. L.....	663
McDonald, In re, Op. Sol. Dept. of L. 502.....	572
v. Banana, The, 24 T. L. R. 887.....	469
v. Banana, The, 1 B. W. C. C. 185, C. A.....	450
v. Dunn, 2 Cal. I. A. C. Dec. 71.....	275, 323, 497
v. Fidelity & Deposit Co. of Md., 2 Mass. Wk. Comp. Cases, 529.....	750
v. Globe Laundry Co., 2 Cal. I. A. C. Dec. 217.....	785, 795
v. Snelling, 14 Allen (Mass.) 290, 92 Am. Dec. 768.....	507
v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases, 224.....	605
v. Wilsons & Clyde Coal Co., 5 B. W. C. C. 478, H. L.....	599, 601, 676
McDonough, In re, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 152.....	215
McDougal v. New Richmond R. M. Co., 125 Wis. 121, 103 N. W. 244.....	821
McDougall v. McDougall, 4 B. W. C. C. 373, Ct. of Sess.....	181
McFadden, In re, Op. Sol. Dept. of L. 396.....	572
McFarland v. Central R. Co. of New Jersey, 84 N. J. Law, 435, 87 Atl. 144, 47 L. R. A. (N. S.) 279, Ann. Cas. 1915A, 1, 4 N. C. C. A. 592.....	643
v. Central R. Co., 84 N. J. Law, 435, 87 Atl. 144.....	813
McGarva v. Hills, 1 Conn. Comp. Dec. 533.....	417, 461, 829, 830
McGarvey v. Independent Oil & Grease Co., 156 Wis. 580, 146 N. W. 895, 5 N. C. C. A. 803.....	165, 166
McGill v. Dunn County, Bul. Wis. Indus. Com., 1912-13, p. 33.....	612
Macgillivray v. Northern Counties Institute for the Blind, 4 B. W. C. C. 429, Ct. of Sess., 11 N. C. C. A. 77.....	182
v. Northern Counties Institute for the Blind, S. C. 897, Ct. of Sess....	577
McGovern v. Cooper & Co., 4 F. 249, Ct. of Sess.....	129
McGrath v. London & N. W. R. Co., 6 B. W. C. C. 251, C. A.....	400
v. San Jose, 2 Cal. I. A. C. Dec. 349.....	303
McGroarty v. Brown & Co., 8 F. 809, Ct. of Sess.....	565, 567
McGuire, In re, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328.....	66
McInerney v. Palmer & McBryde, 2 Cal. I. A. C. Dec. 655.....	371
McInnes v. Dunsmuir & Jackson, 1 B. W. C. C. 226 (Ct. of Sess. Scotland) 306, 461, 518	
McIntyre v. Rodger & Co., 6 F. 176.....	433, 441

	Page
Mack, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 120.....	365
Mackay, In re, Op. Sol. Dept. of L. 136.....	342
In re, Op. Sol. Dept. of L. 176.....	345
v. American Brass Co., 1 Conn. Comp. Dec. 526.....	750
McKay v. City Electric R. Co., Mich. Wk. Comp. Cases (1916) 63.....	739, 740
v. Metropolitan Life Ins. Co., 1 Conn. Comp. Dec. 380.....	348, 426
McKee v. Great Northern R. Co., 1 B. W. C. C. 165, C. A.....	375
v. Southern Electrical Co., 2 Cal. I. A. C. Dec. 805.....	477
v. Stein & Co., 3 B. W. C. C. 544, Ct. of Sess.....	575, 577
Mackenzie v. Coltness Iron Co., 6 F. 8, Ct. of Sess.....	371
McKenzie v. Pullman Co., 2 Cal. I. A. C. Dec. 984.....	479
McKeown v. McMurray, 45 Ir. L. T. 190, C. A.....	456
Mackin v. Detroit-Timkin Axle Co., 187 Mich. S. 153 N. W. 49.....	
4, 7, 16, 30, 67, 68, 70, 71, 73, 81, 88, 89, 92, 97, 98, 102, 785	
Mackinnon v. Miller, 2 B. W. C. C. 64, Ct. of Sess.....	120, 471
v. Miller, 2 B. W. C. C. 70.....	370
McKnight v. American Can Co., 2 Cal. I. A. C. Dec. 427.....	607, 707
McLaren v. Caledonian R. Co., 5 B. W. C. C. 492, Ct. of Sess.....	455
v. Caledonian R. Co. (1911) S. C. 1077.....	323
McLauchlan v. Anderson, 4 B. W. C. C. p. 376.....	383
v. Anderson, 4 B. W. C. C. 379.....	321
McLean, In re, 223 Mass. 342, 111 N. E. 783.....	749, 766, 780
v. Brooks, 2 Cal. I. A. C. Dec. 288.....	496
v. Carse & Holmes, 1 F. 878, Ct. of Sess.....	760
v. Moss Bay Iron & Steel Co., 2 B. W. C. C. 282, C. A.....	230
v. Shields, 2 Cal. I. A. C. Dec. 1046.....	373, 448
McLeod v. Kirkpatrick, 3 Cal. I. A. C. Dec. 19.....	122
McLoughlin v. Anderson, 4 B. W. C. C. 376.....	396
McLuckie v. Watson, Limited, 6 B. W. C. C. 850, Ct. of Sess.....	478
McMahon v. Interborough Rapid Transit Co., 5 N. Y. St. Dept. Rep. 374..	293
McManaman's Case (Mass.) 113 N. E. 287.....	431, 839
McMillan v. Singer Sewing Mach. Co., 6 B. W. C. C. 345, Ct. of Sess....	542
McMurray, In re, Op. Sol. Dept. of L. 571.....	248
v. J. J. Little & Ives Co., 3 N. Y. St. Dept. 395.....	282, 347, 409
McNally v. Diamond Mills Paper Co., The Bulletin, N. Y., vol. 1, No.	
11, p. 12.....	137
v. Diamond Mills Paper Co., The Bulletin, N. Y., vol. 1, No. 7, p.	
8	212, 804
v. Fitzgerald, 7 B. W. C. C. 24, C. A.....	214
v. Furness, Withy & Co., 6 B. W. C. C. 664, C. A.....	608
McNamara v. Ives, 1 Conn. Comp. Dec. 41.....	234
v. United States Fidelity & Guaranty Co., 1 Cal. I. A. C. Dec.	
138	533, 535, 623, 689
McNeice v. Singer Sewing Mach. Co., 4 B. W. C. C. 351, Ct. of Sess....	427

	Page
McNicholas v. Dawson, 1 W. C. C. 80, C. A.....	391
v. Dawson, 1 W. C. C. 86, 87.....	549
McNicol's Case (McNicol, In re) 215 Mass. 497, 499, 102 N. E. 697, L. R. A.	
1916A, 306, 4 N. C. C. A. 522.....	274, 324, 347, 408, 409, 418, 836
v. Speirs, Gibb & Co., 1 F. 604, Ct. of Sess.....	391, 565
v. Summerlee & Mossend Iron & Steel Co., 4 F. 989.....	372
McNiece v. Singer Sewing Mach. Co., 4 B. W. C. C. 351, Ct. of Sess.....	427
McPhee, In re, 222 Mass. 1, 109 N. E. 633, 10 N. C. C. A. 257....	302, 406, 418,
	490, 822, 836
McQueeney v. Sutphen & Hyer, 167 App. Div. 528, 153 N. Y. Supp.	
554	9, 25, 61, 66, 141, 176, 335, 336
McQuibban v. Menzies, 37 Scottish Law R. 526.....	459
McRae, Limited, v. Renfrew, 7 B. W. C. C. 898, Ct. of Sess.....	460
McRoberts v. National Zinc Co., 93 Kan. 364, 144 Pac. 247..	9, 99, 730, 837, 842
McSorley, In re, Op. Sol. Dept. of L. 331.....	477
McWeeny v. Standard Boiler & Plate Co., (D. C.) 210 Fed. 507, 4 N.	
C. C. A. 919 affirmed 218 Fed. 361, 134 C. C. A. 169.....	6, 735, 736
McWilliam v. Great North of Scotland R. Co., 7 B. W. C. C. 875, Ct. of	
Sess.	390, 392
v. Great North of Scotland R. Co. (1914) S. C. 453.....	390, 392
McWilliams v. Haskins, 1 Conn. Comp. Dec. 324.....	358, 446
Madden, In re, 222 Mass. 487, 111 N. E. 379.....	17, 98, 189, 275, 289,
	304, 309, 483, 495
Maffia v. Aquilino, 3 Cal. I. A. C. Dec. 15.....	121, 554, 568
Mahan v. Frankfort General Ins. Co., 2 Cal. I. A. C. Dec. 530...	717, 718, 788
Maher v. New York, N. H. & H. R. R. Co., 1 Conn. Comp. Dec. 82.....	687
v. Sunset Lumber Co., 2 Cal. I. A. C. Dec. 602.....	618
Mahomed v. Maunsell, 124 L. T. Jo. 153, 1 B. W. C. C. 269.....	157
Mahoney v. Gamble-Desmond Co., 90 Conn. 255, 96 Atl. 1025..	248, 257, 638, 702
v. Seymour Mfg. Co., 1 Conn. Comp. Dec. 292.....	635, 667, 793
v. Sterling Borax Co., 2 Cal. I. A. C. Dec. 708.....	374
v. Yosemite Valley R. R. Co., 2 Cal. I. A. C. Dec. 150.....	235, 640, 641
Mahowald v. Thompson-Starrett Co., (Minn.) 158 N. W. 913..	102, 347, 428, 816
Main Colliery Co. v. Davies, A. C. 358, H. L.....	235
v. Davies, 2 W. C. C. 108, 16 T. R. 460.....	225, 235, 256, 271
Maire v. Wm. Landauer & Co., Rep. Wis. Indus. Com. 1914-15, p. 20....	228
Majeau v. Sierra Nevada Wood & Lumber Co., 2 Cal. I. A. C. Dec.	
425	248, 491
Malewicki v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases,	
366	671
Malkowsky v. Silberovicz, 1 Conn. Comp. Dec. 136.....	748
Malloy v. Fidelity & Casualty Co. of New York, 2 Mass. Wk. Comp.	
Cases, 401.....	398, 436
Malone v. Cayzer, Irvine & Co., 1 B. W. C. C. 27, Ct. of Sess.....	509

	Page
Malone v. H. R. Douglas, Inc., 1 Conn. Comp. Dec. 297.....	715
Maloney v. Waterbury Farrel Foundry & Machine Co., 1 Conn. Comp. Dec. 220.....	317, 480, 498
Malott v. Healey, 2 Cal. I. A. C. Dec. 103.....	172, 371, 422, 427
Malzac v. Brule Timber Co., Mich. Wk. Comp. Cases (1916) 330.....	267
Manaloc, In re, Op. Sol. Dept. of L. 383.....	649
Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159	44
Mandell v. Aetna Life Ins. Co., 1 Cal. I. A. C. Dec. 265.....	498
Mandle v. A. Steinhardt & Bro. (Sup.) 160 N. Y. Supp. 2.....	334
Manford v. Carstenbrook, 3 Cal. I. A. C. Dec. 21.....	664
Manfredi v. Union Sugar Co., 2 Cal. I. A. C. Dec. 920.....	293, 678
Manis v. Milwaukee, Bul. Wis. Indus. Com. 1912-13, p. 29.....	166, 447, 739
Mann v. Glastonbury Knitting Co., 90 Conn. 116, 96 Atl. 368.....	25, 320, 326, 350, 389, 394, 396, 397, 398, 571
v. Locke, 2 Cal. I. A. C. Dec. 415.....	132, 194, 195, 808
Manning, In re, Op. Sol. Dept. of L. 279.....	292
Manson v. Forth & Clyde S. S. Co., 6 B. W. C. C. 830 Ct. of Sess.....	415
Mantz v. Falk Co., Rep. Wis. Indus. Com. 1914-15, p. 15.....	209
Marcontonio v. The Charles Francis Press, The Bulletin, N. Y., vol. 1, No. 12, p. 16.....	495, 757
Margolin v. Union Hardware Co., 1 Conn. Comp. Dec. 334.....	580
Marinaccio v. Flinn-O'Rourke Co., 172 App. Div. 378, 158 N. Y. Supp. 715	823
Marks v. Carne, 2 B. W. C. C. 186, C. A.....	181
Markt v. National Brewing Co., 2 Cal. I. A. C. Dec. 881.....	312, 772, 808
Marriott v. Brett & Beney, 5 B. W. C. C. 145, C. A.....	403
Marsh v. Boden, 7 W. C. C. 110, C. A.....	238
Marshall v. Detroit, Mich. Wk. Comp. Cases (1916) 57.....	84, 726, 765
v. East Holywell Coal Co., 7 W. C. C. 19.....	279, 542
v. Navigation Co., 1 K. B. Div. 79.....	524
v. Orient Steam Nav. Co., 3 B. W. C. C. 15 C. A.....	514, 528
v. Ransome Concrete Co., 2 Cal. I. A. C. Dec. 923.....	711
v. Sheppard, 6 B. W. C. C. 571 C. A.....	312
v. United States Fidelity & Guaranty Co., 2 Mass. Wk. Comp. Cases, 119	670
v. Wild Rose, The (1910) A. C. 486.....	270, 469
v. Wild Rose, The, 2 B. W. C. C. 76 C. A.....	313
v. Wild Rose, The, 3 B. W. C. C. 76, C. A.....	474
v. Wild Rose, The, 3 B. W. C. C. 79.....	387
v. Wild Rose, The, 3 B. W. C. C. 514, H. L.....	313
v. Wild Rose, The, 5 B. W. C. C. 385, H. L.....	474
Martin v. Barnett, 3 B. W. C. C. 146 C. A.....	517
v. Fullerton & Co., 1 B. W. C. C. 168, Ct. of Sess.....	450

	Page
Martin v. Lovibond & Sons, 7 B. W. C. C. 243, C. A.....	384, 426
v. Mahoney Bros., 2 Cal. I. A. C. 436.....	591
v. Manchester Corp., 5 B. W. C. C. 259 C. A.....	279, 541, 544
v. Russian River Fruit & Land Co., 1 Cal. I. A. C. Dec. 18.....	194
v. Sacramento, 2 Cal. I. A. C. Dec. 701.....	523
Martucci v. Hills Bros. Co., 171 App. Div. 370, 156 N. Y. Supp. 833.....	405
Maryland Casualty Co. v. Berry, 1 Cal. I. A. C. Dec. 237.....	787
v. Pillsbury (Cal.) 158 P. 1031.....	205
Mashburn v. California-Portland Cement Co., 2 Cal. I. A. C. Dec. 613....	593
Masich v. Northwestern Pac. R. Co., 2 Cal. I. A. C. Dec. 545.....	304, 476
Maskery v. Lancashire Shipping Co. (1914) Stone's W. C. A. Ins. Cas. 290 (Court of Appeal, England), 6 N. C. C. A. 708.....	462
Mason v. Knight, 1 Cal. I. A. C. Dec. 493.....	521, 615
v. Western Metal Supply Co., 1 Cal. I. A. C. Dec. 284.....	126, 168, 216, 351, 440, 585, 586, 796
Massa v. Crowe, 1 Conn. Comp. Dec. 86.....	295, 498, 502
Massachusetts Bonding & Insurance Co. v. Pillsbury, 2 Cal. I. A. C. Dec. 480, 170 Cal. 767, 151 Pac. 419, 11 N. C. C. A. 426.....	615, 697, 709, 733
Matecny v. Vierling Steel Works, 187 Ill. App. 448.....	231, 255, 686
Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 N. W. 71, 73, 5 N. C. C. A. 871.....	21, 63, 64, 82, 84, 85, 86, 96, 98, 110, 161
Matney v. Azusa Irrigating Co., 2 Cal. I. A. C. Dec. 898.....	195, 366
Matteoni v. Roberts & Clark, 1 Cal. I. A. C. Dec. 356.....	706
Matthews v. Bedworth, 1 W. C. C. 124.....	417
Matthiesen v. Pacific Gas & Electric Co., 1 Cal. I. A. C. Dec. 398.....	641, 642
Matwiczuk v. American Car & Foundry Co., (Mich.) 155 N. W. 412.....	747
Maurmann v. Chirhart & Nystedt, 1 Cal. I. A. C. Dec. 499.....	512
Mawdsley v. West Leigh Colliery Co., 5 B. W. C. C. 80, C. A.....	391, 556
May v. Ison, 7 B. W. C. C. 148, C. A., 110 L. T. 525.....	360, 377
Mayhew v. Thayer, 8 Gray (Mass.) 172.....	263
Maynard v. New London Ship & Engine Co., 1 Conn. Comp. Dec. 47.....	454
Mayott, In re, Op. Sol. Dept. of L. 765.....	782
Maziarski v. Ohl & Co., 86 N. J. Law, 692, 93 Atl. 110, 111.....	633
Mazura v. Klingon, 1 Conn. Comp. Dec. 296.....	107, 715
Mazzarisi v. Ward & Tully, 170 App. Div. 868, 156 N. Y. Supp. 964....	305, 340
Mazzini v. Pacific Coast Ry., 2 Cal. I. A. C. Dec. 962....	123, 206, 365, 413, 592
Mead v. Lockhart, 2 B. W. C. C. 398.....	819
Meaddows v. Smith Bros., 2 Cal. I. A. C. Dec. 344.....	348
Mecartea v. Marsh, 2 Cal. I. A. C. Dec. 128.....	667
Meese v. Northern Pacific R. Co., (D. C.) 206 Fed. 222.....	732
Meier v. Dublin Corporation, 2 Ir. R. 129, C. A.....	761
Meissner, In re, Op. Sol. Dept. of L. 131.....	342
Melchor, In re, Op. Sol. Dept. of L. 646.....	769
Meley, In re, 219 Mass. 136, 106 N. E. 559.....	25, 629, 632, 634, 822, 843

	Page
Meley v. Massachusetts Employés Ins. Ass'n., 2 Mass. Wk. Comp. Cases, 404, affirmed 219 Mass. 136, 106 N. E. 559.....	634
Melia v. Race Brook Country Club, 1 Conn. Comp. Dec. 549.....	496
Mellen Lumber Co. v. Industrial Commission, 154 Wis. 114, 142 N. W. 187, L. R. A. 1916A, 374, Ann. Cas. 1915B, 997.....	96, 98, 665, 666
Melling, In re, Op. Sol. Dept. of L. 129.....	346
Melton's Case, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84.....	80
Melville v. McCarthy, 47 Ir. L. T. R. 57.....	754
Memphis Cotton Oil Co. v. Tolbert (Tex. Civ. App.) 171 S. W. 309, 7 N. C. C. A. 547.....	58, 65, 66, 73, 110, 112
Mendocino Lumber Co. v. Southwestern Surety Ins. Co., 2 Cal. I. A. C. Dec. 755.....	451, 787
Menominee Bay Shore Lumber Co. v. Industrial Commission, 162 Wis. 344, 156 N. W. 151.....	729, 785, 791
Mentz v. Armenia Fire Ins. Co., 79 Pa. 478, 21 Am. Rep. 80.....	72
Menzies v. McQuibban, 2 F. 732, Ct. of Sess.....	405
Merchants' & Manufacturers' Bank v. Com., 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236.....	80
Merrill v. Boston & Lowell, 63 N. H. 256, 260.....	33
Merriman v. Scovill Mfg. Co., 1 Conn. Comp. Dec. 596.....	229, 480
Merritt v. Clark & Snow, 2 Cal. I. A. C. Dec. 983.....	348, 413, 563
v. Knife Falls Boom Co., 34 Minn. 245, 25 N. W. 403.....	82
v. North Pacific S. S. Co., 2 Cal. I. A. C. Dec. 237.....	357, 470
v. Travelers Ins. Co., 2 Mass. Wk. Comp. Cases, 635.....	462, 490
Merry & Cuninghame v. Black, 2 B. W. C. C. 372, Ct. of Sess.....	581
Messick v. McEntire, 97 Kan. 813, 156 Pac. 740.....	553
Meyer v. Pacific Light & Power Co., 1 Cal. I. A. C. Dec. 333.....	493
Mezansky v. Sissa, 1 Conn. Comp. Dec. 430.....	83, 135
Michael v. Western Salt Co., 2 Cal. I. A. C. Dec. 501.....	213
Michaels, Barbara, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 156....	199
Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176.....	52, 251
Michigan Sugar Co. v. Auditor General, 124 Mich. 677, 83 N. W. 625, 56 L. R. A. 329, 83 Am. St. Rep. 354.....	70
Michigan Workmen's Compensation Mut. Ins. Co. v. Redfield, Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 34.....	559
Middleton v. Texas Power & Light Co. (Tex.) 185 S. W. 556, 11 N. C. C. A. 873	69, 72, 73, 74, 80, 87, 96
Mifsud v. Palace Hotel Co., 1 Cal. I. A. C. Dec. 37.....	499, 623
Migeles, In re, Op. Sol. Dept. of L. 162.....	345
Mihaica v. Mlagenovich, 1 Cal. I. A. C. Dec. 174.....	132, 554
Mihm v. Hussey, 169 App. Div. 742, 155 N. Y. S. 860.....	332
Mikonis v. Royal Indemnity Co., 2 Mass. Wk. Comp. Cases, 384.....	670

	Page
Miles v. Huntington Beach Hardware Co., 2 Cal. I. A. C. Dec. 422.....	755
Miller, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 46.....	353
Miller, In re, Op. Sol. Dept. of L. 108.....	187
v. Aetna Springs Co., 2 Cal. I. A. C. Dec. 781.....	693, 709
v. Algar, 2 Cal. I. A. C. Dec. 584.....	194
v. American Steel & Wire Co., 90 Conn. 349, 97 Atl. 345.....	538, 539, 540
v. Libby & Blinn, 1 Conn. Comp. Dec. 377.....	413
v. New York, N. H. & H. R. Co., 1 Conn. Comp. Dec. 349.....	48, 724
v. New York Rys. Co., 171 App. Div. 316, 157 N. Y. Supp. 200.....	163, 164, 731
v. Public Service R. Co., 84 N. J. Law, 174, 85 Atl. 1030.....	230, 233, 246, 256
v. Riverside Storage & Cartage Co. (Mich.) 155 N. W. 462.....	224, 225, 230, 256, 257
v. Sovereign Camp W. of W., 140 Wis. 505, 122 N. W. 1126, 28 L. R. A. (N. S.) 178, 133 Am. St. Rep. 1095.....	266
v. Taylor (Sup.) 159 N. Y. Supp. 999.....	445
Millers v. North British Locomotive Co., 2 B. W. C. C. 80, Ct. of Sess....	455
Milliken v. A. Towle & Co., 212 Mass. 293, 103 N. E. 898, L. R. A. 1916A, 337	504
Milwaukee Coke & Gas Co. v. Industrial Commission, 160 Wis. 247, 151 N. W. 245.....	251, 285, 682, 823, 829
Milwaukee Western Fuel Co. v. Industrial Commission, 159 Wis. 635, 150 N. W. 998.....	313, 475, 819, 823, 827, 829
Miner v. Franklin County Tel. Co., 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195.....	397, 458
v. Turnbull, The Bulletin, N. Y., vol. 1, No. 6, p. 21.....	143
Minnaugh v. Brooklyn Union Gas Co., The Bulletin, N. Y., vol. 1, No. 8, p. 10.....	398, 460
Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585.....	62
Minneapolis, St. Paul & S. S. M. R. Co. v. Industrial Commission, 153 Wis. 552, 141 N. W. 1119, Ann. Cas. 1914D, 655, 3 N. C. C. A. 707.....	104
Minnesota, Opinions of Attorney General, Bul. 9, p. 8.....	661
p. 9	662
p. 11	147
p. 12	694
p. 13	673
p. 14	672, 695, 697
p. 15	850
p. 16	43
p. 17	40, 104
p. 19	50
p. 20	50, 196
p. 22	189

	Page
Minnesota, Opinions of Attorney General, Bul. 9, p. 23.....	177
p. 24	223
p. 26	222
p. 27	183
p. 28	495
Bul. 11, p. 15.....	669, 684
p. 16	57, 101
p. 20	201
p. 24	733
p. 29	674
p. 31	229
p. 40	608
Bul. 13, p. 31.....	183, 184, 208
p. 32	171, 184
p. 33	171
Minnis v. Young, The Bulletin, N. Y., vol. 1, No. 10, p. 14.....	512, 516
Miro, In re, Op. Sol. Dept. of L. 728.....	295
Mississippi Valley Trust Co. v. Oregon-Washington Trust Co. (D. C.) 213	
Fed. 988.....	150
Missouri Pacific R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed.	
107	65, 80, 81
Mitchell, In re, vol. 1, No. 7, Bul. Ohio Indus. Com. p. 56.....	373
v. Crichton, 2 Cal. I. A. C. Dec. 1005.....	244, 268
v. Fairchild-Gilmore-Wilton Co., 1 Cal. I. A. C. Dec. 71.....	242, 252
v. Glamorgan Coal Co., 9 W. C. C. 16, C. A.....	468, 746
v. McNab & Smith, 1 Cal. I. A. C. Dec. 116.....	484, 534
v. Occidental Forwarding Co., 2 Cal. A. C. Dec. 336.....	678, 701
v. Saxon, The, 5 B. W. C. C. 623, C. A.....	473
v. State, 115 Md. 360, 80 Atl. 1020.....	28
Mitchinson v. Day Bros., 6 B. W. C. C. 191, C. A.....	409, 436
Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55	
L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463, 2 N. C. C. A.	
243	65, 82
Mockett v. Ashton, 84 N. J. Law, 452, 90 Atl. 127, 4 N. C. C. A. 862.....	661
Mockler v. Hawkes (Sup.) 158 N. Y. Supp. 759.....	616, 625
Moell v. Wilson, The Bulletin, N. Y., vol. 1, No. 10, p. 15.....	258, 391
Moeller v. Bereda Mfg. Co., Bulletin No. 1, Ill., p. 66.....	801
Mohr v. Frederick L. Cranford, Inc., The Bulletin, N. Y., vol. 1, No. 6. p. 10	493
Molamphy v. Sheridan et al., 7 B. W. C. C. 957, C. A.....	526
Mole v. Wadworth, 6 B. W. C. C. 128, 129, 511.....	376
Molloy v. South Wales Anthracite Colliery Co., 4 B. W. C. C. 65, C. A... 356	
Monaghan v. United Collieries, 3 F. 149, Ct. of Sess.....	128
Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L.	
Ed. 327, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875.....	52, 82, 86

	Page
Monroe, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 186.....	169
Monroe v. Yosemite Laundry Co., 2 Cal. I. A. C. Dec. 718.....	210
Montes, In re, Op. Sol. Dept. of L. 153.....	344
Moore, In re, Op. Sol. Dept. of L. 143.....	343
v. Lehigh Valley R. Co., 169 App. Div. 177, 154 N. Y. Supp. 620.....	10, 26, 29, 64, 276, 281, 322, 382, 425
v. Manchester Liners, 3 B. W. C. C. 527, 529, H. L.....	346, 387, 388, 396, 451, 453
v. Manchester Liners, 2 B. W. C. C. 87, C. A.....	387, 451, 453
Moore v. Naval Colliery Co., 5 B. W. C. C. 87, C. A.....	751
v. William Harkin & Sons, 4 N. Y. St. Dep. Rep. 383.....	506
Morales, In re, Op. Sol. Dept. of L. 295.....	399
Moreno v. San Pedro, Los Angeles & Salt Lake R. R. Co., 2 Cal. I. A. C. Dec. 754	53
Morey v. Worden, 2 N. Y. St. Dep. 494.....	594
Morgan, In re, Op. Sol. Dept. of L. 177.....	345
v. Zenaida, The, 2 B. W. C. C. 19, C. A.....	281, 432
Morgan's Louisiana & L. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237.....	45
Morgean v. Westinghouse, Church, Kerr & Co., 1 Conn. Comp. Dec. 311....	654
Morgillo v. Westinghouse, Church, Kerr & Co., 1 Conn. Comp. Dec. 311....	654
Morris v. Lambeth Borough Council, 8 W. C. C. 1, C. A.....	384
v. Rowbotham, 8 B. W. C. C. 157, C. A.....	404
v. Spears, 1 Cal. I. A. C. Dec. 317.....	193
v. Turford & Southward, 6 B. W. C. C. 606, C. A.....	603
Morrish v. Brookmiller, 2 Cal. I. A. C. Dec. 76.....	691
Morrison v. Clyde Navigation Trustees, 2 B. W. C. C. 99, Ct. of Sess.....	454
v. Fidelity & Casualty Co., 2 Mass. Wk. Comp. Cases, 594.....	620
v. Los Angeles Ry. Corp., 2 Cal. I. A. C. Dec. 18.....	438
Morse v. Royal Indemnity Co., 1 Cal. I. A. C. Dec. 53.....	230, 269
v. Waterbury Clock Co., 1 Conn. Comp. Dec. 138.....	413
Moss v. Ames Iron Works, The Bulletin, Vol. 1, No. 8, p. 9.....	774
Moss & Co. v. Akers, 4 B. W. C. C. 294, C. A.....	531, 828
Motely v. McDonald, Bulletin No. 1, Ill., p. 25.....	802
Moyes v. Dixon, Limited, 7 F. 386, Ct. of Sess. 81.....	237
Muir v. Ocean Accident & Guarantee Corp., 2 Mass. Wk. Comp. Cases, 172	368
Mulhall v. Fallon, 176 Mass. 276, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309.....	32
Mulholland v. Hazelton & Co., 36 Ir. L. T. 217, C. A.....	404
Mullan v. Rogers, 2 Cal. I. A. C. Dec. 927.....	145, 307
Mullen v. Stewart & Co., 1 B. W. C. C. 204, Ct. of Sess.....	443
Mulligan v. John Dick & Son, 6 Fed. 126, Ct. of Sess.....	156
Mullins, In re, Op. Sol. Dept. of L. 58.....	188

	Page
Mulrooney v. Todd & The Bradford Corp., 2 B. W. C. C. 191, C. A.....	127
Mulverhill, In re, Op. Sol. Dept. of L. 672.....	304
Munn, In re, Op. Sol. Dept. of L. 597.....	250
v. Industrial Board, 274 Ill. 70, 113 N. E. 110. . .356, 819, 824, 826, 838, 839	
v. People of State of Illinois, 94 U. S. 113, 24 L. Ed. 77.....	86
Murphy, In re, 218 Mass. 278, 105 N. E. 635, 5 N. C. C. A. 716.....	638
Murphy, In re (Mass.) 113 N. E. 283.....	231, 255, 548, 571, 824
v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 817, affirmed by 218 Mass. 278, 105 N. E. 635.....	639
v. Berwick, 2 B. W. C. C. 103, C. A.....	436
v. Berwick, 43 Ir. I. T. R. 126.....	324
v. Blycher, 1 Conn. Comp. Dec. 443.....	135
v. Casualty Co. of America, 1 Cal. I. A. C. Dec. 54.....	316
v. Enniscorthy Board of Guardians, 2 B. W. C. C. 291, C. A.....	179
v. Standard Oil Co., 2 Cal. I. A. C. Dec. 304.....	227
Murphy & Sandwith v. Cooney, 2 I. R. 76, C. A.....	460
v. Allan Bros. & Co., 6 B. W. C. C. 215, C. A.....	450
Murray, In re, Op. Sol. Dept. of L. 239.....	299
v. North British R. Co., 6 Fed. 540, Ct. of Sess.....	156
Muzik v. Erie R. Co., 85 N. J. Law, 131, 89 Atl. 248, 86 N. J. Law, 695, 92 Atl. 1087.....	256
Muzik v. Erie R. Co., 85 N. J. Law, 129, 89 Atl. 248, Ann. Cas. 1916A, 140, affirmed 86 N. J. Law, 695, 92 Atl. 1087.....	233, 469
Mustaccio v. Simpson Const. Co., Bulletin No. 1, Ill., p. 60.....	798
Mustaikas v. Casualty Co. of America, 2 Mass. Wk. Comp. Cases, 547....	305
Mutter, Howey & Co. v. Thomson, 6 B. W. C. C. 424, Ct. of Sess.....	519
Mutual Acc. Ass'n v. Barry, 131 U. S. 100, 121, 9 Sup. Ct. 755, 762, 33 L. Ed. 60.....	276

N

Naruk v. Main, 1 Conn. Comp. Dec. 48.....	606, 611
Nash v. Rangatira, The, 7 B. W. C. C. 590, C. A.....	451
Naud v. King Sewing Mach. Co., 95 Misc. Rep. 676, 159 N. Y. Supp. 910..	277, 280, 818, 830
Naylor v. Musgrave Spinning Co., 4 B. W. C. C. 286, C. A.....	403
Neel v. White, 2 Cal. I. A. C. Dec. 933.....	131, 762
Neimeyer v. Volger, 2 Cal. I. A. C. Dec. 305.....	192
Nekoosa-Edwards Paper Co. v. Industrial Commission, 154 Wis. 105, 141	
N. W. 1013, L. R. A. 1916A, 348, Ann. Cas. 1915B, 995.....	565, 567, 823
Nellis, In re, Op. Sol. Dept. of L. 286.....	371
Nelson, In re, 217 Mass. 467, 105 N. E. 357, 5 N. C. C. A. 694..	224, 259, 262
v. Belfast Corp., 1 B. W. C. C. 158, C. A.....	356, 406
v. Fitzgerald, Bulletin No. 1, Ill. 95.....	117

	Page
Nelson v. Kerr & Mitchell, 3 F. 893. Ct. of Sess.....	577
v. Thomas McLarnon & Co., The Bulletin, N. Y., Vol. 1, No. 10, p. 19	512
Nesland v. Eddy, 131 Minn. 62, 154 N. W. 661.....	251
Nesselroad v. Castle Bros., 2 Cal. I. A. C. Dec. 529.....	307
Netherland v. Contra Costa Const. Co., 1 Cal. I. A. C. Dec. 440.....	473
Neumann v. Milwaukee Electric Ry. & Light Co., Bul. Wis. Indus. Com. Vol. 1, p. 92.....	454, 559
v. Turner, 1 Conn. Comp. Dec. 130.....	107, 742
Nevada, Reports of Industrial Commission 1913-14, p. 16.....	298
p. 19	26
p. 21.....	587, 592, 625
p. 24.....	624, 632, 660
p. 25.....	35, 209, 277, 290, 489
p. 26.....	168, 170
Nevadjic v. Northwestern Iron Co., Bul. Wis. Indus. Com. Vol. 1, p. 93..	261, 548
v. Northwestern Iron Co., Bul. Wis. Indus. Com. 1912-13, p. 21, af- firmed 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877.....	261, 548
New Amsterdam Casualty Co. v. Olcott, 165 App. Div. 603, 150 N. Y. Supp. 772	147
Newark Paving Co. v. Klotz, 85 N. J. Law, 432, 91 Atl. 91.....	162, 241
Newcomb v. Albertson, 85 N. J. Law, 435. 89 Atl. 928.....	492, 632
Newkirk v. Union Ice Co., 1 Cal. I. A. C. Dec. 166.....	706, 718, 791
Newman v. Newman, 218 N. Y. 325, 113 N. E. 332, affirming 169 App. Div. 745, 155 N. Y. Supp. 665.....	29, 175, 321, 338, 418
Newman's Case, In re, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C, 1145.....	256, 259, 262, 263, 822
New Monckton Collieries v. Keeling, 4 B. W. C. C. 49, C. A.....	247
v. Keeling, 4 B. W. C. C. 332, 6 N. C. C. A. 240, H. L.....	247
Newson v. Burstall, 8 B. W. C. C. 21, C. A.....	177
New York Shipbuilding Co. v. Buchanan, 84 N. J. Law, 543, 87 Atl. 86...	661
Nicholas, In re, Op. Sol. Dept. of L. 125.....	342, 346
v. Dawson, 15 T. L. R. 242.....	469
Nicholls v. Briton Ferry U. D. C., 8 B. W. C. C. 42, C. A.....	757, 761
Nichols, In re, 217 Mass. 3, 104 N. E. 566, Ann. Cas. 1915C, 862, 4 N. C. C. A. 546.....	28, 639, 640
v. London Guarantee & Accident Co., 2 Mass. Wk. Comp. Cases, 814, affirmed 217 Mass. 3, 104 N. E. 566, Ann. Cas. 1915C, 862...	640
v. Max Pollock Co., 1 Conn. Comp. Dec. 74.....	622
v. Walter, 37 Minn. 264, 33 N. W. 800.....	82
Nickerson, In re, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790, 5 N. C. C. A. 645.....	548, 549, 556, 569, 824

	Page
Nickerson v. New England Casualty Co., 2 Mass. Wk. Comp. Cases, 379...	561
Nicoletti v. Pennsylvania Mining Co., 2 Cal. I. A. C. Dec. 347.....	315
Niemark v. West Coast Roofing Co., Bulletin No. 1, Ill., p. 56.....	635
Nisbet v. Rayne & Burn, 3 B. W. C. C. 507, C. A.....	284
v. Rayne & Burn, 2 K. B. 689.....	426, 433, 437
Nitram Co. v. Court of Common Pleas, 84 N. J. Law, 243, 86 Atl. 435....	634
v. Creagh, 84 N. J. Law, 243, 86 Atl. 435.....	13, 93, 620, 633
Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186, 55 L. Ed. 112,	
32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487.....	98
Noden v. Galloways, Limited, 5 B. W. C. C. 7, C. A.....	462, 517
Nolan v. Cranford Co., 4 N. Y. St. Dep. Rep. 337, affirmed 155 N. Y. Supp.	
1128	169
v. New England Casualty Co., 2 Mass. Wk. Comp. Cases, 417.....	409
v. Parter & Sons, 2 B. W. C. C. 106.....	359
Noonan v. Ferris, 2 Cal. I. A. C. Dec. 89.....	185
Noriega, In re, Op. Sol. Dept. of L. 378.....	645
Norman v. Empire Lighterage & Wrecking Co., 2 N. Y. St. Dep. Rep. 480..	119
Norris v. Lambeth Borough Council, 8 W. C. C. 3.....	396
North v. University of Illinois, Bulletin No. 1, Ill., p. 63.....	118, 339
North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L.	
Ed. 591, Ann. Cas. 1914C, 159, 9 N. C. A. 109.....	379
Northern Employers' Mutual Indemnity Co. v. Kniveton, 19 T. L. R. 504,	
Dist. Ct., 4 W. C. C. 37.....	146
Northern Pac. R. Co. v. Meese, 239 U. S. 614, 36 Sup. Ct. 223, 60 L.	
Ed. 467	65
Northwestern Fuel Co. v. Leipus, 161 Wis. 450, 152 N. W. 856.....	
	624, 625, 628, 629
Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97, 142 N. W.	
271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877....	28, 259, 264, 265,
	266, 821, 823, 825
v. Industrial Commission, 160 Wis. 633, 152 N. W. 416.....	382, 396
Norton v. Shore Line Electric R. Co., 84 Conn. 24, 35, 78 Atl. 587.....	827
Noval v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases,	
586, C. A.....	617
Nurse, In re, Op. Sol. Dept. of L. 626.....	769
Nycek v. C. Reiss Coal Co., Bul. Wis. Indus. Com. 1912-13, p. 23.....	592

O

Oaks v. Berkeley Steel Co., 1 Cal. I. A. C. Dec. 218.....	844
Oberts v. Wisconsin Tel. Co., Rep. Wis. Indus. Com. 1914-15, p. 24....	486, 713
O'Brien v. Casualty Co. of America, 2 Mass. Wk. Comp. Cases, 226.....	469
v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 398..	709
v. Star Line, Limited, 1 B. W. C. C. 177, Ct. of Sess.....	473

	Page
O'Connell v. Simms Magneto Co., 85 N. J. Law, 64, 89 Atl. 922, 4 N. C. C. A. 590	626
O'Connor v. London Guarantee & Accident Co., 2 Mass. Wk. Comp. Cases, 387	439
v. Yosemite Lumber Co., 2 Cal. I. A. C. Dec. 334	707
O'Donnell v. Clare County Council, 6 B. W. C. C. 457, C. A.	201, 214
Ogilvie v. Egan, 1 Cal. I. A. C. Dec. 79	366, 423, 449
O'Hara v. Cadzow Coal Co., 5 F. 439, Ct. of Sess.	560
v. Hayes, 3 B. W. C. C. 586, C. A.	308
O'Hare v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases 369	496
Okrzezs v. Lehigh Valley R. Co., 170 App. Div. 15, 155 N. Y. Supp. 919..	46
Oldenberg v. Industrial Commission, 159 Wis. 333, 150 N. W. 444.	823, 830
Oldham v. Southwestern Surety Ins. Co., 1 Cal. A. C. Dec. 258.	370, 377
Oleskie v. Dodge Bros., Mich. Wk. Comp. Cases (1916) 45.	845
Oliveira v. Aetna Life Ins. Co., 2 Mass. Wk. Comp. Cases, 517.	671
Oliver v. Christopher, 98 Kan. 660, 159 Pac. 397.	778, 837, 841
v. Macon Hardware Co., 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300	183, 186
v. Nautilus Steam Shipping Co., 2 K. B. 639, C. A. 5, W. C. C. 65.	157
Ollie v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases, 676.	532
Olney v. West Side Lumber Co., 2 Cal. I. A. C. Dec. 272.	493
Olsen v. Hale, 2 Cal. I. A. C. Dec. 607.	313, 387
v. Rogers Development Co., 2 Cal. I. A. C. Dec. 586.	184
v. Western Fuel Co., 2 Cal. I. A. C. Dec. 643.	657
Olson, In re, Op. Sol. Dept. of L. 136.	342
Olson, In re, Op. Sol. Dept. of L. 141.	344
v. Dorset, The, 6 B. W. C. C. 658, C. A.	311
v. Hillman's, Inc., Bulletin No. 1, Ill. p. 121.	749
v. Olson Winery Co., 2 Cal. I. A. C. Dec. 325.	578
v. Tice, 2 Cal. I. A. C. Dec. 333.	658
O'Neal v. Palmer & McBryde, 2 Cal. I. A. C. Dec. 745.	781
Oneida Steel Pulley Co., In re (N. Y.) 113 N. E. 455.	844
O'Neil v. Carley Heater Co., 218 N. Y. 414, 113 N. E. 406.	435
O'Neill v. Brown & Co., (1913) S. C. 653.	526
v. Brown & Co., 6 B. W. C. C. 428, Ct. of Sess.	528
Opinion of Justices, In re, 209 Mass. 607, 96 N. E. 308, 309, 1 N. C. C. A. 557.	81, 85, 97
Opinions of Attorney Generals of various states will be found in this table under the name of the state.	
Opinions of Comptroller of Treasury will be found under "Federal Act" in this table.	
Opinions of Special Counsel to Iowa Industrial Commission will be found in this table under "Iowa".	

	Page
Opitz v. Chas. Hoertz & Son, Mich. Wk. Comp. Cases (1916) 311.....	136, 144
O'Regan v. Cunard S. S. Co., 160 Mass. 356, 361, 35 N. E. 1070, 39 Am. St. Rep. 484.....	159
Oregon, First Annual Reports Industrial Accident Commission June 30, 1915, p. 6.....	22
p. 7.....	23
p. 10.....	23
p. 18.....	503
p. 19.....	14
p. 22.....	22
p. 23.....	21
p. 24.....	13, 21
p. 42.....	20
Orient Ins. Co. of Hartford, Conn. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552.....	80
O'Rourke v. Cudahy Packing Co., 1 Conn. Comp. Dec. 8.....	107
Osgood, In re, Op. Sol. Dept. of L. 391.....	490
Ostrowski v. Stanley Iron Works, 1 Conn. Comp. Dec. 554.....	241
Otot v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 254..	496
Owen v. Mahoney Bros., 1 Cal. I. A. C. Dec. 308.....	656
Oyos v. Pacific Sewer Pipe Co., 2 Cal. I. A. C. Dec. 622.....	470

P

Pacific Coast Casualty Co. v. Pillsbury, 2 Cal. I. A. C. Dec. 538, 171 Cal. 52, 151 Pac. 658.....	806, 810
v. Pillsbury, 171 Cal. 319, 153 Pac. 24... 515, 521, 719, 774, 797, 810,	835
Paddington Borough Council v. Stack, 2 B. W. C. C. 402, C. A.....	527
Page v. Burtwell, 2 K. B. 758, C. A.....	156, 739
Pagliarulo, In re, Op. Sol. Dept. of L. 503.....	573
Palacios, In re, Op. Sol. Dept. of L. 162.....	345
Palama v. Chase Metal Works, 1 Conn. Comp. Dec. 444.....	311, 413, 480
Palmer v. Scheidenhelm, Bulletin No. 1, Ill., p. 135.....	634
Palmeri v. Greist Mfg. Co., 1 Conn. Comp. Dec. 669.....	349, 414
Pampuro v. Murray Bros., 1 Conn. Comp. Dec. 674.....	698
Panama-Pacific International Exposition Co. v. Hooper, 1 Cal. I. A. C. Dec. 429.....	191, 198
Panasuk, In re (Pansuk's Case) 217 Mass. 589, 105 N. E. 368, 5 N. C. C. A. 688.....	25, 689, 696, 697, 698, 784
v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 338, affirmed 217 Mass. 589, 105 N. E. 368.....	698
Pangburn, In re, Op. Sol. Dept. of L. 138.....	343
Pansoda v. Bridgeport Hydraulic Co., 1 Conn. Comp. Dec. 118.....	240
Papinaw v. Grand Trunk R. Co., (Mich.) 155 N. W. 545.....	347, 825

	Page
Pappas v. Warren, 2 Cal. I. A. C. Dec. 874.....	193
Pappiani v. White Oak Crushed Stone Co., 1 Conn. Comp. Dec. 619.....	270
Parini v. Selby Smelting & Lead Co., 2 Cal. I. A. C. Dec. 192.....	535, 680
Parker v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 392	411, 478
v. Black Rock, The, 7 B. W. C. C. 152, C. A.....	459
v. Hambrock, 5 B. W. C. C. 608, C. A.....	393, 400
v. Pont, 5 B. W. C. C. 45, C. A.....	455
v. Pout, 105 L. T. 493.....	376
Parro v. New York, S. & W. R. Co., 85 N. J. Law, 155, 88 Atl. 825, 4 N. C. C. A. 680.....	813
Parsley v. O'Brien Bros., 1 Cal. I. A. C. Dec. 494.....	640
Parsons v. Delaware & Hudson Co., 167 App. Div. 536, 153 N. Y. Supp. 179	46, 176
Partridge v. Whiteley, Limited, 8 B. W. C. C. 53, C. A.....	456
Pascale v. S. L. & G. H. Rogers Co., 1 Conn. Comp. Dec. 33.....	633
Passus, In re, Op. Sol. Dept. of L. 371.....	649
Patch v. First Nat. Bank, Rep. Wis. Indus. Com. 1914-15, p. 9....	482, 777, 792
Paterson v. Lockhart, 7 F. 954, Ct. of Sess.....	214
v. Moore & Co., 3 B. W. C. C. 541, Ct. of Sess.....	577
Paton v. Dixon, Limited, 6 B. W. C. C. 882, Ct. of Sess.....	522, 542
Patralla v. American Brass Co., 1 Conn. Comp. Dec. 412.....	709
Pattberg v. Young & Swain Baking Co., 2 Cal. I. A. C. Dec. 883.....	315
Patterson, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 33.....	475, 778
Patterson, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 157.....	763
v. Bloomington, D. & C. R. Co., Bulletin No. 1, Ill. p. 101.....	361, 452
Pattison v. White & Co., 6 W. C. C. 61, C. A.....	129
Paul v. Johnson Bros., 3 Cal. I. A. C. Dec. 32.....	719
v. Nikkel, 1 Cal. I. A. C. Dec. 648.....	137, 204, 205, 406
Pawlak v. Hayes, 162 Wis. 503, 156 N. W. 464, 11 N. C. C. A. 752....	520, 742
Payne v. Barlow, 84 Kan. 132, 113 Pac. 432.....	73
Peabody v. Superior, Bul. Wis. Indus. Com. vol. 1, p. 99.....	137
Pearce v. Southwestern R. Co., 2 W. C. C. 152.....	427
Pearl v. Harris, 121 Mass. 390.....	71
Pears v. Gibbons, 6 B. W. C. C. 722, C. A.....	180
Peck v. San Francisco-Oakland Terminal Rys., 1 Cal. I. A. C. Dec. 462....	505, 519
Pedersen v. Delaware, L. & W. R. R., 229 U. S. 146, 33 Sup. Ct. 648, 47 L. Ed. 1125, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779.....	55
Pédez, In re, Op. Sol. Dept. of L. 171.....	344
Pedroni v. C. W. Blakeslee & Sons, 1 Conn. Comp. Dec. 670.....	710
Peel v. Lawrence & Sons, 5 B. W. C. C. 274, C. A.....	418, 419
Peet v. Mills, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154, 4 N. C. C. A. 786.....	19, 25, 27, 58, 73, 732

	Page
Peggie v. Wemyss Coal Co. (1910) S. C. 93, Ct. of Sess.....	765
Pelham v. Burstein, 1 Conn. Comp. Dec. 49.....	569, 693, 723
Pellett v. Industrial Commission of Wis., 162 Wis. 596, 156 N. W. 956..	754, 760
Peloquin v. Fidelity & Deposit Co. of Maryland, 2 Mass. Wk. Comp. Cases,	
718	259
Penfield v. Glastonbury, 1 Conn. Comp. Dec. 637.....	204, 209, 369, 580
Penn v. Spiers & Pond, 1 B. W. C. C. 401, C. A.....	575
Pennington v. Geo. W. Pennington Sons, 2 Cal. I. A. C. Dec. 994.....	726
Pensabene v. F. & J. Auditore Co., 78 Misc. Rep. 538, 138 N. Y. Supp. 947	
	40, 91, 92
People v. Brady, 268 Ill. 192, 108 N. E. 1009.....	24
v. Henning Co., 260 Ill. 554, 103 N. E. 530.....	24
v. McCue, 150 Cal. 195, 88 Pac. 899.....	785, 829
v. Township Board of Salem, 20 Mich. 452, 4 Am. Rep. 400.....	70
People ex rel. Kinney v. White, 64 App. Div. 390, 392, 72 N. Y. Supp. 91..	329
Pepper v. Sayer, 7 B. W. C. C. 616, C. A.....	389
Peres v. Wand, 1 Cal. I. A. C. Dec. 607.....	697
Perkins, In re, Op. Sol. Dept. of L. 579.....	248
Peroni v. San Francisco, Napa & Calistoga Ry., 2 Cal. I. A. C. Dec. 818..	466
Perry v. Anglo-American Decorating Co., 3 B. W. C. C. 310.....	359
v. Ocean Coal Co., 5 B. W. C. C. 421.....	308
v. San Jose, 1 Cal. I. A. C. Dec. 537.....	446, 452
v. Wright, 1 B. W. C. C. 354.....	592
Petch v. Lamont & Richardson, 2 Cal. I. A. C. Dec. 982.....	803
Peters v. Indianapolis Abattoir Co., 1 Conn. Comp. Dec. 263.....	618
Peters, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 25.....	540
Petersen v. Pellasco, 2 Cal. I. A. C. Dec. 199...178, 205, 207, 665, 781, 799, 808	
v. Sperry & Barnes, 1 Conn. Comp. Dec. 370.....	481
v. Valley Pipe Line Co., 2 Cal. I. A. C. Dec. 606.....	438, 439
Peterson v. H. B. Beach & Sons, 1 Conn. Comp. Dec. 469.....	713, 714, 716
v. State of California, 2 Cal. I. A. C. Dec. 48.....	182
Petrie, In re, 215 N. Y. 335, 109 N. E. 549.....	25, 633
In re (N. Y.) 113 N. E. 455.....	844
In re, 165 App. Div. 561, 151 N. Y. Supp. 307.....	633
Petrock v. Keystone Steel & Wire Co., Bulletin No. 1, Ill., p. 89.....	802
Petrozino v. American Mut. Liability Co. (Caliendo's Case) 219 Mass. 498,	
107 N. E. 370.....	225, 238, 239, 257
Petrucchi v. Red River Lumber Co., 3 Cal. I. A. C. Dec. 40.....	260
Petschelt v. Preis, 8 B. W. C. C. 44, C. A.....	542, 761
Pettee v. Noyes (Minn.) 157 N. W. 995.....	190
Pettit v. Mendenhall, 2 Cal. I. A. C. Dec. 212.....	285, 748
Pfaender v. Chicago & N. W. R. Co., 86 Minn. 218, 90 N. W. 393.....	82
Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589,	
56 L. Ed. 911.....	66

	Page
Phillips, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 49.....	364
v. Chanslor-Canfield Midway Oil Co., 1 Cal. I. A. C. Dec. 580.....	354, 412, 552, 567, 588, 611, 798
v. Pacific Gas & Electric Co., 2 Cal. I. A. C. Dec. 789.....	400
v. Williams, 4 B. W. C. C. 143, C. A.....	356, 401
Philp v. International Silver Co., 1 Conn. Comp. Dec. 448.....	699
Platt v. Swift & Co., 188 Mo. App. 584, 176 S. W. 434.....	101, 108, 739
Pickett, In re, Op. Sol. Dept. of L. 80.....	189
Pidgeon v. Maryland Casualty Co., 2 Mass. Wk. Comp. Cases, 348.....	463
Pierce v. Boyer-Van Kuran Lumber & Coal Co., 99 Neb. 321, 156 N. W. 509, Ann. Rep. Neb. St. Dept. of L. 1915, Bulletin 32, p. 94.....	320, 410, 441, 659, 660
v. Provident Clothing & Supply Co., 4 B. W. C. C. 242, C. A.....	426
Pigeon v. Employers' Liability Assur. Corp., 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516.....	122, 385, 447, 724, 777, 784, 785, 821, 822, 836
Pimm v. Clement Talbot, Limited, 4 B. W. C. C. 565, C. A.....	753
Pinel v. Rapid Ry. System, 184 Mich. 169, 150 N. W. 897.....	228
Pinoza v. Northern Chair Co., 152 Wis. 473, 140 N. W. 84.....	113
Pitt v. Central Illinois Public Service Co., 273 Ill. 617, 113 N. E. 153.....	831
Pizzo v. Wiemann, 149 Wis. 235, 134 N. W. 899, 38 L. R. A. (N. S.) 678, Ann. Cas. 1913C, 803, 3 N. C. C. A. 149.....	113
Plass v. New England R. Co., 169 App. Div. 826, 155 N. Y. Supp. 854.....	301, 823
Pliska v. Hatton Lumber Co., Bul. Wis. Indus. Com. vol. 1, p. 95.....	272
Plumb v. Cobden Flour Mills Co. (1914) App. C. 62 (Eng.).....	321, 779
v. Cobden Flour Mills Co., 6 B. W. C. C. 245, C. A.....	453
v. Cobden Flour Mills Co., 7 B. W. C. C. 1, H. L.....	455
v. Cobden Flour Mills Co., 7 B. W. C. C. 6.....	392
Poccardi v. Public Service Commission, 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299.....	282, 313, 467, 483, 746, 826, 828
Pogue v. Nassau Light & Power Co., 1 N. Y. St. Dep. Rep. 429.....	366
Polin v. Bristol Bay Packing Co., 3 Cal. I. A. C. Dec. 12.....	34
Poling v. Brown, Bulletin No. 1, Ill., p. 21.....	117, 719
Pollard v. Goole & Hull Steam Towing Co., 3 B. W. C. C. 366, C. A.....	122, 124
Polled v. Great Northern R. Co., 5 B. W. C. C. 620, C. A.....	247
Pollock v. Wagner Leather Co., 3 Cal. I. A. C. Dec. 37.....	244
Pomfret v. Lancashire & Y. R. Co., 2 K. B. 718, 5 W. C. C. 22.....	427, 472
Ponce v. Engstrum Co., 2 Cal. I. A. C. Dec. 370.....	315
Ponder v. Adams & McBratney, 1 Cal. I. A. C. Dec. 207.....	553
Pope v. Heywood Bros. & Wakefield Co., 221 Mass. 143, 108 N. E. 1058....	109
v. Hill's Plymouth Co., 5 B. W. C. C. 175, H. L.....	456
v. Hill's Plymouth Co., 102 L. T. R. 632, 3 B. W. C. C. 339, C. A.....	456, 570
v. Hill's Plymouth Co., 105 L. T. R. 678, 5 B. W. C. C. 175.....	570
Poppos v. Silver Palace Theatre Co., 2 Cal. I. A. C. Dec. 397.....	497

	Page
Porter v. Anderson, 1 Cal. I. A. C. Dec. 608.....	485
v. Anderson, 2 Cal. I. A. C. Dec. 67.....	806
v. Noble, 1 Cal. I. A. C. Dec. 588.....	521
v. Whitbread & Co., 7 B. W. C. C. 205, C. A.....	663
Portnoy v. Fidelity & Casualty Co. of New York, 2 Mass. Wk. Comp. Cases, 823.....	617
Porton v. Central (Unemployed) Body for London, 2 B. W. C. C. 296, C. A. 181, 579	579
Posey, In re, Op. Sol. Dept. of L. 183.....	345
Post v. Burger & Gohlke, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, 10 N. C. C. A. 888.....	33, 34, 175
Postex Cotton Mill Co. v. McCamy (Tex. Civ. App.) 184 S. W. 570.....	73
Potter, In re, Op. Sol. Dept. of L. 272.....	301
v. Welch & Sons, 7 B. W. C. C. 738, C. A.....	753
Potts v. Niddrie & Benhar Coal Co. (1913) A. C. 531, 538.....	257
v. Pacific Stevedoring & Ballasting Co., 1 Cal. I. A. C. Dec. 630.....	567
Poulton v. Kelsall, 5 B. W. C. C. 318, C. A.....	362, 385
Powell v. Brown, 1 Q. B. 157, C. A. 1 W. C. C. 44.....	130
v. Brynddu Colliery Co., 5 B. W. C. C. 124, C. A.....	456
v. Lanarkshire Steel Co., 6 F. 1039, Ct. of Sess.....	401, 456, 561, 562
v. Main Colliery Co., 2 W. C. C. 25, A. C.....	762
v. Main Colliery Co., 2 W. C. C. 29, H. L.....	769
v. Main Colliery Co. (1900) A. C. 366.....	739
v. State of Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253	63
Powely, In re, 169 App. Div. 170, 154 N. Y. Supp. 426.....	217, 685, 823
Powers, In re, Op. Sol. Dept. of L. 214.....	318
In re, Op. Sol. Dept. of L. 622.....	770
v. Smith, 3 B. W. C. C. 470, C. A.....	492
Preston, Ex parte, 72 Tex. Cr. R. 77, 161 S. W. 115.....	222
Price, In re, Op. Sol. Dept. of L. 163.....	346
v. Burnyeat, Brown & Co., 2 B. W. C. C. 337, C. A.....	603
v. Clover Leaf Coal Mining Co., 188 Ill. App. 27.....	90, 100, 109
v. Occidental Life Ins. Co., 169 Cal. 800, 147 Pac. 1175.....	278
v. Tredegar Iron & Coal Co., 7 B. W. C. C. 387, C. A.....	455, 547
Prichard v. American Beet Sugar Co., 2 Cal. I. A. C. Dec. 341.....	226, 228, 268
Printy v. Jacobsen-Bade Co., 1 Cal. I. A. C. Dec. 519.....	535
Pritchard v. Torkington, 7 B. W. C. C. 719, C. A.....	455
Procknau, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 66.....	399
Proctor & Sons v. Robinson, 3 B. W. C. C. 41, C. A.....	606
Prohaska v. American Typewriter Co., 1 Conn. Comp. Dec. 116.....	715
Proprietors of Hays' Wharf, Limited, v. Brown, 3 B. W. C. C. 84.....	524
Proulx v. Hudson & Sons, Bulletin, No. 1, Ill. 45.....	518
Pryce v. Penrikyber Nav. Colliery Co. 1 K. B. 221.....	225

	Page
Pryce v. Penrikyber Nav. Colliery Co., 4 W. C. C. 115, C. A.....	252
Przykopski v. Citizens' Coal Co., 270 Ill. 275, 110 N. E. 336.....	64
Puddy v. Fitch, Rep. Wis. Indus. Com. 1914-15, p. 17.....	130
Puget Sound Traction, Light & Power Co. v. Schleif, 220 Fed. 48, 135 C. A. 616.....	106, 341
Pugh v. Dudley, 7 B. W. C. C. 528, C. A.....	467
Puljevich v. Lime Rock Sugar Co., 1 Cal. I. A. C. Dec. 165.....	295, 500
Punipanelli v. Aberthaw Const. Co., 1 Conn. Comp. Dec. 620.....	656
Purdy v. Sault Ste. Marie (Mich.) 155 N. W. 597.....	750
Puridzy v. Winchester Repeating Arms Co., 1 Conn. Comp. Dec. 420.....	611
Purnell v. State Board of Education, 125 Md. 266, 93 Atl. 518.....	28
Purse v. Hayward, 85 L. T. 502.....	288
Puterbaugh, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 143.....	389
Putnam v. Murray, The Bulletin, N. Y. vol. 1, No. 4, p. 9.....	325, 776
Puza v. C. Hennecke Co., 158 Wis. 482, 149 N. W. 223.....	112, 113
Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999.....	774
Pyrah, In re, Op. Sol. Dept. of L. 129.....	312

Q

Queen v. Baird & Co., 6 F. 271, Ct. of Sess.....	407, 560
v. Clarke, 2 Ir. R. 135.....	245
v. Hepburn, 11 U. S. (Cranch.) 296, 3 L. Ed. 348.....	776
Query of Naval Constructor of Boston Navy Yard, In re, Op. Sol. Dept. of L. 345.....	649
Quinlan v. Barber Asphalt Pav. Co., 84 N. J. Law, 510, 87 Atl. 127.....	643
Quinn v. McCallum, 2 B. W. C. C. 339.....	514
v. McCallum, 46 S. L. R. 141, Ct. of Sess.....	511
Quong Wing v. Kirkendall, 39 Mont. 64, 101 Pac. 250.....	82

R

Racujja v. National Folding Box & Paper Co., 1 Conn. Comp. Dec. 522....	718
Radcliffe v. Pacific Steam Nav. Co., 3 B. W. C. C. 185, C. A.....	676
v. Pacific Steam Nav. Co. (1910) 1 K. B. 685.....	599
Radigen v. Sanitary Dist. of Chicago, Bulletin No. 1, Ill., p. 138...16, 100, 125	
Radley v. Nephew, 2 Cal. I. A. C. Dec. 78.....	484
Railroad Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585....	62
v. Berry, 31 Tex. Civ. App. 408, 72 S. W. 1049.....	183
v. Mackay, 127 U. S. 205, 8 Sup. Ct. 1161, 1163, 32 L. Ed. 107....65, 80, 81	
v. Matthews, 174 U. S. 106, 19 Sup. Ct. 609, 43 L. Ed. 909.....	80
v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911.....	66
v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243.....	65, 82

	Page
Railroad Co. v. Westby, 102 C. C. A. 65, 178 Fed. 619, 47 L. R. A. (N. S.) 97	80
Raily v. Island Transp. Co., 2 Cal. I. A. C. Dec. 608.....	583, 600, 678
Rainey v. McClain, 1 Cal. I. A. C. Dec. 57.....	571, 680
Rains v. Diamond Match Co., 171 Cal. 326, 153 Pac. 230.....	834
Rakiec v. Delaware, L. & W. R. Co. (N. J. Sup.) 88 Atl. 953, 4 N. C. C. A. 734	630, 635, 840
Ralph v. Mitchell, 6 B. W. C. C. 678, C. A.....	756
Ramirez v. Binkley & Wayne, 3 Cal. I. A. C. Dec. 33.....	667
Ramlow v. Moon Lake Ice Co. (Mich.) 158 N. W. 1027.....	482, 550
Rankine v. Alloa Coal Co., 6 F. 375, Ct. of Sess.....	752
Ransom, In re, Op. Sol. Dept. of L. 103.....	187
Raper v. Harrison, 37 Kan. 243, 15 Pac. 219.....	763
Raphael, The, v. Brandy, 4 B. W. C. C. 307, H. L., 6 C. A.....	586
Ratcliff v. DeWitt Co., 1 Cal. I. A. C. Dec. 639.....	192
Rathbone v. Hopper, 57 Kan. 240, 45 Pac. 610, 34 L. R. A. 674.....	73
Ratzberg v. Deltax Grass Rug Co., Rep. Wis. Indus. Com. 1914-15, p. 34...	317
Ravenscroft v. Packard, 3 Cal. I. A. C. Dec. 24.....	207
Raymond v. Chicago, M. & St. P. R. Co. (C. C. A.) 233 Fed. 239.....	55, 58, 62, 67, 68
Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386, 4 N. C. C. A. 851....	325, 361, 823, 839
v. Sligh Furniture Co., Op. Mich. Indus. Acc. Bd. Bul. No. 3, p. 22...	393
Razziumi v. John Salter & Son, 1 Conn. Comp. Dec. 687.....	714
Read v. Bowman, 2 Cal. I. A. C. Dec. 681.....	702
Reardon v. Philadelphia & R. R. Co., 85 N. J. Law, 90, 88 Atl. 970, 4 N. C. C. A. 776.....	226, 643
Rebello v. Marin County Milk Producers, 1 Cal. I. A. C. Dec. 87.....	282, 778
Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771, 5 N. C. C. A. 917.....	71, 466, 774, 777, 778, 780, 783, 795, 829
Redburn, In re, Op. Sol. Dept. of L. 154.....	344
Redfield v. Michigan Workmen's Compensation Mut. Ins. Co., 183 Mich. 633, 150 N. W. 362, 8 N. C. C. A. 889.....	793, 822, 838
Rediger v. Pekin Wagon Co., Bulletin No. 1, Ill. p. 146.....	667, 773
Redondo, In re, Op. Sol. Dept. of L. 563.....	769
Reed v. Booth & Platt Co., 1 Conn. Comp. Dec. 121.....	168, 424
v. Great Western R. Co., 2 B. W. C. C. 109, H. L.....	401
v. Orient Music Co., 1 Conn. Comp. Dec. 35.....	699
v. Rothe, Rep. Wis. Indus. Com. 1914-15, p. 33.....	244, 248
v. Smith, Wilkinson & Co., 3 B. W. C. C. 223, C. A.....	120
v. Washington Fire & Marine Ins. Co., 138 Mass. 572.....	72
v. Winn, 2 Cal. I. A. C. Dec. 687.....	197
v. Zelinsky, 1 Cal. I. A. C. Dec. 496.....	684
Rees v. Kynoch, Limited, 4 B. W. C. C. 14, C. A.....	562
Rees, In re, Op. Sol. Dept. of L. 599.....	250

	Page
Rees v. Penrikyber Nav. Colliery Co., 87 L. T. 661, 5 W. C. C. 117.....	229, 245
v. Powell Duffryn Steam Coal Co., 4 W. C. C. A. 17.....	551
v. Thomas, 1 W. C. C. A. 9, C. A.....	407
v. Thomas, 4 W. C. C. A. 9.....	416
Reese v. Yale & Towne Mfg. Co., 1 Conn. Comp. Dec. 154....	349, 447, 700, 749
Reeves, In re, Op. Sol. Dept. of L. 73.....	188
Refuge Assur. Co. v. Millar, 5 W. B. C. C. 522, Ct. of Sess.....	414, 752
Reger v. McCloud River Lumber Co., 1 Cal. I. A. C. Dec. 567.....	588
Reich v. Imperial, 1 Cal. I. A. C. Dec. 337.....	294, 503
Reid v. State of Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108....	45
v. Thomas Elevator Co., Bulletin No. 1, Ill. p. 144.....	299
Reimers v. Proctor Pub. Co., 85 N. J. Law, 441, 89 Atl. 931, 4 N. C. C. A. 738	310, 392, 464, 467
Reinburg, In re, Op. Sol. Dept. of L. 398.....	572
Reis v. Standard Portland Cement Co., 2 Cal. I. A. C. Dec. 869.....	261
Reisinger, In re, Op. Sol. Dept. of L. 161.....	345
Reithel, In re, 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A, 304, 11 N. C. C. A. 235.....	351, 437
Remsnider v. Union Savings & Trust Co., 89 Wash. 87, 154 Pac. 135.....	330
Remlow v. Moon Lake Ice Co. (Mich.) 158 N. W. 1027.....	823
Renfrew v. McCraw, Limited, 7 B. W. C. C. 898.....	401
Rennie v. Reid, 1 B. W. C. C. 324, Ct. of Sess.....	191, 200
Renwick, In re, Op. Sol. Dept. of L. 172.....	345
Replogle v. Seattle School Dist. No. 1, 84 Wash. 581, 147 Pac. 196....	340, 737
Report of Nevada Industrial Commission will be found in this table under "Nebraska."	
Reseberg v. Hamilton Mfg. Co., Rep. Wis. Indus. Com. 1914-15, p. 14....	703
Ress v. Youngstown Sheet & Tube Co., Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 194.....	236, 290
Revere Rubber Co., In re, 222 Mass. 461, 111 N. E. 166.....	584
Revie v. Cumming, 5 B. W. C. C. 483, Ct. of Sess.....	454, 455
Revita v. Royal Indemnity Co., 2 Mass. Wk. Comp. Cases, 352.....	671
Reynolds v. Mound City Water & Light Co., Bulletin No. 1, Ill. p. 123 390, 571	
v. Smith, 1 Cal. I. A. C. Dec. 35.....	575
Rheinwald, In re, 168 App. Div. 425, 153 N. Y. Supp. 598.....	
5, 9, 15, 16, 26, 170, 171, 172, 175, 199, 220, 330, 829	
Rhyner v. Hueber Bldg. Co., 171 App. Div. 56, 156 N. Y. Supp. 903.....	233, 234, 823, 825, 827
Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455	278
Richardson v. Builders' Exch. Ass'n, The Bulletin, N. Y., Vol. 1, No. 10, p. 18.....	495, 755
v. Denton Colliery Co., 6 B. W. C. C. 629, C. A.....	394

	Page
Richardson v. Morris, 7 B. W. C. C. 130, C. A.....	377
v. Sears, Roebuck & Co., 271 Ill. 325, 111 N. E. 85.....	64
v. Avonmore, The, 5 B. W. C. C. 34, C. A.....	349, 471
Richerson, In re, Op. Sol. Dept. of L. 775.....	649
Ridler v. Little Co., Op. Mich. Indus. Acc. Bd. Bul. No. 3, p. 27.....	169, 635
Rideout Co. v. Pillsbury (Cal.) 159 Pac. 435.....	311, 355, 509, 554, 778, 824
Rieff v. Sacramento, 2 Cal. A. I. C. Dec. 223.....	381, 412
Riggs, In re, Op. Sol. Dept. of L. 155.....	344
Riley v. Holland & Sons, 4 B. W. C. C. 155, C. A.....	356, 363
v. Walsh, 1 Conn. Comp. Dec. 505.....	655
Rintoul v. Dalmeny Oil Co., 1 W. B. C. 340.....	229
Ripley, In re, Op. Sol. Dept. of L. 110.....	187
Risdale v. Kilmarnock, The, 8 B. W. C. C. 7, C. A.....	405
Rist v. Larkin & Sangster, 171 App. Div. 71, 156 N. Y. Supp. 875.....	300, 408, 414
Ritchings v. Bryant, 6 B. W. C. C. 183, C. A.....	200
Rives v. Smith, 2 Cal. I. A. C. Dec. 972.....	798
Roadhouse v. Wells, 2 Cal. I. A. C. 251.....	206
Robbins v. Original Gas Engine Co. (Mich.) 157 N. W. 437.....	275, 276, 279, 280, 295, 587
Roberts, In re, Op. Sol. Dept. of L. 127.....	342
v. Charles Wolf Packing Co., 95 Kan. 723, 728, 149 Pac. 413.....	653, 761
v. Trollop & Sons & Colls, 7 B. W. C. C. 679, C. A.....	399
v. Whaley (Mich.) 158 N. W. 209.....	226, 241
Robertson v. Allan Bros. & Co., 1 B. W. C. C. 172, C. A.....	451
v. Hall Bros. S. S. Co., 3 B. W. C. C. 368, C. A.....	245
Robinson, In re, Op. Sol. Dept. of L. 386.....	647
In re, Op. Sol. Dept. of L. 389.....	573
v. Durfy, 2 Cal. I. A. C. Dec. 1060.....	143
Robison v. Newark Reflector Co., Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 167.....	215, 695
Robitson v. Panama Fruit Co., 1 Cal. I. A. C. Dec. 385.....	693
Robson v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases, 235, C. A.....	598
Robson, Eckford & Co. v. Blakey, 5 B. W. C. C. 536, Ct. of Sess.....	432
Rocca v. Stanley Jones & Co., 7 B. W. C. C. 101, C. A.....	519
Rock, In re, Op. Sol. Dept. of L. 573.....	249, 256
Rockwell, In re, Op. Sol. Dept. of L. 307.....	387
v. Lewis, 168 App. Div. 674, 154 N. Y. Sup. 893.....	630
Rodger v. Paisley School Board, 5 B. W. C. C. 547, Ct. of Sess.....	432
Rodriguez, In re, Op. Sol. Dept. of L. 227.....	292
In re, Op. Sol. Dept. of L. 551.....	769
Roesch v. Reo Pac. Co., 2 Cal. I. A. C. Dec. 486.....	501
Roger v. School Board (1912) S. C. 583.....	429
Rogers v. Cardiff Corporations, 8 W. C. C. 51.....	28

	Page
Rokos v. Glaros & Papas, 2 Cal. I. A. C. Dec. 993.....	803
Roles v. Pascall & Son, 4 B. W. C. C. 148, C. A.....	754
Roll, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 63.....	353
Rollins, In re, Op. Sol. Dept. of L. 153.....	343
Rollnik v. Lankershim, 1 Cal. I. A. C. Dec. 45.....	293, 791
Rolph v. Morgan, 2 Cal. I. A. C. Dec. 543.....	494
Roman v. American Steel & Wire Co., 1 Conn. Comp. Dec. 566.....	510
Rongo v. R. Waddington & Sons, 87 N. J. Law, 395, 94 Atl. 408, 9 N. C. C. A. 402.....	122
Roos v. State, 6 Minn. 428 (Gil. 291).....	63
Roper v. Greenwood, 83 L. T. 471.....	288
Rose v. Los Angeles, 2 Cal. I. A. C. Dec. 574.....	461, 495
v. Morrison & Mason, 4 B. W. C. C. 277, C. A.....	455
v. North Pac. S. S. Co., 2 Cal. I. A. C. Dec. 57.....	348, 553
v. Pickrell, 1 Cal. I. A. C. Dec. 85.....	210, 219
Rosenberg v. Western Mercantile Co., 2 Cal. I. A. C. Dec. 673.....	217
Rosenquist v. Bowring & Co., 1 B. W. C. C. 395, C. A.....	576
v. Bowring & Co., 2 Cal. I. A. C. Dec. 673.....	174
Ross v. Aberthaw Const. Co., 1 Conn. Comp. Dec. 533.....	718
v. Casualty Co. of America, 2 Mass. Wk. Comp. Cases, 663.....	448
v. Erickson Const. Co., 89 Wash. 634, 155 Pac. 153....	13, 20, 520, 732, 736
Rossi v. Standard Oil Co., 2 Cal. I. A. C. Dec. 307.....	243, 261, 269, 687
Rossow v. Denvir, Bulletin No. 1, Ill., p. 141.....	801
Rothwell v. Davies, 5 B. W. C. C. 141, C. A.....	528
Rouda & Spivock v. Heenan, 3 Cal. I. A. C. Dec. 36.....	309
Rouser v. Columbia Steel Co., 2 Cal. I. A. C. Dec. 207.....	621
Rounsaville v. Central R. Co., 87 N. J. Law, 371, 94 Atl. 392....	34, 41, 48, 49, 92, 99, 101
Rowland v. Wright, 1 B. W. C. C. 192, C. A.....	381, 426
Ruabon Coal Co. v. Thomas, 3 B. W. C. C. 32, C. A.....	528
Rudder v. Ocean Shore R. Co., 1 Cal. I. A. C. Dec. 209....	283, 352, 438, 590, 796
Rugan, In re, Op. Sol. Dept. of L. 285.....	365
Rulings of Washington Industrial Accident Insurance Commission, will be found in this table under "Washington, Rulings of Industrial Accident Insurance Commission."	
Rumboll v. Nunnery Colliery Co., 80 L. T. 42, 1 W. C. C. 28.....	823
v. Nunnery Colliery Co., 1 W. C. C. 29, C. A.....	559
Ruprecht v. Dominguez Land Corp., 3 Cal. I. A. C. Dec. 5.....	193
v. Red River Lumber Co., 2 Cal. I. A. C. Dec. 864....	550, 567, 568, 587, 694
Ruth v. Witherspoon-Engler Co., 98 Kan. 179, 157 Pac. 403.....	504, 519, 774
Ryalls v. Mechanics Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 677....	29
Ryan v. California Baking Co., 2 Cal. I. A. C. Dec. 190.....	516
v. Griswold & Davis, 1 Conn. Comp. Dec. 510.....	804

	Page
Ryan v. Hartly, 5 B. W. C. C. 407, C. A.....	726
v. Metropolitan Chair Co., 1 Conn. Comp. Dec. 37.....	174
v. Tipperary County Council, 5 B. W. C. C. 578, C. A.....	212

S

Saari v. Pacific Lumber Co., 2 Cal. I. A. C. Dec. 182.....	451, 452, 453
Sabella v. Brasileiro, 86 N. J. Law, 505, 91 Atl. 1032, 6 N. C. C. A. 958	201, 203
v. Brasileiro, 87 N. J. Law, 710, 94 Atl. 1103.....	201
Sabre's Case, 86 Vt. 347, 85 Atl. 695, Ann. Cas. 1915C, 1269.....	72
Saccoccio v. Bradley Contracting Co., The Bulletin, N. Y., vol. 1, No. 5, p. 11.....	589
Sadowski v. Thomas Furnace Co., 157 Wis. 443, 146 N. W. 770.....	25
St. John v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases, 376.....	400
St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 235, 11 Sup. Ct. 554, 557, 35 L. Ed. 154.....	164
Sala v. Martorella & Giannesi, The Bulletin, N. Y. Vol. 1, No. 6, p. 11....	124
Salem Hospital v. Olcott, 67 Or. 448, 136 Pac. 341, 4 N. C. C. A. 614.....	696
Salus v. Great Northern R. Co., 157 Wis. 546, 147 N. W. 1070. 100, 112, 114, 284	
Salvatore v. Andreani & Gelormino, 1 Conn. Comp. Dec. 169....	254, 260, 789
v. New England Casualty Co., 2 Cal. I. A. C. Dec. 355...517, 520, 792, 810	
Sampo v. Yellow Aster Min. & Mill. Co., 2 Cal. I. A. C. Dec. 539.....	613
Sams v. Komas & Dorros, 2 Cal. I. A. C. Dec. 285.....	702
Sandberg v. Kruse, 1 Cal. I. A. C. Dec. 441.....	39, 40, 41
v. San Pedro, Los Angeles & Salt Lake R. R. Co., 2 Cal. I. A. C. Dec. 694	53
Sanders, In re, Op. Sol. Dept. of L. 114.....	187
Sanderson v. Parkinson & Sons, 6 B. W. C. C. 648, C. A.....	752
v. Wright, 7 B. W. C. C. 141, C. A.....	391
Sanderson's Case, In re (Mass.) 113 N. E. 355.....	378, 420, 796, 824
Sanford v. Connecticut Co., 1 Conn. Comp. Dec. 485.....	561
San Francisco Stevedoring Co. v. Pillsbury, 2 Cal. I. A. C. Dec. 298, 170 Cal. 321, 149 Pac. 586, 9 N. C. C. A. 37.....	741
Sargent, In re, Op. Sol. Dept. of L. 275.....	292
Saudek v. Milwaukee Electric Ry. & Light Co. (Wis.) 157 N. W. 579....	155
Saunders v. Oxnard Home Telephone, 1 Cal. I. A. C. Dec. 636.....	586, 808
Savage, In re, 222 Mass. 205, 110 N. E. 283.....	464, 465
Sayers v. Girard, 1 Cal. I. A. C. Dec. 352.....	189, 209
Sayles v. Foley (R. I.) 96 Atl. 340.....	58, 60, 64, 65, 66, 67, 69, 85, 88
Scales v. West Norfolk Farmers' Manure & Chemical Co., 6 B. W. C. C. 188, C. A.....	308
Scanlan, In re, Op. Sol. Dept. of L. 724.....	464
Schaeffer v. De Grottola, 85 N. J. Law, 444, 89 Atl. 921, 4 N. C. C. A. 582	201, 585

	Page
Schatz, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 60.....	254, 369
Schebrosky v. Morrison & O'Neil, 1 Cal. I. A. C. Dec. 401.....	664, 809
Schlechter, In re, Op. Sol. Dept. of L. 331.....	403
Schlegal v. Frankfort General Ins. Co., 2 Cal. I. A. C. Dec. 491.....	714
Schlusser, In re, Op. Sol. Dept. of L. 133.....	342
Schmidt v. Menominee Bay Shore Lumber Co., Rep. Wis. Indus. Com. 1914-15, p. 22.....	806
v. O. K. Baking Co., 1 Conn. Comp. Dec. 683.....	305, 804
v. O. K. Baking Co., 90 Conn. 217, 96 Atl. 963.....	30, 751, 754
v. William Pfeifer Berlin Weiss Beer Brewing Co., Bulletin No. 1, Ill., p. 118.....	137
Schmitt, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 81.....	379
Schmitz v. Appleton, Bul. Wis. Indus. Com. 1912-13, p. 31.....	177
Schmoll v. Weisbrod & Hess Brewing Co. (N. J. Sup.) 97 Atl. 723....	439, 458, 505, 815
Schoenreiter v. Quincy Mining Co., Mich. Wk. Comp. Cases (1916) 2....	674
Schofield v. Orrell Colliery Co., 2 B. W. C. C. 294, H. L., 301 C. A.....	242
Schoonmaker v. Gilmore, 102 U. S. 118, 26 L. Ed. 95.....	44
Schrewe v. New York Cent. R. R. Co. (Mich.) 158 N. W. 337.....	819
Schroeb, Earl W, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 132.....	364
Schultz v. Pacific Electric R. Co., 2 Cal. I. A. C. Dec. 709.....	791
Schuman v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 599	118
Schwab v. Emporium Forestry Co., 167 App. Div. 614, 153 N. Y. Supp. 234	620
Schwanz v. Wujek, 163 Mich. 492, 128 N. W. 731.....	229
Schwartz v. India Rubber, Gutta Percha & Telegraph Works Co., 5 B. W. C. C. 390, 2 K. B. 299 (1912) W. M. 98, 28 T. L. R. 331, 81 L. J. K. B. N. S. 780 (1912) W. C. R. E. P. 190, 106 L. T. N. S. 706.....	32
Schweitzer v. Hamburg American Line, 149 App. Div. 900, 134 N. Y. Supp. 812.....	33
v. Hamburg American Line, 78 Misc. Rep. 448, 138 N. Y. Supp. 944	33, 37
Schwenlein, In re, Vol. 1, No. 7, Bul. Indus. Com. p. 136.....	353
Scott, In re, Op. Sol. Dept. of L. 595.....	249
v. Aetna Life Ins. Co., 1 Cal. I. A. C. Dec. 343....	689, 690, 692, 695, 705
v. Payne Bros., 85 N. J. Law, 446, 89 Atl. 927, 4 N. C. C. A. 682....	92, 104, 175, 201, 325, 347, 393, 397, 415, 437, 839
v. What Cheer Coal Co., Mich. Wk. Comp. Cases (1916) 1.....	282
Sczerbowicz v. New Britain, 1 Conn. Comp. Dec. 671.....	527
Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. Ed. 175.....	780
v. Horton, 233 U. S. 501, 34 Sup. Ct. 638, 58 L. Ed. 1068, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.....	52

	Page
Searles v. Connecticut Co., 1 Conn. Comp. Dec. 97.....	702, 822
Sebestini v. Fred T. Ley & Co., 1 Conn. Comp. Dec. 569.....	531
Sedlock v. Carr Coal Min. & Mfg. Co., 98 Kan. 680, 159 Pac. 9.....	369, 452
Sefton v. Midway Driller Pub. Co., 2 Cal. I. A. C. Dec. 987.....	498
Seiberlich v. Buckingham & Hecht, 1 Cal. I. A. C. Dec. 372.....	310
Sellos, In re, Op. Sol. Dept. of L. 387.....	595
Selsus v. J. I. Case Threshing Mach. Co., Rep. Wis. Indus. Com. 1914-15, p. 22.....	104
Semi v. Rolandi, 1 Cal. I. A. C. Dec. 184.....	582
Senter v. Klyce, 2 Cal. I. A. C. Dec. 704.....	484
Septimo, In re, 219 Mass. 430, 107 N. E. 63, 7 N. C. C. A. 906.....	607, 618, 822, 830
Sexton v. Massachusetts Bonding & Insurance Co., 1 Cal. I. A. C. Dec. 48 241, 244, 253	
v. Newark Dist. Tel. Co., 84 N. J. Law, 85, 86 Atl. 451, 3 N. C. C. A. 569, affirmed 86 N. J. Law, 701, 91 Atl. 1070....	21, 31, 66, 67, 86, 88, 91, 92, 95, 108, 571
Shade v. Ash Grove Lime & Portland Cement Co., 92 Kan. 146, 139 Pac. 1193, Ann. Rep. Kan. B. of L. 1913, p. 184, 5 N. C. C. A. 763....	101, 730
v. Ash Grove Lime & Portland Cement Co., 93 Kan. 257, 144 Pac. 249.....	11, 64, 65, 66, 67, 73, 83, 90, 99
Shafer v. Parke, Davis & Co., Mich. Wk. Comp. Cases (1916) 7.....	195, 748
Shaffer, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 7.....	228, 246, 252, 790
v. Southern California Hardwood Mfg. Co., 2 Cal. I. A. C. Dec. 891..	218
Shanahan v. Monarch Engineering Co., 92 Misc. Rep. 466, 156 N. Y. Supp. 143	738
Shannessy v. Chicago, Bulletin No. 1, Ill., p. 160.....	589
Shapiro v. New Haven Carriage Co., 1 Conn. Comp. Dec. 508.....	718
Sharman v. Holliday & Greenwood, 6 B. W. C. C. 147, C. A.....	676
Sharp v. Johnson & Co., 7 W. C. C. 28, 30, C. A.....	360
Shaw v. Foley, 1 Cal. I. A. C. Dec. 629.....	168
v. Massachusetts Employees' Ins. Ass'n, 2 Mass. Wk. Comp. Cases, 501	715
v. Wigan Coal & Iron Co., 3 B. W. C. C. 81, C. A.....	435
Shay v. Christian Feigenspan Corp., 1 Conn. Comp. Dec. 232.....	413
Shea v. United States Casualty Co., 2 Mass. Wk. Comp. Cases, 481.....	568
v. Western Grain & Sugar Products Co., 2 Cal. I. A. C. Dec. 550..... 270, 312, 470	
Sheehy v. Great Southern & W. R. Co., 6 B. W. C. C. 927, C. A.....	381
Sheeran, In re, 28 Op. Atty. Gen. 254.....	542
Sheerin v. F. & J. Clayton & Co., 2 Ir. R. 110, C. A.....	278, 300
v. F. & J. Clayton & Co., 3 B. W. C. C. 418.....	544
Sheldon v. Needham, 7 B. W. C. C. 471, C. A.....	418, 422
Shepard v. Jacobs, 204 Mass. 110, 90 N. E. 392, 393, 26 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648.....	122
Sheppard, In re, Op. Sol. Dept. of L. 98.....	187

	Page
Sheridan v. P. J. Grool Const. Co. (N. Y.) 112 N. E. 568, reversing (Sup.) 155 N. Y. Supp. 859.....	331
Sheriff v. Wilson, 3 F. 661, Ct. of Sess.....	359
Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819.....	45
Sherwood v. Johnson, 5 B. W. C. C. 686, C. A.....	310
Shetler, In re, Op. Sol. Dept. of L. 108.....	186
Shevchenko v. Detroit United Ry. (Mich.) 155 N. W. 423.....	105, 827
Shields v. Miller, 2 Cal. I. C. Dec. 1032.....	478
Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 N. Y. Supp. 423, 9 N. C. C. A. 342.....	597, 636, 737, 733
v. Clover Farms Co., 90 Misc. Rep. 1, 152 N. Y. Supp. 649.....	737
Shipp v. Frodingham Iron & Steel Co., 6 W. R. C. C. 1, C. A.....	575
Shirt v. Calico Printers' Ass'n., 2 B. W. C. C. 342.....	518
Shmidt, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 21.....	34
Shouler v. Greenberg, 1 Cal. I. A. C. Dec. 146.....	204, 213, 618, 791
Shushke v. Vail & Vickers, 2 Cal. I. A. C. Dec. 182.....	615
Sickles v. Ballston Refrigerating Storage Co., 171 App. Div. 108, 150 N. Y. Supp. 864.....	334
Siemientkowski v. Berwind White Coal Mining Co. (N. J.) 92 Atl. 909....	839
Sieplenska v. New York Cent. R. R., 4 N. Y. St. Dep. Rep. 395.....	412
Sigman v. Columbia Oil Producing Co., 3 Cal. I. A. C. Dec. 2.....	723
Silcock & Sons v. Golightly, 8 B. W. C. C. 48, C. A.....	605
Sileg v. Southern California Edison Co., 2 Cal. I. A. C. Dec. 988.....	479
Silva v. Common, 1 Cal. I. A. C. Dec. 644.....	790, 808
v. Kopperud, 2 Cal. I. A. C. Dec. 631.....	155, 158
v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases 597.....	494
Silveria v. Connecticut Quarries Co., 1 Conn. Comp. Dec. 509.....	594
Silverman v. Zibulsky Bros., The Bulletin, N. Y. Vol. 1, No. 6, p. 13.....	316
Simmons v. Faulds, 3 W. C. C. 169, C. A.....	212
v. Heath Laundry Co., 3 B. W. C. C. 200.....	179
v. White Bros., 80 L. T. 344, 1 W. C. C. 89.....	225
Simonelli v. Sargent & Co., 1 Conn. Comp. Dec. 553.....	676
Simpson, In re, Op. Sol. Dept. of L. 316.....	373
In re, Op. Sol. Dept. of L. 319.....	387
In re, Op. Sol. Dept. of L. 675.....	316
v. Paraffine Paint Co., 1 Cal. I. A. C. Dec. 76.....	516, 690, 716
v. Shepard, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1571, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.....	45
Sinclair, Limited v. Carlton, 5 B. W. C. C. 937, Ct. of Sess.....	400
Sinner v. Colchester, 1 Conn. Comp. Dec. 286.....	123
Sinnes v. Daggett, 80 Wash. 673, 142 Pac. 5.....	612, 613, 616, 624, 818
Sinsigalli v. Suzio, 1 Conn. Comp. Dec. 455.....	486
Sipe v. State, 86 Ohio St. 80, 87, 99 N. E. 208, 210.....	28
Siri v. Arata & Co., 2 Cal. I. A. C. Dec. 645.....	454

	Page
Sirica v. Scovill Mfg. Co., 1 Conn. Comp. Dec. 171.....	519, 568, 703
Sittert, In re, Op. Sol. Dept. of L. 90.....	187
Skailles v. Blue Anchor Line, 4 B. W. C. C. 16, C. A.....	574
Skates v. Jones & Co., 3 B. W. C. C. 461, C. A.....	127
Skidmore v. Brown, 2 Cal. I. A. C. Dec. 556.....	217
Skill, In re, Op. Sol. Dept. of L. 157.....	344
Skinner v. Connecticut School for Imbeciles, 1 Conn. Comp. Dec. 106.....	171, 182
v. Stratton Fire Clay Co., Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 103..	110, 124, 390
Skoczyllois v. Vincour, The Bulletin, N. Y. Vol. 1, No. 6, p. 14.....	143
Skougstad v. Star Coal Co., Rep. Wis. Indus. Com. 1914-15, p. 31.....	428, 431
Slade v. Taylor, 8 B. W. C. C. 65, C. A.....	419, 423
Slater v. Blyth Shipbuilding & Dry Docks Co., 7 B. W. C. C. 193, C. A.....	677
v. New Britain Trap Rock Co., 1 Conn. Comp. Dec. 501.....	527
Slattery v. Ocean Accident & Guarantee Co., 2 Cal. I. A. C. Dec. 522.....	360, 424, 425
Slingluff v. Weaver, 66 Ohio St. 621, 64 N. E. 574.....	29
Smale v. Wrought Washer Mfg. Co., 160 Wis. 331, 151 N. W. 803.....	730, 733
Small, In re, Op. Sol. Dept. of L. 164.....	344
v. Coles, 2 Kings Bench, 821.....	28
Smith, In re, Op. Sol. Dept. of L. 186.....	345
In re, Op. Sol. Dept. of L. 541.....	652
In re, Op. Sol. Dept. of L. 745.....	648
In re, Op. Sol. Dept. of L. 759.....	494
v. Atchison, T. & S. F. R. Co., 2 Cal. I. A. C. Dec. 851.....	385
v. Buxton, 8 B. W. C. C. 196, C. A.....	200
v. Christopher's Market, 2 Cal. I. A. C. Dec. 536.....	235
v. Cord Taton Colliery Co., 2 W. C. C. 121, C. A.....	530
v. Fife Coal Co., 7 B. W. C. C. 253, H. L.....	399, 404
v. Forsythe, 1 Conn. Comp. Dec. 190.....	107
v. General Motor Cab Co. (1911) A. C. 188, 1 N. C. C. A. 576.....	179
v. Hardman, Limited, 6 B. W. C. C. 719.....	778
v. Hayashi Floral Store, 2 Cal. I. A. C. Dec. 526.....	205
v. Horlock, 6 B. W. C. C. 638, C. A.....	181
v. Industrial Acc. Commission of California, 2 Cal. I. A. C. Dec. 439,	
26 Cal. App. 560, 147 Pac. 600, 601.....	51, 785, 822, 826, 833
v. Israel Bros., Bulletin No. 1, Ill. p. 164.....	800, 805
v. Lancashire & Y. R. Co., 1 W. C. C. 1, C. A.....	401
v. McPhee Stevedoring Co., 1 Cal. I. A. C. Dec. 197.....	461, 490
v. Morrison, 5 B. W. C. C. 162, C. A.....	449
v. National Sash & Door Co., 96 Kan. 816, 153 Pac. 533.....	234, 242
v. Price, 168 App. Div. 421, 153 N. Y. Supp. 221.....	26, 176, 329, 336, 352
v. South Normantown Colliery Co., 5 W. C. C. 14, C. A.....	356, 367, 401
v. Stanton Ironworks Co. Collieries, 6 B. C. C. 239, C. A.....	474

	Page
Smith v. Western States Portland Cement Co., 94 Kan. 501, 146 Pac. 1026	734
Smith's Dock Co. v. Redhead & Sons, 5 B. W. C. C. 449.....	157
Smolenski v. Eastern Coal Dock Co., 87 N. J. Law, 26, 93 Atl. 85, 9 N. C. C. A. 531.....	585, 595
Smrakar v. Pacific Lumber Co., 2 Cal. I. A. C. Dec. 87.....	514, 680
Sneddon v. Addie & Sons' Collieries, 6 F. 992.....	246
v. Greenfield Coal & Brick Co., 3 B. W. C. C. 557, Ct. of Sess.....	406
Snell v. Bristol Corporation, 7 B. W. C. C. 236, C. A.....	592
Snelling v. Norton Hill Colliery Co., 6 B. W. C. C. 506, C. A.....	759
Snow v. Harris, 2 Cal. I. A. C. Dec. 393.....	207
v. Winkler, 1 Conn. Comp. Dec. 76.....	211
Snyder v. Goodwin, 1 Cal. I. A. C. Dec. 433.....	799
v. Pacific Tent & Awning Co., 3 Cal. I. A. C. Dec. 1.....	489, 513, 793
Socquet v. Connecticut Mills Co., 1 Conn. Comp. Dec. 653.....	381, 454
Soderstrom v. Hart-Wood Lumber Co., 2 Cal. I. A. C. Dec. 688.....	553
Solle v. New York, N. H. & H. R. R., 4 N. Y. St. Dep. Rep. 393.....	448
Solloway v. Kopperud, 2 Cal. I. A. C. Dec. 187.....	615
Soloski v. Strickland, 1 Conn. Comp. Dec. 564.....	125
Sonsmith v. Pere Marquette R. Co. (Sonesmith's Case) 173 Mich. 57, 73, 138 N. W. 347, 356, 360.....	80, 81
Soon Hing's Case, 113 U. S. 703, 5 Sup. Ct. 731, 28 L. Ed. 1145.....	83
Sorensen v. Gaff & Co., 6 B. W. C. C. 279, Ct. of Sess.....	662
v. Menasha Paper Co., 56 Wis. 342, 14 N. W. 446.....	475
Sorge v. Aldebaran Co., 3 N. Y. St. Dep. Rep. 390.....	412
Southall v. Cheshire County News Co., 5 B. W. C. C. 251, C. A.....	509
Southerland v. Cowell Lime & Cement Co., 2 Cal. I. A. C. Dec. 994.....	726
Southern California Hardwood & Mfg. Co. v. Adams, 1 Cal. I. A. C. Dec. 406.....	554, 558
Southern Pac. Co. v. Pillsbury, 2 Cal. I. A. C. Dec. 443, 170 Cal. 782, 151 Pac. 277.....	51
Southwestern Surety Ins. Co. v. Pillsbury (Cal.) 158 Pac. 762.....	277, 278, 497, 799, 800, 822
Souza v. Stangland & Co., 2 Cal. I. A. C. Dec. 765.....	787
Spangler v. Philbin, 2 Cal. I. A. C. Dec. 158.....	513, 520
Spears v. Santa Monica, 2 Cal. I. A. C. Dec. 1016.....	132
Spence v. Baird & Co., 5 B. W. C. C. 542.....	308
Spencer, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. 179.....	237
v. Dowd, 1 Cal. I. A. C. Dec. 46.....	464
v. Gibson, 1 Cal. I. A. C. Dec. 565.....	609
v. Scanlon, 1 Conn. Comp. Dec. 280.....	566
Spiers v. Elderslie S. S. Co., 2 B. W. C. C. 203.....	124, 128
Spillane v. State of Connecticut, 1 Conn. Comp. Dec. 505.....	398
Sponatski, In re (Sponatski's Case) 220 Mass. 526, 527, 528, 108 N. E. 466, L. R. A. 1916A, 333.....	270, 326, 471, 483, 505, 508, 779, 822

	Page
Spooner v. Detroit Saturday Night Co., 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A, 17, 9 N. C. C. A. 647.....	398, 402, 458, 839
v. Estate of P. D. Beckwith, 183 Mich. 323, 149 N. W. 971....	729, 819, 825
Spottsville v. Western States Portland Cement Co., 94 Kan. 258, 146 Pac. 356	108, 112
Spratt v. Sweeney & Gray Co., 168 App. Div. 403, 153 N. Y. Supp. 505, 9 N. C. C. A. 918.....	9, 26, 34, 38, 141
Spring v. J. G. Miller Co., 3 Cal. I. A. C. Dec. 4.....	710
Springer, In re, Op. Sol. Dept. of L. 267.....	306
Stachuse v. Fidelity & Casualty Co. of New York, 2 Wk. Comp. Cas. 324	617
Stadtmuller v. Travelers' Ins. Co., The Bulletin, N. Y., vol. 1, No. 4, p. 9..	776
Stagg v. Benjamin, 1 Conn. Comp. Dec. 405.....	168
Staley v. Illinois Cent. R. Co., 268 Ill. 356, 109 N. E. 342, L. R. A. 1916A, 450	51
v. Illinois Cent. R. Co., 186 Ill. App. 593.....	662
Stampick v. American Steel & Wire Co., 1 Conn. Comp. Dec. 474.....	495, 778
Stanland v. North Eastern Steel Co., 2 K. B. 425, C. A.....	246
Stanley v. F. R. Wood & W. H. Dolson Co., The Bulletin, N. Y., vol. 1, No. 4, p. 10.....	491
Stanton v. Masterson, 2 Cal. I. A. C. Dec. 707.....	143, 189
Stapleton v. Dinnington Main Coal Co., 5 B. W. C. C. 602, C. A.....	300, 468
State v. Alderman, 81 N. J. Law, 549, 79 Atl. 283.....	231
v. Brown, 97 Minn. 402, 106 N. W. 477, 5 L. R. A. (N. S.) 327.....	82
v. Business Property Security Co., 87 Wash. 627, 152 Pac. 334.....	340
v. Chicago, M. & P. S. R. Co., 80 Wash. 435, 141 Pac. 897.....	341
v. Clausen, 63 Wash. 535, 116 Pac. 7.....	82
v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, 3 N. C. C. A. 599...7, 8, 10, 11, 19, 27, 58, 59, 62, 64, 65, 67, 68, 81, 82, 89, 95	
v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498.....	63, 82
v. Creamer, 85 Ohio St. 349, 386, 97 N. E. 602, 603, 39 L. R. A. (N. S.) 694, 1 N. C. C. A. 30.....	5, 8, 31, 64, 66, 70, 71, 83, 85, 86, 98
v. Fisher, 129 Wis. 57, 108 N. W. 206.....	827
v. Griffin, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177, 76 Am. St. Rep. 130	65
v. Justus, 85 Minn. 279, 88 N. W. 759, 56 L. R. A. 757, 89 Am. St. Rep. 550	82
v. Losby, 115 Wis. 57, 90 N. W. 188.....	827
v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645, 5 N. C. C. A. 811 58, 64, 65, 67, 70, 96	
v. Ohio Industrial Commission, 92 Ohio St. 434, 111 N. E. 299.....	4, 8, 12, 17, 29, 92, 254, 662, 786
v. Powers, 38 Ohio St. 63.....	80
v. Seattle, 73 Wash. 396, 132 Pac. 45.....	58, 59, 64, 66, 151, 152
v. Speyer, 207 Mo. 540, 106 S. W. 505, 14 L. R. A. (N. S.) 836.....	735

	Page
State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527.....	82
v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. Rep. 571	82
v. Willcuts, 143 Wis. 449, 453, 128 N. W. 97.....	827
State Compensation Insurance Fund v. Breslow, 1 Cal. I. A. C. Dec. 194..	260
v. Jacobsen, 1 Cal. I. A. C. Dec. 311.....	637
v. Lemon, 2 Cal. I. A. C. Dec. 507.....	363, 424, 786
State ex rel. Anseth v. District Court (Minn.) 158 N. W. 713.....	410, 436, 661, 712, 837
Beek v. Wagner, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442, 77 Am. St. Rep. 681.....	82
Carlson v. District Court, 131 Minn. 96, 154 N. W. 661, 11 N. C. C. A. 630.....	258
Casualty Co. of America v. District Court (Minn.) 158 N. W. 700..	611, 612
City of Duluth v. District Court (Minn.) 158 N. W. 790, 791.....	183, 663
City of Northfield v. District Court, 131 Minn. 352, 155 N. W. 103, 11 N. C. C. A. 366.....	25, 749
Coffey v. Chittenden, 112 Wis. 569, 88 N. W. 587.....	264
Crookston Lumber Co. v. District Court, 131 Minn. 27, 154 N. W. 509 239, 251, 642	749, 750
Crookston Lumber Co. v. District Court (Minn.) 156 N. W. 278..	17, 25, 321, 326, 397, 429, 445, 447
Duluth Brewing & Malting Co. v. District Court, 129 Minn. 176, 151 N. W. 912.....	129 Minn. 423, 152
Duluth Diamond Drilling Co. v. District Court, 129 Minn. 423, 152 N. W. 838, 9 N. C. C. A. 1119.....	726, 749, 764, 814, 843
Garvin v. District Court, 129 Minn. 156, 151 N. W. 810, 8 N. C. C. A. 1052	28, 621
Gaylord Farmer's Co-op. Creamery Ass'n v. District Court, 128 Minn. 486, 151 N. W. 182, 9 N. C. C. A. 86.....	578, 637, 642
Globe Indemnity Co. v. District Court (Minn.) 156 N. W. 120.....	256, 258, 642, 835, 838
Hayden v. District Court (Minn.) 158 N. W. 792.....	642
Kennedy v. District Court, 129 Minn. 91, 151 N. W. 930, 8 N. C. C. A. 478.....	630
Klemer v. District Court (Minn.) 158 N. W. 825.....	816
London & Lancashire Guarantee & Accident Co. of Canada v. District Court (Minn.) 158 N. W. 515.....	814
Maryland Casualty Co. v. District Court (Minn.) 158 N. W. 798..	24, 30, 243
Nelson-Spelliscy Co. v. District Court, 128 Minn. 221, 150 N. W. 623 31, 64, 66, 835, 839	502, 153 N. W.
People's Coal & Ice Co. v. District Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344, 9 N. C. C. A. 129.....	325, 409, 418, 429
Splady v. District Court, 128 Minn. 338, 151 N. W. 123.....	25, 238
Varchmin v. District Court (Minn.) 158 N. W. 250.....	242

	Page
State ex rel. Virginia & Rainy Lake Co. v. District Court, 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076.....	25, 168, 169, 170
State Journal Co., In re, 161 Ky. 562, 170 S. W. 437, 1166, L. R. A. 1916A, 389, Ann. Cas. 1916B, 1273.....	95, 103
v. Workmen's Compensation Board, 162 Ky. 387, 172 S. W. 674, L. R. A. 1916A, 402, affirming 161 Ky. 562, 170 S. W. 1166, L. R. A. 1916A, 389, Ann. Cas. 1916B, 1273.....	103
State Workmen's Compensation Commission, In re (Dale v. Saunders Bros.) 218 N. Y. 59, 112 N. E. 571, affirming 171 App. Div. 528, 157 N. Y. Supp. 1062.....	17, 175, 336, 337, 823, 826
Steel v. Cammell, Laird & Co., 2 K. B. p. 238.....	279
v. Cammell, Laird & Co., 2 K. B. p. 232.....	539
Steers v. Dunnewald, 85 N. J. Law, 449, 89 Atl. 1007, 4 N. C. C. A. 676..	312, 472
Steiman v. Sford, 2 Cal. I. A. C. Dec. 1018.....	177
Steinat v. German General Benev. Soc., 1 Cal. I. A. C. Dec. 280.....	502
Stephens v. Clarke, 2 Cal. I. A. C. Dec. 135.....	522, 768
Stephenson v. Piscataqua Fire & Marine Ins. Co., 54 Me. 55.....	72
v. Rossall Steam Fishing Co., 8 W. B. C. C. 209, C. A.....	171
Sterling v. Inderredian Co., 2 Cal. I. A. C. Dec. 172.....	380, 420, 421
Stertz v. Industrial Insurance Commission of Washington (Wash.) 158 Pac. 256.....	19, 29, 67, 275, 326, 340, 375, 745
Stetz v. F. Mayer Boot & Shoe Co. (Wis.) 156 N. W. 971.....	683
Stevens v. Hillman's Department Store, Bulletin No. 1, Ill. p. 17.....	331
v. Insoles, Limited, 5 B. W. C. C. 164, C. A.....	750, 756, 760
v. Tittle, 2 Cal. I. A. C. Dec. 146.....	217, 808, 834
Stevenson v. Illinois Watch Case Co., 186 Ill. App. 418.....	257, 636
v. Union Metallic Cartridge Co., 1 Conn. Comp. Dec. 621.....	398, 410
Stewart v. Pacific Mail S. S. Co., 2 Cal. I. A. C. Dec. 583.....	754
v. Wilsons & Clyde Coal Co., 5 F. 122, Ct. of Sess.....	277, 281
Stickley, In re, 219 Mass. 513, 107 N. E. 350.....	837
Stinton v. Brandon Gas Co., 5 B. W. C. C. 426, C. A.....	756
Stites v. Universal Film Mfg. Co., 2 Cal. I. A. C. Dec. 670.....	219, 554, 589
Stith, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 67.....	522
Stockwell v. Waymire, 1 Cal. I. A. C. Dec. 225.....	701, 800
Stoll v. Ocean Shore R. Co., 2 Cal. I. A. C. Dec. 81.....	765, 792
v. Pacific Coast S. S. Co. (D. C.) 205 Fed. 169.....	48, 58, 65, 67
Stollery v. Cicero & Proviso St. R. Co., 243 Ill. 290, 90 N. E. 709.....	774
Stonaker v. Jones & Delaney, 2 Cal. I. A. C. Dec. 834.....	218
Stone v. Old Colony St. Ry., 212 Mass. 459-464, 99 N. E. 218.....	33
v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases, 715.....	236
Stopyra v. United States Coal Co., decided August 14, 1914.....	390
v. United States Coal Co., Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 92..	555
Stormont v. Bakersfield Laundry Co., 1 Cal. I. A. C. Dec. 533.....	518, 664
Stoughton Wagon Co. v. Myre (Wis.) 157 N. W. 522.....	628

	Page
Strayer, <i>In re</i> , Op. Sol. Dept. of L. 446.....	572
Strom v. Postal Telegraph-Cable Co., 271 Ill. 544, 111 N. E. 555.....	85
Strong, <i>In re</i> , Op. Sol. Dept. of L. 132.....	342
Stronge v. Hazlett, Limited, 3 B. W. C. C. 581, C. A.....	758
Stuart v. Nixon & Bruce, 2 W. C. C. 101, 104, C. A.....	119
Sturbridge v. Franklin, 160 Mass. 149, 35 N. E. 669.....	263
Sturdivant v. Pillsbury (Cal.) 158 Pac. 222.....	788
Sturgeon, <i>In re</i> , Op. Sol. Dept. of L. 669.....	770
Sudell v. Blackburn Corp., 3 B. W. C. C. 227, C. A.....	223
Sugar v. Atlas Taxicab Co., 1 Cal. I. A. C. Dec. 34.....	555
Suhr & Co. v. State Compensation Ins. Fund, 2 Cal. I. A. C. Dec. 725.....	788
Sullivan, <i>In re</i> , 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A, 378, 5 N. C. C. A. 735.....	25, 599, 600, 601
<i>In re</i> , Op. Sol. Dept. of L. 609.....	250
v. American Mut. Liability Ins. Co., 2 Mass. Wk. Comp. Cases, 435, C. A., affirmed 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A, 378..	600
v. Chicago, M. & St. P. R. Co. (Wis.) 158 N. W. 321.....	571
v. Industrial Engineering Co. (Sup.) 158 N. Y. Supp. 970.....	512, 830
Summers v. National Tent & Awning Co., 2 Cal. I. A. C. Dec. 968.....	570
Summerville v. DeBella & Co., 2 Cal. I. A. C. Dec. 122.....	568
Sundine v. London Guarantee & Accident Co., 2 Mass. Wk. Comp. Cases, 833, affirmed 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318.....	370, 453
Sundine, <i>In re</i> (Sundine's Case) 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318, 5 N. C. C. A. 616.....	136, 142, 379, 380, 396
Supreme Council v. Frosinger, 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. Rep. 196.....	72
Susznik v. Alger Logging Co., 76 Or. 189, 147 Pac. 922.....	179
Sutter, <i>In re</i> , Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 147.....	364
Sutton v. Wurster Const. Co., 2 Cal. I. A. C. Dec. 705.....	807
Swain v. Pacific Telephone & Telegraph Co., 2 Cal. I. A. C. Dec. 360.....	704
Swank v. Chanslor-Canfield Midway Oil Co., 2 Cal. I. A. C. Dec. 330..	547, 557
Swansea Vale, The, v. Rice, 4 B. W. C. C. 298, H. L.....	462, 471, 746
Swanson v. Sargent & Co., 1 Conn. Comp. Dec. 433.....	622, 647, 650, 714
Sweeney v. Pumpherston Oil Co., 5 F. 972, Ct. of Sess.....	528
Swickard v. Arrow Motor Cartage Co., Bulletin No. 1, Ill. p. 172.....	631
Symmonds v. King, 8 B. W. C. C. 189, C. A.....	423
Synkus v. Big Muddy Coal & Iron Co., 190 Ill. App. 602.....	106, 107, 109, 111

T

Taddei v. Schmitz' Estate, 2 Cal. I. A. C. Dec. 592.....	485
Tallman v. Chippewa Sugar Co., 155 Wis. 36, 143 N. W. 1054.....	28
v. Hart Const. Co., 1 Cal. I. A. C. Dec. 568.....	134
Tarr v. Stockton State Hospital, 2 Cal. I. A. C. Dec. 591.....	517

	Page
Tarter v. Associated Oil Co., 2 Cal. I. A. C. Dec. 848.....	756
Tatta v. Capitol City Lumber Co., 1 Conn. Comp. Dec. 161.....	674
Taylor, In re, Op. Sol. Dept. of L. 411.....	572
In re, Op. Sol. Dept. of L. 542.....	651
v. London & N. W. Ry. (1912) A. C. 242, 245.....	675
v. New York Supply Co., 1 Conn. Comp. Dec. 182.....	177
v. Nicholson & Son, 8 B. W. C. C. 114, C. A.....	759
v. Seabrook, 87 N. J. Law, 407, 94 Atl. 399, 11 N. C. C. A. 710.....	252, 266, 545, 571, 686, 722
v. Spreckels, 2 Cal. I. A. C. Dec. 62.....	535, 623, 707, 789
v. Sulzberger & Sons Co., 98 Kan. 169, 157 Pac. 435.....	232
Taylorson v. Framewellgate Coal & Coke Co., 6 B. W. C. C. 56, C. A.....	492
Telford v. Healy-Tibbitts Const. Co., 3 Cal. I. A. C. Dec. 41.....	521, 704, 754, 755, 760
Tennant v. Broxburn Oil Co. (1907) S. C. 581, Ct. of Sess.....	546
v. Ives, 2 Cal. I. A. C. Dec. 169.....	708
v. Ives, 2 Cal. I. A. C. Dec. 862.....	358, 704
Terlecki v. Strauss, 85 N. J. Law, 454, 89 Atl. 1023, 4 N. C. C. A. 584,	
affirmed 86 N. J. Law, 708, 92 Atl. 1087.....	324, 361, 365, 458
Thackway v. Connelly & Sons, 3 B. W. C. C. 37, C. A.....	308, 473
Thayer, In re, Op. Sol. Dept. of L. 266.....	291
Thayne v. Gray & Co., 8 B. W. C. C. 17, C. A.....	608
Thennard, In re, Op. Sol. Dept. of L. 167.....	344
Theroux v. Shore Line Electric R. Co., 1 Conn. Comp. Dec. 667.....	480
Thoburn v. Bedlington Coal Co., 5 B. W. C. C. 128, C. A.....	490, 508
Thomas v. Fairbairn, Lawson & Co., 4 B. W. C. C. 195.....	676
Thompson, In re, Op. Sol. Dept. of L. 165.....	344
v. Employers' Liability Assur. Corp., 2 Mass. Wk. Comp. Cases, 145..	386, 445
v. Gould & Co., 2 B. W. C. C. 166, C. A.....	762
v. Gould & Co., 3 B. W. C. C. 392, H. L.....	762
v. North Eastern Marine Engineering Co., 7 B. W. C. C. 49, C. A....	752
v. Thompson, 53 Wis. 153, 10 N. W. 166.....	266
v. Twiss, 90 Conn. 444, 97 Atl. 328....	199, 200, 203, 204, 208, 211, 213, 832
Thompson & Sons v. North Eastern Marine Engineering Co., 5 W. C. C. 71	157
Thomson v. Flemington Coal Co., 4 B. W. C. C. 406, 408, Ct. of Sess....	372, 455
Thorn v. Humm & Co., 8 B. W. C. C. 190, C. A.....	434
Throop v. Tangdon, 40 Mich. 673.....	222
Tibbs v. Watts, Blake, Bearne & Co., 2 B. W. C. C. 164, C. A.....	751
Ticzkus v. Standard Office Co., Bulletin No. 1, Ill., p. 176.....	675
Tiedman v. Chelsea Fibre Mills, The Bulletin, N. Y., vol. 1, No. 10, p. 16...	482
Tillman v. Sperry Engineering Co., 1 Conn. Comp. Dec. 408.....	496
Tindall v. Great Northern Steam Fishing Co., 5 B. W. C. C. 667, C. A.....	171
v. Great Northern Steam Fishing Co., 6 B. W. C. C. 480, H. L.....	171

	Page
Tirre v. Bush Terminal Co., 172 App. Div. 386, 158 N. Y. Supp. 883.....	224, 233, 257, 722, 823, 829
Tischman v. Central R. Co., 84 N. J. Law, 527, 87 Atl. 144, 4 N. C. C. A. 736 643	
Tobin v. Aetna Life Ins. Co., 2 Mass. Wk. Comp. Cases, 612.....	670
v. Hearn, 2 Ir. R. 639, C. A.....	391
Todd v. Caledonian R. Co., 1 F. 1047, Ct. of Sess.....	367, 390, 551
Toennes v. Milwaukee Electric Ry. & Light Co., Rep. Wis. Indus. Com. 1914-15, p. 26.....	314
Tomalin v. Pearson & Son, 2 B. W. C. C. 1, 2 K. B. 61, 7 L. J. K. B. N. S. 863, 100 L. T. N. S. 685, 25 Times L. R. 477.....	32
Tomasi v. Mazzotti & Butini, 2 Cal. I. A. C. Dec. 936.....	259
Tomassi v. Christensen, 171 App. Div. 284, 156 N. Y. Supp. 905.....	329, 339
Tombs v. Bomford, 5 B. W. C. C. 338, C. A.....	191
Tomlinson v. Garratt's, Limited, 6 B. W. C. C. 489, C. A.....	400
Toney v. Williams, 1 Cal. I. A. C. Dec. 348.....	499, 502
Tong v. Great Northern R. Co., 4 W. C. C. 40, K. B. D.....	155
Toole v. Robert D. Daly Co., 1 Conn. Comp. Dec. 651.....	477
Topping v. Ellis, 2 Cal. I. A. C. Dec. 382.....	198, 789
Towle, In re, Op. Sol. Dept. of L. 565.....	254
Toy v. Maryland Casualty Co., 2 Mass. Wk. Comp. Cases, 147.....	478
Trahey, In re, Op. Sol. Dept. of L. 105.....	187
Trammell, In re, Op. Sol. Dept. of L. 244.....	307
Travelers' Ins. Co., In re, 223 Mass. 273, 111 N. E. 792.....	620
v. Hallauer, 131 Wis. 371, 111 N. W. 527.....	266, 821
v. Spaulding & Bros., 1 Cal. I. A. C. Dec. 575.....	354, 693
Travis v. Hobbs, Wall & Co., 2 Cal. I. A. C. Dec. 506.....	213, 218
Traviso, In re, Op. Sol. Dept. of L. 161.....	345
Traynor v. Addie & Sons, 4 B. W. C. C. 357, Ct. of Sess.....	473
Treadwell v. Marks, 3 Cal. I. A. C. Dec. 3.....	417, 436
Treiber v. Weibel Brewing Co., 1 Conn. Comp. Dec. 547.....	727
Tremblay v. Travelers' Ins. Co., 2 Mass. Wk. Comp. Cases, 156.....	604
Trenholm v. Hough, 1 Cal. I. A. C. Dec. 260.....	206
Trim Joint District School v. Kelly (1914) App. Cas. 667.....	11, 437
v. Kelly, 6 B. W. C. C. 921, C. A.....	276, 283
v. Kelly, 7 B. W. C. C. 274, H. L.....	276, 283, 417, 434
Trobitz v. Cameron, 1 Cal. I. A. C. Dec. 550.....	355
Trodden v. McLennard & Sons, 4 B. W. C. C. 190, C. A.....	306
Troth v. Millville Bottle Works (N. J.) 98 Atl. 435, affirming 86 N. J. Law, 558, 91 Atl. 1031.....	62, 66, 103, 750
Trueblood v. Los Angeles County, 2 Cal. I. A. C. Dec. 998.....	700
Trumbull v. Trumbull Motor Car Co., 1 Conn. Comp. Dec. 304.....	727
Tucker, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 86.....	357
Turgeon v. Fox Co., 1 Cal. I. A. C. Dec. 68.....	355, 650
Turley v. Bible Institute Bldg. Co., 1 Cal. I. A. C. Dec. 472.....	227

	Page
Turnbull v. Lambton Collieries, Limited, 2 W. C. C. 84, C. A.....	129
v. Vickers, Limited, 7 B. W. C. C. 396, C. A.....	760
Turner, In re, Op. Sol. Dept. of L. 406.....	573
v. Bell & Sons, 4 B. W. C. C. 63.....	828
v. Brooks & Doxey, 3 B. W. C. C. 22, C. A.....	603
v. Miller & Richards, 3 B. W. C. C. 305, C. A.....	245
v. Oil Pumping & Gasoline Co., 2 Cal. I. A. C. Dec. 496.....	144, 168, 214
v. Port of London Authority, 6 B. W. C. C. 23, C. A.....	584
v. Santa Cruz, 2 Cal. I. A. C. Dec. 991.....	303, 618, 651, 668, 766, 794
Turnquist v. Hannon, 219 Mass. 560, 107 N. E. 443.....	155, 159, 160, 739
Tuttle v. Embury-Martin Lumber Co. (Mich.) 158 N. W. 875.....	118, 209, 214
Tutton v. Majestic, The, 100 L. T. 644, 2 B. W. C. C. 346, C. A.....	526, 528, 529
Tutton's Case, 2 K. B. 54.....	526
Twoomey v. Royal Indemnity Co., 2 Mass. Wk. Comp. Cases, 540.....	506
Tynron, The, v. Morgan, 2 B. W. C. C. 406.....	675
v. Morgan, 2 K. B. 66.....	675
Tyrrell, In re, Op. Sol. Dept. of L. 546.....	652

U

Udell v. Wagner, Peterson & Wilson, 2 Cal. I. A. C. Dec. 113.....	608
Udey v. Winfield, 97 Kan. 279, 155 Pac. 43.....	183
Uhl v. Hartwood Club, The Bulletin, N. Y. vol. 1, No. 11, p. 11.....	337
Underwood v. McDuffee, 15 Mich. 361, 93 Am. Dec. 194.....	71
Ungar v. Howell, 7 B. W. C. C. 36, C. A.....	758
Union Pac. R. Co. v. U. S., 99 U. S. 700, 25 L. Ed. 496.....	63
United Collieries v. Hendry, 1 B. W. C. C. 289, Ct. of Sess.....	255
v. Hendry, 2 B. W. C. C. 308, H. L.....	255
v. McGhie, 6 F. 808, 810.....	562, 564
U. S. v. Kie, Fed. Cas. No. 15,528b.....	735
v. Maurice, 2 Brock, 96, 102, 103, Fed. Cas. No. 15,747.....	327
United States Board & Paper Co. v. Lander, 47 Ind. App. 315, 93 N. E. 232	168
United States Fidelity & Guaranty Co. v. New York Rys. Co., 93 Misc. Rep. 118, 156 N. Y. Supp. 615.....	140, 163, 686
v. Rawling, 1 Cal. I. A. C. Dec. 64.....	295
v. Rosenbach, 1 Cal. I. A. C. Dec. 92.....	713
United States Life Ins. Co. v. Vocke, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65	774
Unodeskia v. Scovill Mfg. Co., 1 Conn. Comp. Dec. 32.....	479
Uphoff v. Industrial Board of Illinois, 271 Ill. 312, 111 N. E. 128.....	339, 827
Upper Forest & Worcester Steel & Tinplate Co. v. Grey, 3 B. W. C. C. 424, C. A.....	607
Upton v. Stahlhuth, 2 Cal. I. A. C. Dec. 539.....	358
Utieres v. Otto, 2 Cal. I. A. C. Dec. 652.....	617

V

	Page
Valente v. Fay, 2 Cal. I. A. C. Dec. 514.....	364
Valentine v. Smith-Angevine Co., 2 N. Y. St. Dep. Rep. 460, affirmed 168 App. Div. 403, 153 N. Y. Supp. 505, 9 N. C. C. A. 918.....	34
Vamplew v. Parkgate Iron & Steel Co., 5 W. C. C. 114, C. A.....	214
Van Dalsem v. Di Fiore, 1 Cal. I. A. C. Dec. 229.....	304
Van Lanker v. Los Angeles County, 1 Cal. I. A. C. Dec. 107.....	555, 707
Van Sittert, In re, Op. Sol. Dept. of L. 169.....	344
Van Winkle v. Johnson Co., 2 Cal. I. A. C. Dec. 188.....	465
Varine v. Sargeant, 1 Conn. Comp. Dec. 194.....	173, 381
Vaughan v. Nicoll, 8 F. 464, Ct. of Sess.....	549
Vaughn v. American Coal Co., 1 Conn. Comp. Dec. 617.....	25, 697, 698, 719
Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273, 10 N. C. C. A. 729.....	28, 278, 298, 301, 417
Verderame v. Blenner, 1 Conn. Comp. Dec. 325.....	616
Vereeke v. Grand Rapids, 184 Mich. 474, 151 N. W. 723.....	831
Verkamp, In re, Vol. 1, No. 7, Bul. Ohio Indus. Comp. p. 123.....	403
Veseth, In re, Op. Sol. Dept. of L. 185.....	345
Victor Chemical Works v. Industrial Board of Illinois, 274 Ill. 11, 113 N. E. 173.....	13, 24, 28, 64, 97, 105, 203, 240, 744, 765, 774, 795, 822, 826, 828, 837
Victoria, The v. Barlow, 5 B. W. C. C. 570, C. A.....	181
Viglione v. Montgomery Garage Co., 2 Cal. I. A. C. Dec. 87.....	623, 691
Viita v. Dolan (Minn.) 155 N. W. 1077.....	683
Villafranca, In re, Op. Sol. Dept. of L. 676.....	811
In re, Op. Sol. Dept. of L. 762.....	782
Village of Kiel v. Industrial Commission of Wisconsin (Wis.) 158 N. W. 68.....	7, 25, 223
Village of West Salem v. Industrial Commission, 162 Wis. 57, 155 N. W. 929.....	591
Villanueva, In re, Op. Sol. Dept. of L. 765.....	782
Vincent v. Louis, 2 Cal. I. A. C. Dec. 130.....	193
Vindicator, etc., Mining Co. v. Firstbrook, 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1108.....	85
Viotti v. De Bisschop, 1 Conn. Comp. Dec. 195.....	240, 789
Visser v. Michigan Cabinet Co., Op. Mich. Indus. Acc. Bd., Bul. No. 3, p. 24.....	294
Vitale v. Fidelity & Deposit Co. of Maryland, 2 Mass. Wk. Comp. Cases 425.....	523, 543
Vittorio v. California Pottery Co., 3 Cal. I. A. C. Dec. 26.....	442
Voelz v. Industrial Commission, 161 Wis. 240, 152 N. W. 830.....	298, 472, 795, 796
Vogler v. M. Carpenter Baking Co., Rep. Wis. Indus. Com. 1914-15, p. 35.....	314

	Page
Vojacek v. Schlaefer, Rep. Wis. Indus. Com. 1914-15, p. 8.....	202, 576, 699
Von Ette, In re, 223 Mass. 56, 111 N. E. 697.....	384, 464, 467, 469, 472, 483, 545, 822
Voorhees v. Smith Schoonmaker Co., 86 N. J. Law, 500, 92 Atl. 280, 7	
N. C. C. A. 646.....	304
Vujic v. Youngstown Sheet & Tube Co. (D. C.) 220 Fed. 390.....	239, 254

W

Waddell v. Coltness Iron Co., 6 B. W. C. C. 306, Ct. of Sess.....	560
Wagner, In re, Op. Sol. Dept. of L. 666.....	770
v. American Bridge Co. (Sup.) 158 N. Y. Supp. 1043.....	64, 597, 624, 636
Waites v. Franco-British Exhibition, Inc., 2 B. W. C. C. 199, C. A....	127, 179
Wajteniak v. Pratt & Cady Co., 1 Conn. Comp. Dec. 545.....	417
Walde v. San Pedro, L. A. & S. L. R. Co., 2 Cal. I. A. C. Dec. 751.....	53
Waldman v. Hermann, 1 Cal. I. A. C. Dec. 82.....	505, 513
Waldock v. Winfield, 2 K. B. 596.....	122
Walker, In re, 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87.....	44
v. Clyde S. S. Co., 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87..	44
v. Crystal Palace Football Club, Limited, 3 B. W. C. C. 51, C. A....	179
v. Hockney Bros., 2 B. W. C. C. 20, C. A.....	542
v. Lilleshall Coal Co., 1 Q B. 488.....	276
v. Mullins, 1 B. W. C. C. 211, C. A.....	483
v. Murrays, 4 B. W. C. C. 409.....	308
v. Santa Clara Oil & Development Co., 2 Cal. I. A. C. Dec. 1..	120, 143, 786
Wallace v. Glenboig Union Fireclay Co., (1907) S. C. 967.....	546
v. Pratchner, 2 Cal. I. A. C. Dec. 661.....	130, 131
v. Regents of University of California, 1 Cal. I. A. C. Dec. 97....	310, 483
v. Tracy Bros. Co., 1 Conn. Comp. Dec. 155, 156.....	610, 624
Wallack v. Sorensen, 1 Conn. Comp. Dec. 197.....	576
Walsell v. Russell & Sons, 8 B. W. C. C. 230, C. A.....	757
Walsh, In re, Op. Sol. Dept. of L. 231.....	300
v. Hayes, 2 B. W. C. C. 202, C. A.....	127
v. Locke & Co., 7 B. W. C. C. 117, C. A.....	527
v. New York Cent. & H. R. R. Co., 204 N. Y. 58, 62, 63, 97 N. E. 408, 37 L. R. A. (N. S.) 1137.....	164, 731
v. Waterford Harbor Com'rs, 7 B. W. C. C. 960, C. A.....	212
Walters v. Brune, 2 Cal. I. A. C. Dec. 249.....	304
v. Staveley Coal & Iron Co., 105 L. T. 119, 4 B. W. C. C. 89, 303, H. L.....	359, 376
Walther v. American Paper Co. (N. J. Sup.) 98 Atl. 264.....	275, 276, 284, 322, 410, 438
Walton v. South Kirby, Featherstone & Hensworth Colliery, 5 B. W. C. C. 640, C. A.....	676

	Page
Walton v. Tredegar Iron & Coal Co., 6 B. W. C. C. 592, C. A.....	376, 377
Waltzer v. Martinez, 2 Cal. I. A. C. Dec. 951.....	764
Walz v. Holbrook, Cabot & Rollins Corp., 170 App. Div. 6, 155 N. Y. Supp. 703.....	226, 229, 233, 239, 256, 643
Wambold v. Fox Ice Co., Rep. Wis. Indus. Com. 1914-15, p. 36.....	104
Ward v. Miles, 4 B. W. C. C. 182, C. A.....	605
Ware, In re, Op. Sol. Dept. of L. 335.....	371
Warneken v. Moreland & Son, 100 Law Times, 12, 2 B. W. C. C. 350, 355.....	477, 527, 529
Warner v. Couchman, 4 B. W. C. C. 32, C. A.....	431
v. Couchman, 5 B. W. C. C. 177, 179, H. L.....	320, 431
Warnock v. Glasgow Iron & Steel Co., 6 F. 474, Ct. of Sess.....	476, 483
Warren v. Hedley's Colliery Co., 6 B. W. C. C. 136, C. A.....	385
Warton, In re, Op. Sol. Dept. of L. 315.....	352
Warwick S. S. Co. v. Callaghan, 5 B. W. C. C. 283, C. A.....	602
Washington, In re, Op. Sol. Dept. of L. 181.....	345
Washington, Opinion of Attorney General Sept. 8, 1911.....	148
Sept. 20, 1911.....	117
Dec. 12, 1911.....	664
Jan. 9, 1912.....	152, 644
Feb. 1, 1912.....	146
May 16, 1912.....	264
Sept. 17, 1913.....	174, 182
Washington, Rulings of Industrial Accident Insurance Commission,	
p. 3.....	328, 436, 736
p. 4.....	340, 341
p. 5.....	39, 117, 164, 239, 242, 245, 435, 673
p. 6.....	241, 264, 271, 438, 673, 773
p. 7.....	148
p. 9.....	149, 150, 151
p. 10.....	147, 148, 151
p. 11.....	148
p. 12.....	55, 148, 174
p. 13.....	146, 148, 149, 151
p. 14.....	20, 152, 823
p. 16.....	149, 153, 173, 242, 610, 644
p. 17.....	581, 626, 673
p. 18.....	147, 253, 654, 673
p. 19.....	104, 108, 110, 115, 146, 682
p. 20.....	56, 474, 609, 685
p. 21.....	56, 609
p. 22.....	151
p. 23.....	55, 152, 183
p. 24.....	833

	Page
Washington, Rulings of Industrial Accident Insurance Commission, p. 25...	21
p. 27	55, 56
p. 28	21
Wasilewski v. Warner Sugar Refining Co., 87 Misc. Rep. 156, 149 N. Y. Supp. 1035	33, 40, 92, 734
Waters, In re, Op. Sol. Dept. of L. 110.....	187
v. Jewell Belting Co., 1 Conn. Comp. Dec. 511.....	761
v. Kewanee Boiler Co., Bulletin No. 1, Ill., p. 169.....	583
v. William J. Taylor Co., 218 N. Y. 248, 112 N. E. 727, affirming 170 App. Div. 942, 154 N. Y. Supp. 1149.....	11, 406, 459
Watkins, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 135.....	387
v. Guest, Keen & Nettlefolds, 5 B. W. C. C. 307, C. A.....	547
Watson, In re, Op. Sol. Dept. of L. 730, 733.....	357
v. St. Louis, I. M. & S. R. Co., (C. C.) 169 Fed. 942.....	65
Watson Limited v. Brown, 6 B. W. C. C. 416, Ct. of Sess.....	491
v. Brown, 7 B. W. C. C. 259, H. L.....	491
Watters v. Kroehler Mfg. Co., 187 Ill. App. 548.....	632, 636
Watts v. Ohio Valley Electric R. Co., (W. Va.) 88 S. E. 659....	20, 85, 111, 114
v. Watts, 160 Mass. 464, 468, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509.....	263
Wayman v. Huff, 1 Cal. I. A. C. Dec. 358.....	704, 720
Weaver v. Assawaga Co., 1 Conn. Comp. Dec. 331.....	232
v. Eyster & Stone, 1 Cal. I. A. C. Dec. 563.....	218, 347, 521
v. Maxwell Motor Co., 186 Mich. 588, 152 N. W. 993, L. R. A. 1916B, 1276	28, 621
Webb, In re, Op. Sol. Dept. of L. 336.....	471
Webber v. Wansborough Paper Co., 3 K. B. 615.....	474
v. Wansbrough Paper Co., 6 B. W. C. C. 583, C. A.....	451
v. Wansbrough Paper Co., 7 B. W. C. C. 795, H. L.....	451
Weber v. American Silk Spinning Co., (R. I.) 95 Atl. 603.....	578, 579, 632, 815, 839
Webster v. Cohen Bros., 6 B. W. C. C. 92, C. A.....	753
Weekes v. Stead & Co., 7 B. W. C. C. 398, C. A.....	434
Weighill v. South Henton Coal Co., 4 B. W. C. C. 141, C. A.....	393, 400, 547
Weimert v. Boston Elevated Ry., 216 Mass. 598, 104 N. E. 360.....	309
Weiser v. Industrial Accident Commission of State of California (Cal.) 157 Pac. 593.....	144
Weissenborn, In re, Op. Sol. Dept. of L. 388.....	649
Wells, In re, Op. Sol. Dept. of L. 515.....	651
Welton v. Waterbury Rolling Mill, 1 Conn. Comp. Dec. 78.....	37, 173, 797
Wemyss Coal Co. v. Symon, 6 B. W. C. C. 298, Ct. of Sess.....	456
Wendt v. Industrial Ins. Commission, 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790.....	25, 340, 341, 397
Wentworth v. Chamberlain Co., 1 Conn. Comp. Dec. 588.....	498

	Page
Wessman v. Bloomfield, 1 Conn. Comp. Dec. 336.....	710, 715
West v. Pasadena, 1 Cal. I. A. C. Dec. 274.....	568
Western Grain & Sugar Products Co. v. Pillsbury, (Cal.) 159 Pac. 423....	470, 778, 779, 827
Western Indemnity Co. v. O'Brien, 2 Cal. I. A. C. Dec. 368.....	230
v. Pillsbury, 2 Cal. I. A. C. Dec. 454, 170 Cal. 686, 151 Pac. 398,	
10 N. C. C. A. 1.....	4, 5, 8, 11, 16, 59, 60, 63, 65, 66, 67, 80,
	82, 91, 98, 283, 329, 351, 811, 822, 826, 829
v. State Industrial Accident Commission, 158 Pac. 1033.....	221
Western Metal Supply Co. v. Pillsbury (Cal.) 156 Pac. 491..	60, 61, 68, 73, 74,
	118, 127, 224, 283, 284, 585, 785
Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35.....	826
West Jersey Trust Co. v. Philadelphia & R. R. Co., 88 N. J. Law, 102,	
95 Atl. 753.....	41, 48, 545, 682
Wetherell v. American Hardware Corp., 1 Conn. Comp. Dec. 367....	480, 481
Whalen v. United States Fidelity & Guaranty Co., 2 Mass. Wk. Comp.	
Cases, 318	543
Whaley v. Hudson, Bulletin No. 1, Ill. p. 186.....	348, 447
Wheadon v. Red River Lumber Co., 1 Cal. I. A. C. Dec. 640.....	489
Wheatley v. Journal Pub. Co., 1 Conn. Comp. Dec. 110.....	389, 446
v. Smith, 2 Cal. I. A. C. Dec. 910.....	533
Wheeler v. Contoocook Mills Corp., 77 N. H. 551, 94 Atl. 265.....	65, 85, 88,
	355, 453, 814
Wheeler, Ridley & Co. v. Dawson, 5 B. W. C. C. 645, C. A.....	528
Whelan v. Great Northern Steam Fishing Co., 2 B. W. C. C. 235.....	172
v. Moore, 2 B. W. C. C. 114, C. A.....	455
Whitbread v. Arnold, 99 L. T. 105, 1 B. W. C. C. 317, C. A.....	376, 378
White v. Fidelity & Deposit Co. of Maryland, 2 Mass. Wk. Comp. Cases,	
567	566
v. New York Cent. R. Co., 2 N. Y. St. Dep. Rep. 477.....	46
v. Scioto Land Co., Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 114.....	259, 268, 349
v. Sheepwash, 3 B. W. C. C. 382, C. A.....	419, 542
v. Wiseman, 5 B. W. C. C. 654, C. A.....	594
White & Sons v. Harris, 4 B. W. C. C. 39, C. A.....	605
Whitehead v. Reader, 3 W. C. C. 40, C. A.....	391, 393, 561
Whiteman v. Clifden, 6 B. W. C. C. 49, C. A.....	403
Whitfield v. Lambert, 8 B. W. C. C. 91, C. A.....	448
Whitney v. Accident Ass'n, 52 Minn. 378, 54 N. W. 184.....	72
v. Peterson, 1 Cal. I. A. C. Dec. 306.....	194
Whitsell v. Montgomery, 1 Cal. I. A. C. Dec. 572.....	315
Whitton v. Bell & Sime, 1 F. 942, Ct. of Sess.....	129
Wicks v. Dowell & Co., 7 W. C. C. 14, C. A.....	461, 462
Wilken v. Superior Stevedores Co., Bul. Wis. Indus. Com. vol. 1, p. 88..	334

	Page
Wildner v. Ferguson, 42 Minn. 112, 43 N. W. 794, 6 L. R. A. 338, 18 Am. St. Rep. 495.....	183
Wilhelm, In re, Op. Sol. Dept. of L. 508.....	573
Wilkinson v. Frodingham Iron & Steel Co., 6 B. W. C. C. 200, C. A.....	516
William v. Llandudno Coaching & Carriage Co., 8 B. W. C. C. 143, C. A.....	457, 460
Williams, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 31.....	228, 238, 589
v. Duncan, The, 7 B. W. C. C. 767, C. A.....	172
v. Ocean Coal Co., 9 W. C. C. 44, C. A.....	242, 246
v. Ruabon Coal & Coke Co., 7 B. W. C. C. 202, C. A.....	605
v. Smith, 6 B. W. C. C. 102, C. A.....	372
v. Vauxhall Colliery Co., 2 K. B. 433, 436.....	682
v. Vauxhall Colliery Co., 9 W. C. C. 120, C. A.....	251
v. Wigan Coal & Iron Co., 3 B. W. C. C. 65, C. A.....	402
v. Williams, 122 Wis. 27, 99 N. W. 431.....	266
Williamson, In re, Op. Sol. Dept. of L. 750.....	648
v. St. Catherine's Hospital, 2 Cal. I. A. C. Dec. 430.....	119
Wilmerson v. Lynn & Hamburg S. S. Co., 6 B. W. C. C. 542, C. A.....	126
Wilmunder v. Southern Pac. Co., 2 Cal. I. A. C. Dec. 1030.....	54
Wilson, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 84.....	494
v. American Co., 2 Cal. I. A. C. Dec. 896.....	755
v. C. A. Dorflinger & Sons, 218 N. Y. 84, 112 N. E. 567, reversing 170 App. Div. 119, 155 N. Y. Supp. 857, remittitur amended 113 N. E. 454	333, 338, 339, 844
v. Cheney Bros., 1 Conn. Comp. Dec. 66.....	413
v. Gallagher, 1 Cal. I. A. C. Dec. 306.....	654, 656, 657
v. Jackson's Stores, 7 W. C. C. 122, C. A.....	606
v. Laing, 2 B. W. C. C. 118, Ct. of Sess.....	443
v. Red River Lumber Co., 2 Cal. I. A. C. Dec. 807.....	767
Winfield v. New York Cent. & H. R. R. Co., 168 App. Div. 351, 153 N. Y. Supp. 499.....	26, 49, 139, 140
Winn, In re, Op. Sol. Dept. of L. 389.....	649
v. Small, 1 Cal. I. A. C. Dec. 5.....	604
Winter v. Atkinson-Frizelle Co., 88 N. J. Law, 401, 96 Atl. 360.....	839
v. Johnson-Pollock Lumber Co., 1 Cal. I. A. C. Dec. 387.....	395, 556, 558
v. Peter Doelger Brewing Co., 95 Misc. Rep. 150, 159 N. Y. Supp. 113	737, 738
Winters v. Mellen Lumber Co., Bul. Wis. Indus. Com. vol. 1, p. 89.....	327, 598, 772, 797
v. New York Herald, 155 N. Y. Supp. 1149.....	512
Wisconsin, Report Industrial Commission, 1914-15, p. 2.....	12
Withey v. Bloem, 163 Mich. 419, 128 N. W. 913, 35 L. R. A. (N. S.) 628..	81
Withy, In re, Op. Sol. Dept. of L. 273.....	299
Witt v. Pacific Lumber Co., 2 Cal. I. A. C. Dec. 861.....	773

	Page
Wolf v. Scripps, 1 Cal. I. A. C. Dec. 509.....	192
Wolff v. Levison & Zellerbach, 1 Cal. I. A. C. Dec. 347.....	582
Wood v. Camden Iron Works (D. C.) 221 Fed. 1010.....	121
v. Chico Const. Co., 1 Cal. I. A. C. Dec. 89.....	409
v. Detroit (Mich.) 155 N. W. 592, L. R. A. 1916C, 388.....	63, 66, 85, 98
v. Humphrey, 114 Mass. 185.....	71
Woodcock v. London & N. W. R. Co., 6 B. W. C. C. 471, K. B. D.....	155
v. Walker, 170 App. Div. 4, 155 N. Y. Supp. 702.....	252, 253
Wooden v. Western New York & P. R. Co., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803.....	33
Woodhouse v. Midland R. Co., 7 B. W. C. C. 690, C. A.....	606
Woodruff v. Peterson, 1 Cal. I. A. C. Dec. 516.....	197, 514, 571
Woods v. Wilson & Sons Co., 6 B. W. C. C. 750, C. A.....	482
v. Wilson & Sons Co., 8 B. W. C. C. 288, H. L.....	482
Woodward v. E. W. Conklin & Sons, 171 App. Div. 736, 157 N. Y. Supp. 948	683
Woolsey v. Pethick Bros., 1 Butterworth, 411.....	776
Worden v. Commonwealth Power Co., 20 Det. Leg. News No. 39.....	421
v. Commonwealth Power Co., Mich. Wk. Comp. Cases, 14.....	423
Wowinski v. Vito, 1 Conn. Comp. Dec. 629.....	208, 211
Wray v. Panama-Pacific International Exposition, 3 Cal. I. A. C. Dec. 6.....	665
v. Taylor Bros. & Co., 6 B. W. C. C. 529, C. A.....	179
Wright v. Bagnall & Sons, 2 W. C. C. 36, C. A.....	764
v. Barnes, 1 Conn. Comp. Dec. 248.....	142, 211, 832
v. Kerrigan, 4 B. W. C. C. 432, C. A.....	492, 746
v. Lindsay, 5 B. W. C. C. 531, Ct. of Sess.....	157
Wrigley v. Nasmyth, Wilson & Co. (Cal.) 159 Pac. 435.....	311
v. Nasmyth, Wilson & Co., Workmen's Compensation Reports (Eng- land) 1913, p. 145.....	442
W. R. Rideout Co. v. Pillsbury (Cal.) 159 Pac. 435.....	355, 509, 554, 778, 824
Wygant, In re, Op. Sol. Dept. of L. 118.....	342
Wyrwas v. Bigelow-Hartford Carpet Co., 1 Conn. Comp. Dec. 326.....	702

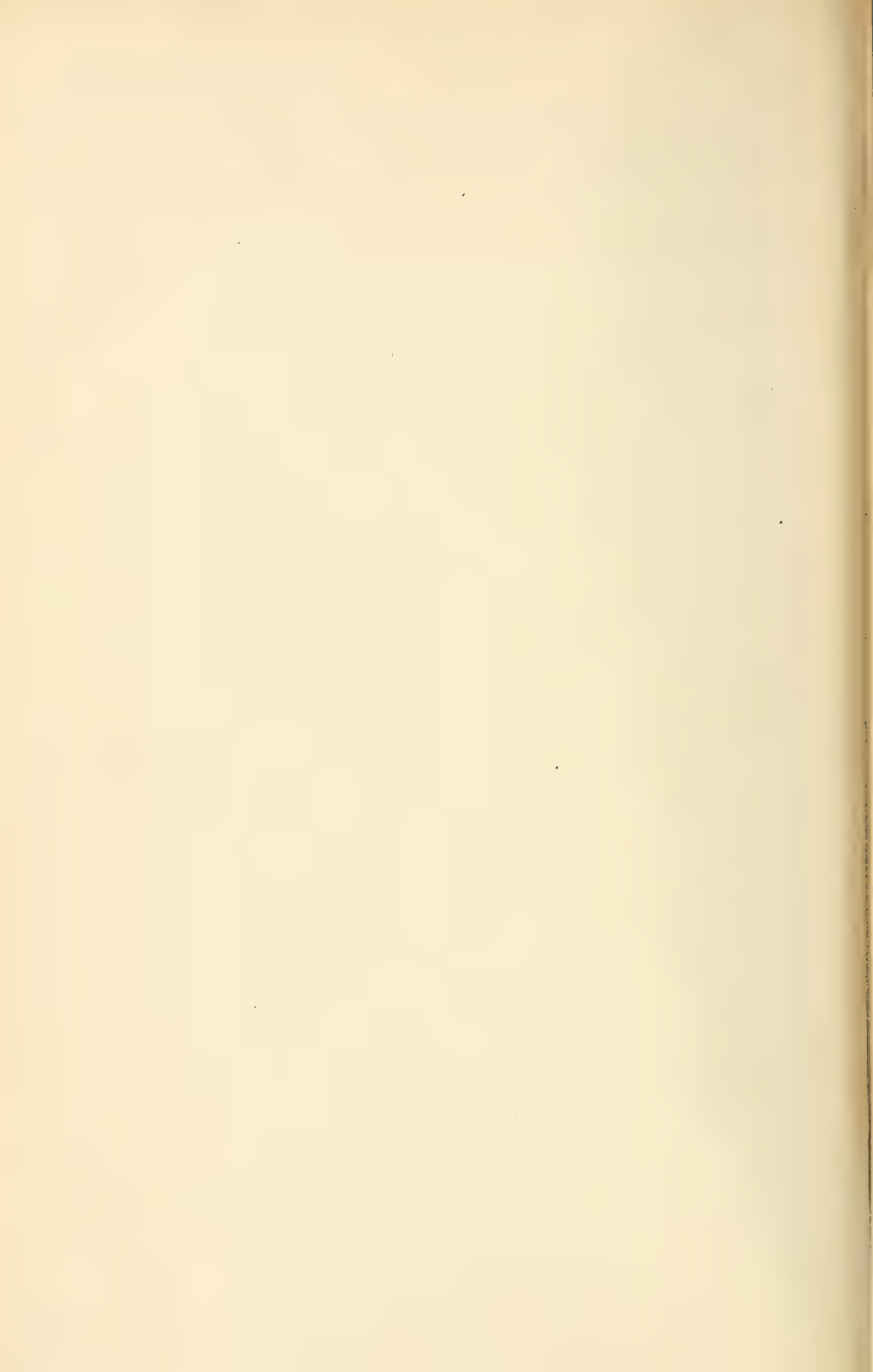
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Yamasaki v. Commonwealth Bonding & Casualty Ins. Co., 1 Cal. I. A. C. Dec. 658.....	844
Yancey v. Los Angeles County, 2 Cal. I. A. C. Dec. 601.....	223
Yates v. South Kirby, Featherstone & Hemsworth Collieries, 3 B. W. C. C. 418, C. A.....	293, 294, 406, 603
v. Union Ice Co., 2 Cal. I. A. C. Dec. 424.....	754
Young v. Boston & M. R. Co., 168 Mass. 219, 46 N. E. 624.....	33
v. Duncan, 218 Mass. 346, 106 N. E. 1.....	6, 26, 90, 98, 102, 103, 731, 785
v. Holcomb, 1 Conn. Comp. Dec. 482.....	327

	Page
Young v. Niddrie & Benhar Coal Co., 5 B. W. C. C. 552, Ct. of Sess.....	229
v. Niddrie & Benhar Coal Co., 6 B. W. C. C. 774, H. L.....	229
v. Paris, 2 Cal. I. A. C. Dec. 518.....	314
Younger v. Gilro Mach. Co., 2 Cal. I. A. C. Dec. 908.....	123
Ystradowen Colliery Co. v. Griffith, 2 K. B. 533, C. A.....	491, 505, 508
v. Griffiths, 2 B. W. C. C. 357, C. A.....	306
Yukanovitch v. Massachusetts Employés Ins. Ass'n., 2 Mass. Wk. Comp. Cases, 787.....	533
Yume v. Knickerbocker Portland Cement Co., 3 N. Y. St. Dep. Rep. 353 affirmed 169 App. Div. 905, 153 N. Y. Supp. 1151.....	274, 283, 352, 438

Z

Zabriskie v. Erie R. Co., 85 N. J. Law, 157, 88 Atl. 824, 4 N. C. C. A. 778, affirmed, 86 N. J. Law, 266, 92 Atl. 385, L. R. A. 1916A, 315.....	324, 325, 383, 427, 839
Zacias, In re, Op. Sol. Dept. of L. 62.....	188
Zappala v. Industrial Ins. Commission, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295.....	19, 25, 27, 286, 294, 841
Zarling v. North Side Coal Co., Bul. Wis. Indus. Com. 1912-13, p. 29.....	658
Zavella v. Naughton, 2 Cal. I. A. C. Dec. 956.....	493
Zbinden v. Union Oil Co. of California, 2 Cal. I. A. C. Dec. 616.....	362, 370
Zelavzmi, In re, Vol. 1, No. 7, Bul. Ohio Indus. Com. p. 87.....	399
Zilch v. Bomgardner, 91 Ohio St. 205, 110 N. E. 459.....	739, 740
Zillwood v. Winch, 7 B. W. C. C. 60, C. A.....	752
Zobel v. Godlevski, Rep. Wis. Indus. Com. 1914-15, p. 12.....	31, 104, 212
Zorcic v. Adams Exp. Co., Bulletin No. 1, Ill., p. 55.....	102, 331
Zugg v. J. & J. Cunningham, Limited, 1 B. W. C. C. 257, Ct. of Sess.....	127



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